No. 10-30249

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: KATRINA CANAL BREACHES LITIGATION

NORMAN ROBINSON; KENT LATTIMORE; LATTIMORE & ASSOCIATES; TANYA SMITH; ANTHONY FRANZ, JR.; LUCILLE FRANZ, individually,
Plaintiffs-Appellees/Cross-Appellants,
v.

UNITED STATES OF AMERICA,
Defendant-Appellant/Cross-Appellee

MONICA ROBINSON,
Plaintiff-Appellee/Cross-Appellant,
v.

UNITED STATES OF AMERICA,
Defendant-Appellant/Cross-Appellee.

On Appeal From The United States District Court for the Eastern District of Louisiana (Stanwood R. Duval, Jr., J.)

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Certificate of Interested Persons

Case No. 10-30249

In re: Katrina Canal Breaches Litigation

Norman Robinson, Monica Robinson, Kent Lattimore, Lattimore & Associates, Tanya Smith, Anthony Franz, Jr., Lucille Franz v. United States

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees/Cross-Appellants

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Monica Robinson
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Lattimore & Associates, having no parent corporation and no publicly held corporation that owns 10% or more of its stock
Tanya Smith
Anthony Franz, Jr.
Lucille Franz

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Other Persons or Entities

All persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who were domiciled, resided, owned property, engaged in business or other related activities, and/or

were otherwise located in the Lower Ninth Ward, St. Bernard Parish, and New Orleans East on or about August 28, 2005, and filed a timely Form 95 claim form with the appropriate government agency.

Dated: February 18, 2011

Respectfully Submitted,
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STATEMENT REGARDING ORAL ARGUMENT

In this action brought under the Federal Tort Claims Act ("FTCA"), the district court held the United States liable for flood damage during Hurricane Katrina caused by the "gross negligence" of the U.S. Army Corps of Engineers (the "Corps" or "Army Corps") for nearly a half century of failing to operate and maintain safely the Mississippi River-Gulf Outlet ("MRGO"). *See In re Katrina Canal Breaches Consolidated Litigation,* 647 F.Supp.2d 644, 732 (E.D. La. 2009). Significantly, the government on appeal does not contest this determination of liability or any of the myriad supporting factual findings. Instead, the United States seeks to avoid responsibility for the catastrophic flooding of large portions of the City of New Orleans and St. Bernard Parish by urging the applicability of two statutory immunity provisions.

Relying upon *Graci v. United States,* 456 F.2d 20 (5th Cir. 1971), the district court rejected the government's contention that this suit is barred by the Flood Control Act of 1928 (33 U.S.C. §702c). The flood damage was caused by the Corps' negligent management and operation of the MRGO navigation project that was unrelated to, and independent of, the Lake Pontchartrain and Vicinity Hurricane Protection Project ("LPV") whose levee system failed catastrophically due to the adverse effects created by the MRGO. *See* 647 F.Supp.2d at 648-50, 699.

Relying upon settled Supreme Court and Fifth Circuit precedent, the district court also rejected the government's contention that this suit is also barred by the FTCA's discretionary function exception (28 U.S.C. § 2680(a)) because neither prong of the exception—absence of a mandatory legal duty and policy-driven decisions—had been established. 647 F.Supp.2d at 732.

The district court awarded five plaintiffs nearly $720,000 in damages for real and personal property losses and inconvenience, while denying damages to two plaintiffs residing in New Orleans East whom the trial court concluded did not prove negligence with respect to the Corps' failure to build a surge protection barrier that would have prevented flooding of their home.

Given the importance of the issues presented, Plaintiffs-Appellees/Cross-Appellants respectfully request oral argument.

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MISCELLANEOUS

JURISDICTIONAL STATEMENT

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1346(b)(1), and 2674. The district court entered final judgment under Fed. R. Civ. P. 54(b) on November 18, 2009. USCA5 22978-79. The court denied motions filed under Fed. R. Civ. P. 59(e) on December 29, 2009. USCA5 23097-105. The United States and plaintiffs filed timely notices of appeal on February 25, 2010. USCA5 23106-13. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

In this suit under the FTCA, the district court held the United States liable for flood damage during Hurricane Katrina caused by the Corps' gross negligence in operating and maintaining a shipping channel. The government's appeal presents the following questions:

1. Whether the legal immunity provision in the Flood Control Act of 1928, 33 U.S.C. § 702c, which this Court held did not apply in *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971) (Wisdom, J.), protects the government in a case based on the same shipping channel and the same type of harm alleged in *Graci*.

2. Whether the Army Corps' decades of conceded malfeasance in violating mandatory duties, committing engineering malpractice, and expanding the channel to multiples of its Congressionally-authorized design dimensions in disregard of

the known risk of catastrophe constitutes an exercise of discretionary federal government policy protected under 28 U.S.C. § 2680(a).

The cross-appeal presents the following questions:

1. Whether the Army Corps' substantial knowledge about the dangerous "funnel effect" learned after the MRGO's initial design and construction—and Hurricane Betsy—required it to assess the safety risk and undertake remedial measures to prevent the flooding of New Orleans East.

2. Whether the Army Corps' negligent operation and maintenance of the MRGO over decades after its initial design and construction—and the resulting enhanced conveyance and velocity of water along Reach 1—was a substantial factor in the catastrophic flooding of the home of Plaintiffs Norman and Monica Robinson in New Orleans East.

3. Whether the destruction of the home of Plaintiffs Anthony and Lucille Franz in the Lower Ninth Ward was concurrently caused by the indistinguishable, merged floodwaters from the MRGO's Reach 2 as well as the Inner Harbor Navigation Canal.

STATEMENT OF THE CASE

1. On August 29, 2005, catastrophic flooding destroyed the nation's 35th largest city. One thousand three hundred people perished, 80% of the housing in

New Orleans and virtually 100% in St. Bernard Parish was destroyed, over 1.1 million residents were evacuated, and estimated property losses (including 300,000 homes) approached $100 billion. *See In re Katrina Canal Breaches Consolidated Litigation* (Levee Class Action), 533 F.Supp.2d 615, 628 (E.D. La. 2008); Plaintiffs' Trial Exhibit 21 (hereinafter "PX21") (Federal Response to Hurricane Katrina: Lessons Learned) at pp. 1-2, 6-9.

The *Robinson* trial addressed the "single most catastrophic failure of an engineered system in United States history." PX3 (ILIT Report) at p.12-10. The official Department of Defense investigation, independent forensic engineering studies, and a respected federal judge concluded that the epic flooding of Greater New Orleans was a man-made disaster caused by the Army Corps' "gross negligence." *See, e.g., In re Katrina Canal Breaches Litigation*, 647 F.Supp.2d 644, 731-33 (E.D. La. 2009) (MRGO); *In re Katrina Canal Breaches Cons. Lit.*, 533 F.Supp.2d at 615 (E.D. La. 2008) (outfall canal levees); *see also* PX999 (Interagency Performance Task Force ("IPET") Report) at I-119 to I-134.

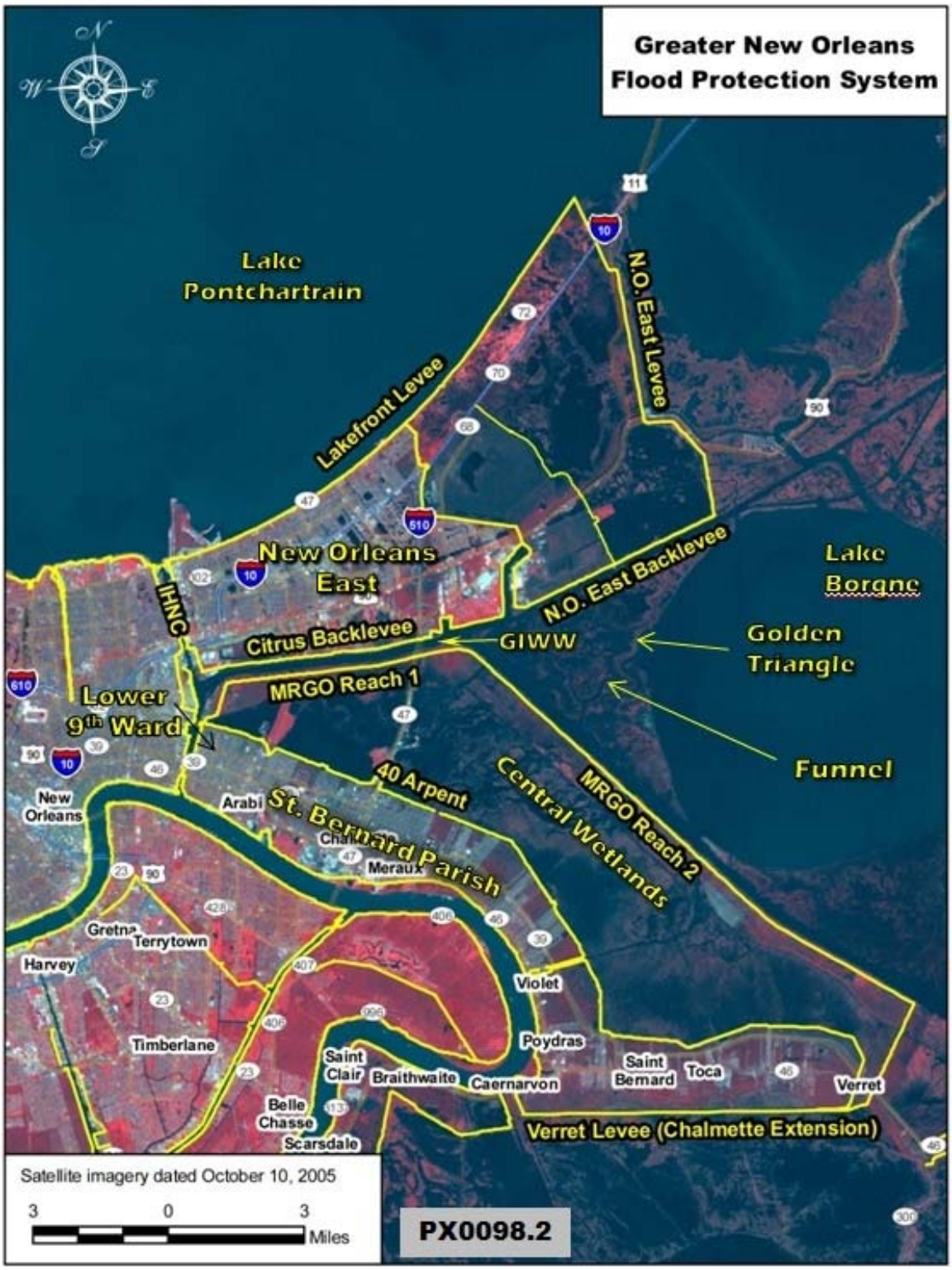
Two separate sets of FTCA lawsuits sought to hold the government responsible for the Corps' dereliction of duty, and in both instances, the government invoked immunities afforded by §702c and the discretionary function exception. With regard to litigation challenging the LPV, the district court

reluctantly dismissed the lawsuit on both immunity grounds, yet catalogued four decades of engineering mistakes. *See, e.g.*, 533 F.Supp.2d at 621 ("tortured tale of . . . construction"), 621 ("catastrophic failure of the Corps to fulfill its mission"), 625 (use of "outmoded data"), 626 ("monumental" miscalculations), 628 ("outdated" and inadequate "engineering calculations" were "known to the Corps"); *see also* PX999 (IPET), at I-119 to I-134 (government's $25 million, four year investigation severely criticized the Army Corps for its inadequate planning, design, and construction of the LPV). In the MRGO case, however, the same trial judge rejected the applicability of §702c and the discretionary function exception, holding the government accountable for its 40 years of "monumental negligence" in improperly maintaining and unsafely operating the MRGO. *See* 647 F.Supp.2d at 732. The MRGO and the LPV flood control system projects occupied some of the same landscape, but they were so bureaucratically isolated from each other because of their different purposes (navigation and flood control), it was as if the Corps was managing two projects in two different states. *In re Katrina Canal Breaches Cons. Lit.*, 577 F.Supp.2d 802, 813-16 (E.D. La. 2008).

2. Congress authorized the MRGO in Public Law Number 84-455, 70 Stat. 65 (1956). A deep-draft navigation channel on the east side of the Mississippi River running from the Inner Harbor Navigation Canal ("IHNC") eastward along

the Gulf Intracoastal Waterway ("GIWW"), the MRGO strikes a southeasterly course along the south shore of Lake Borgne and through the marshlands to the Gulf of Mexico. The 76-mile waterway was designed to be 38 feet deep and 650 feet wide at the surface until it reached the Gulf of Mexico where it became wider and deeper. 647 F.Supp.2d at 649.

The MRGO was partially opened in 1963, and was operated and maintained by the Corps at full dimensions from 1968 right up to Katrina. The MRGO's use never lived up to expectations and sharply declined over the last two decades before its 2008 deauthorization. *See* USCA5 12285-88. The mounting annual costs of maintenance dredging, however, continued due to the endless cycle of channel bottom dredging necessitated by the channel's relentless crumbling and widening of the banks that had not been armored with rocks as prescribed in the original design and Congressional authorization. 647 F.Supp.2d at 650, 656, 661-62. Despite decades of fierce opposition by a chorus of federal, state, and local government agencies, public officials, environmental groups, experts, and citizens who presciently warned of the ship channel's grave risk to public safety and property, the Corps did not recommend closure until 2007, two years after Hurricane Katrina. *See* USCA5 12286-88.


Greater New Orleans
Flood Protection System
Lake
Pontchartrain
Lakefront Levee
N.O. East Levee
New Orleans
East
IHNC
Citrus Backlevee
GIWW
N.O. East Backlevee
Lake
Borgne
Golden
Triangle
MRGO Reach 1
Lower
9th Ward
Funnel
40 Arpent
Central Wetlands
MRGO Reach 2
New
Orleans
Arabi
St. Bernard Parish
Meraux
Gretna
Terrytown
Harvey
Violet
Timberlane
Poydras
Saint
Clair
Braithwaite
Caernarvon
Saint
Bernard
Toca
Verret
Belle
Chasse
Scarsdale
Verret Levee (Chalmette Extension)
Satellite imagery dated October 10, 2005
3 0 3
Miles
PX0098.2

The MRGO's Reach 1 is the east-west portion beginning at the IHNC on the east and running coterminously with the GIWW. A "funnel" is created by the confluence of Reach 1 and Reach 2—the north-south leg stretching from the GIWW to the Gulf of Mexico. The marsh area to the east of this intersection and to the west of the northwestern shore of Lake Borgne is known as the "Golden Triangle." The "Central Wetlands Unit" is 32,000 acres of marshland encircled at the north by the Reach 1 levee, to the east by the Reach 2 levee, and to the south by the 40 Arpent Levee. 647 F.Supp.2d at 650-51, 666; *see also* USCA5 12389.

The MRGO is one of the "greatest catastrophes in the history of the United States." USCA5 15306 (Gagliano). The total land loss from 1956 to 2005 was 19,559 acres—30 square miles or some 14,791 football fields. 647 F.Supp.2d at 669-70. Besides destroying the valuable habitat of myriad species of fish, wildlife, and vegetation, this ecological devastation removed a highly effective natural surge buffer protecting Greater New Orleans during hurricanes. *Id.* at 666; *see also* USCA5 12288-91.

The Corps' failure to install foreshore protection (armoring with rocks) along Reach 2 foreseeably led to significant wave wash erosion of the unstable banks and widening of the channel by more than 300% of its authorized width in places. 647 F.Supp.2d at 671, 702. This transmogrification of the channel to

multiples of its Congressionally-authorized design dimensions precipitated four adverse effects: (1) the need for continuous dredging with the unstable banks literally crumbling into the channel; (2) destruction of wetlands from bank erosion and depositing of dredged spoil materials; (3) a wider open water surface area (fetch) for storm-driven waves to attack more ferociously the frontside of the Reach 2 levees; and (4) the dangerous encroachment of the channel on the Reach 2's south bank levees which materially diminished protection from hurricane surge and waves. *Id.* at 671-76.

Despite decades of knowledge that the MRGO was a catastrophe in the making, the Corps continued to dredge the channel without preparing mandatory environmental disclosures or undertaking any remedial measures. *Id.* at 717-31. The Corps never informed Congress of the grave flooding threat to public safety posed by this severe bank erosion. *Id.* at 661-66. There was a direct "causal connection between the Corps' failures to file the proper … reports and the harm which plaintiffs incurred." *Id.* at 730.

3. Six individuals (Norman Robinson, Monica Robinson, Anthony Franz, Lucille Franz, Kent Lattimore, and Tanya Smith) and a business (Lattimore & Associates) filed a damages action against the United States pursuant to the FTCA (28 U.S.C. §§ 1346 (b) (1), 2674). 647 F.Supp.2d at 732-33. The Plaintiffs

sought to hold the United States liable for the damages that they sustained when their neighborhoods in the Lower Ninth Ward, St. Bernard Parish, and New Orleans East were destroyed in Katrina's aftermath. Their case (*Robinson v. United States*) was consolidated with hundreds of similar MRGO-related lawsuits. The district court deferred action on the other suits and a class action certification motion pending trial and appellate court resolution of the *Robinson* case. *See In re Katrina Canal Breaches Consolidated Litigation,* 2010 WL 487431, at *18, n. 9 (E.D. La. Feb. 2, 2010).

"Plaintiffs [were] not seeking damages for the failure of the levees or flood projects." *In re Katrina Canal Breaches Consolidated Litigation*, 471 F.Supp.2d 684, 694 (E.D. La. 2007). Rather, the gravamen of their case is that as far back as the planning stages in the 1950s and right up to Katrina, the Corps had extensive institutional knowledge that its deep water ship channel enhanced the risk of catastrophic flooding of Greater New Orleans during hurricanes. Plaintiffs also alleged that foreseeable and preventable environmental devastation caused the combined effects of significant channel widening, loss of massive amounts of protective wetlands due to uninhibited salt intrusion and bank erosion, and the lowering of the protective crowns of the Reach 2 levees.

4. Over four years of intense litigation, the Government filed five motions for dismissal. The District Court denied two motions to dismiss on the basis that the suit was barred by the Flood Control Act of 1928 (33 U.S.C. §702c) ("§702c"). *See* 471 F.Supp.2d at 690-97; 577 F.Supp.2d 802. The trial court also denied two motions to dismiss on the ground that the suit was barred by the discretionary function and due care exceptions to the FTCA (28 U.S.C. § 2680 (a)). *See* 471 F.Supp.2d at 696-705; *In re Katrina Canal Breaches Consolidated Litigation*, 627 F.Supp.2d 656 (E.D. La. 2009). Finally, the district court denied a motion for summary judgment alleging that Plaintiffs had failed to adduce sufficient proof that the MRGO's adverse effects were a cause-in-fact of the flooding of Plaintiffs' properties. *See In re Katrina Canal Breaches Consolidated Litigation*, 2009 WL 1033783 (E.D. La. 2009).

5. The case went to trial as a test case on a voluminous record compiled after extensive discovery. The district court conducted a 19-day bench trial with dozens of witnesses testifying in person or by deposition. *See* USCA5 22789. The bulk of the testimony featured 15 expert witnesses, seven for the government and eight for Plaintiffs. As the transcript reveals, the trial judge questioned the expert witnesses extensively, probing the facts and science underlying their opinions. *See, e.g.*, USCA5 17959-62, 17964-65, 17969-73, 17979-95, 17999-18003, 18011-

17, 18023-38, 18098-101, 18114-15, 18117-19, 18124-33, 18143-54, 18157-58, 18160-68, 18171-76, 18208, 18271-73, 18276, 18293-94. The trial court admitted over 3,200 exhibits, a number of which were internal, official Corps records. The government has not assigned as error on appeal anything related to the conduct of the trial, admission of exhibits or testimony, or rulings on objections.

6. Like its pretrial rulings, the district court in its post-trial decision rejected the government's contention that §702c barred liability. *See* 647 F.Supp.2d at 699. Relying upon *Graci v. United States*, 456 F.2d 20, 26 (5th Cir. 1971) as controlling precedent, the trial court found that the MRGO is a navigation, not a flood control, project and that Plaintiffs were predicating the Corps' liability on its acts of "'negligence that are extrinsic to the LPV.'" 647 F.Supp.2d at 699 (quoting 577 F.Supp.2d at 827). It was the MRGO's negligent operation and maintenance—failing to keep Reach 2 within authorized dimensions and prevent wetlands destruction—and not any defalcations relating to the LPV's design or construction that was the basis for liability. "Thus, the failures at issue here are extrinsic to the LPV and not subject to §702c immunity." 647 F.Supp.2d at 699.

Again, like its pretrial rulings, the district court in its post-trial decision also rejected the government's contention that this suit is barred by the discretionary function exception under 28 U.S.C. § 2680(a). *See* 647 F.Supp.2d at 700-32. The

court held that under controlling Supreme Court and Fifth Circuit precedent, neither prong of the two-part discretionary function exception test had been established. First, the Corps had no discretion to dredge the channel, destroy the wetlands, and imperil public safety without complying with the National Environmental Quality Act ("NEPA") (42 U.S.C. §§ 4321-4370f). Second, the operative conduct was not a policy decision protected by the discretionary function exception because the Corps failed to adhere to safety and professional engineering standards in its maintenance of the MRGO, thereby knowingly sustaining "a substantial risk of catastrophic loss of human life and private property due to malfeasance." 647 F.Supp.2d at 705-17, 732.

Concluding that the Lower Ninth Ward and St. Bernard Parish were flooded by waters carried from Reach 2 due to the multiple adverse effects of the MRGO's grossly negligent operation and maintenance, the district court entered judgment against the United States on the claims of Lucille and Anthony Franz, Tanya Smith, Kent Lattimore, and Lattimore & Associates. The Corps' gross negligence included failure (1) "to maintain the MRGO properly," (2) "to implement foreshore protection when it recognized or should have recognized the extreme degradation that failure caused to the Reach 2 levee," (3) to remediate salinity intrusion that caused the ruinous loss of wetlands; (4) "to warn Congress officially

and specifically" about the need for foreshore protection, (5) to properly prioritize requests for congressional funding "to alleviate life threatening harm which the MRGO posed," and (6) "to inform Congress of the dangers which it perceived and/or should have perceived in the context of the environmental damage to the wetlands caused by the operation and maintenance of the MRGO . . . ." *Id.* at 706, 716-17; *see also id.* at 676, 700, 730-31.

The trial court awarded the five plaintiffs a total of nearly $720,000 in damages for loss of real and personal property and inconvenience. *See* 647 F.Supp.2d at 735-36. The government is appealing that judgment.

Specifically, the government appeals the District Court's rejection of the §702c and discretionary function exception immunities and the award of nearly $720,000 in damages to five plaintiffs. Significantly, the United States does *not* contest the trial court's factual findings and legal conclusions that the Corps was grossly negligent for decades, or that the adverse effects of its malfeasance (such as massive channel widening in excess of Congressionally-authorized design limits and wetlands destruction) were a substantial factor in most of the flooding of the Lower Ninth Ward and St. Bernard Parish. Because the Appellant's Brief fails to contest the fact findings as clear error, these determinations are conclusively established. *See Affco Inv. 2001 v. Proskauer Rose, LLP*, 625 F.3d 185, 191 n.6

(5th Cir. 2010) (assertion not briefed and developed on appeal was waived); *see also* Fed. R. Civ. P. 52 (a); *In re Omega Protein, Inc.*, 548 F.3d 361, 367 (5th Cir. 2008) (negligence and causation are factual issues that may not be set aside on appeal unless clearly erroneous).

7. The district court entered judgment in favor of the United States on the claims of Norman and Monica Robinson whose New Orleans East home was destroyed by twelve feet of water from the MRGO's Reach 1. The court ruled that the Corps was not negligent in failing to design and construct a surge protection barrier that would have prevented virtually all of the flooding in New Orleans East. *See* 647 F.Supp.2d at 696-97. The court did not rule, however, on Plaintiffs' alternative arguments, supported by undisputed evidence, that (1) the MRGO's ongoing negligent operation and maintenance long after its design and construction—and the resulting increased conveyance and velocity of water along MRGO Reach 1—was a substantial factor in the catastrophic flooding of the Robinsons' home and (2) the Corps acquired substantial knowledge after designing the MRGO that the "funnel effect" posed a serious catastrophic flooding risk warranting remedial measures.

The district court did not award any damages for destruction of the Lower Ninth Ward home of the Plaintiffs Anthony and Lucille Franz but did award

$100,000 for loss of personal possessions. 647 F.Supp.2d at 735-36. The experts substantially agreed that "about 88 to 90 percent of the Lower Ninth Ward [flooding] was caused by the Reach 2 breaches." *Id.* at 698. The court, however, denied recovery for the home's destruction based on the finding that IHNC breaches had not been caused by the MRGO and that IHNC floodwaters had reached the home minutes before the Reach 2 waters. *Id.* at 735. Nonetheless, because the MRGO Reach 2 water had the additive effect of flooding the second floor, the court awarded $100,000 for the content loss. *Id.* at 735-36. The court rejected Plaintiffs' argument that the waters indistinguishably merged and that both were substantial factors and concurrent causes of the destruction of the Franz' home under controlling Louisiana law. USCA5 23097-99.

Plaintiffs cross-appeal the District Court's rulings on whether the Corps was negligent after the MRGO's construction in failing to implement remedial measures to prevent flooding in New Orleans East and the resulting destruction of the Robinsons' home and whether the MRGO was a concurrent cause of the destruction of the Franz' home.

STATEMENT OF FACTS

The trial evidence proved that the Corps was grossly negligent and obdurate in ignoring, over five decades, a catastrophic threat repeatedly described in their

internal documents. *See* 647 F.Supp.2d 644. The picture of chronic inaction in the face of actual knowledge of impending disaster is vivid:

> *It was clear from its inception that because of its location, degradation of the area would result unless proper, prophylactic measures were taken.* In fact, some measures were included in the Corps' plans; they simply were not implemented in time to prevent immense environmental destruction. . . . *[I]t is clear that the paramount need for timely providing protection [to the channel banks] was obvious to the Corps. . . . It is clear that the Corps had knowledge by the early 1970s that protection was necessary. The extreme loss of wetlands* particularly along the North Bank abutting Lake Borgne *was recognized in 1973*. . . . [The Corps had been warned] that *the inhabitants of the area were at risk* . . . in the 1970s. . . . [T]he sole focus of the Corps was to guarantee the navigability of the channel *without regard to the safety of the inhabitants of the area or to the environment.* The reality of *this myopic and telescopic approach* is demonstrated by the Corps' practice with respect to reporting required by the Environmental Protection Act . . . . [The Corps *took no action e]ven with the knowledge that the [catastrophic] erosion problem was potentially cataclysmic for the lives and property* of those who lived in St. Bernard Parish . . . .

647 F.Supp.2d at 653, 657, 659, 661-62, 664 (emphasis added).

The testimony at trial only underscored these findings:

> Thus, it is clear from the testimony and documentary evidence that the Corps knew *at least from the early 1970s that the MRGO was endangering the Chalmette Unit Reach 2 Levee.* It knew that a primary source of the devastating shoaling was a result of wave wash that occurred with each ship that navigated the channel. Even though it was determined unequivocally in 1968 that the funding for the South Bank would be under the MRGO rubric, until 1982 nothing was done and it was not completed until 1986. As to the north shore, *the callous and/or myopic approach of the Corps to the obvious deleterious nature of the MRGO is beyond understanding.*

Id. at 665-66 (emphasis added).

The district court issued nearly 93 published pages of findings of fact and conclusions of law. Substantiated by scores of citations to the evidentiary record, these findings reveal the trial judge's mastery of the complex scientific and engineering issues, first-hand determinations about witness credibility, and unique opportunity to study the development of the MRGO and LPV in the course of issuing dozens of rulings throughout over five years of Katrina-related litigation. *Accord In re Katrina Canal Breaches Consolidated Litigation*, 524 F.3d 700, 712 (5th Cir. 2008) (The trial judge here has been "the able manager of this complex litigation").

I. The Corps' Knowledge of the Enormous Danger Dates Back to the 1950s

This tragedy was "predicted" and "preventable." USCA5 15306 (Gagliano); *see also* 647 F.Supp.3d at 649, 675. Throughout the years, the MRGO—"one of the greatest catastrophes in the history of the United States"—was strongly opposed by local, state, and federal government agencies on environmental and public safety grounds. USCA5 15306 (Gagliano); *see* PX142 (1958 U.S. Fish & Wildlife Resources Report) at 1, 8, 16-19; PX174 (Statement of Louisiana Wildlife and Fisheries Commission); PX166 (U.S. Fish & Wildlife Memorandum) at 1;

PX187 (1976 FEIS) at IX-3, 13, IX-20; PX1979 (St. Bernard Parish Government, Resolution SBPC #454-08-94 – Closure of the MRGO); PX3 (ILIT Report) at 12-9 (State of Louisiana Legislature); USCA5 12287 (Exhibits cited in Plaintiffs' Proposed Findings of Fact, No. 186). The Corps dredged and dumped into the wetlands more material than was excavated in the Panama Canal's construction, destroying an area of surge-absorbing wetlands five times the size of Manhattan. *See* 577 F.Supp.2d at 805; 647 F.Supp.2d at 669.

Before construction began, a 1957 St. Bernard Policy Jury Tidal Channel Advisory Committee report predicted that "[d]uring times of hurricane conditions, the existence of the channel will be *an enormous danger to the heavily populated areas of the Parish* due to the rapidity of the rising waters reaching the protected areas in full force through the avenue of this proposed channel. *This danger is one that cannot be discounted.* [Flooding of homes] is *a major catastrophe*." USCA5 6977 (PX144, Tidewater Channel Advisory Committee Report) (emphasis added). Despite these warnings, the Corps never took corrective action. *See* PX4 (Team Louisiana Report) at 1.

II. The Corps' Decisions and Non-Decisions Were Matters of Safety and Professional Engineering Standards

Almost immediately after the MRGO was constructed, the Corps encountered a "Sisyphus-like dilemma" of crumbling banks, endless dredging, and

sinking levees. 647 F.Supp.2d at 675; *see also id.* at 674. With mounting evidence that the MRGO was morphing into a serious hurricane flooding threat, the Corps conducted a series of studies and reports documenting the hazards but never did anything to implement remedial measures. 647 F.Supp.2d at 654, 658-70; PX91 (Kemp Report (July 2008)) at 194, 197. The Corps adopted an institutional attitude that either ignored this evidence or temporized it by documenting and reporting these hazards but never taking steps to implement competent remedial measures. 647 F.Supp.2d at 654, 658-70; PX91 (Kemp Expert Report (July 2008)) at pp. 194, 197. Regardless of the reason, the result was always the same: official denial of the danger and no action taken "to prevent the catastrophic disaster that ensued with the onslaught of Hurricane Katrina." 647 F.Supp.2d at 707.

At a cost of $645 million in today's dollars, the Corps undertook to build, without any feasible safety precautions, a 76-mile inland waterway from the Gulf of Mexico directly into a major metropolitan area with over 1.3 million people. In so doing, the Corps created channels that would "provide efficient conduits to funnel surge into the heart of New Orleans." PX91 Kemp Expert Report (July 2008)) at 186 (citation omitted). This "storm surge delivery system aimed at the heart of Greater New Orleans" had the inherent potential of causing catastrophic damage. PX91 (Kemp Expert Report (July 2008)) at 187.

Before construction was completed, the Chief of Engineers determined that the channel would create an "added threat." JX322, at VRG 014-00000091. As time went by, the Reach 2 channel grew like Topsy and wetlands perished, but still the Corps did nothing. *See* Statement of Facts, III & IV, *infra*. By the early 1970s, the Corps knew what feasible remedial measures were required, but it never implemented them. 647 F.Supp.2d at 668. Indeed, the Corps never completed a remedial action plan or told Congress about the gathering storm over the MRGO, much less requested funding to ameliorate this danger that the Corps' own documents admitted threatened catastrophic damage during hurricanes. 647 F.Supp.2d at 661 n. 19, 716-17; PX91 (Kemp Expert Report (July 2008)) at 194-95. While the agency employed an extensive local, regional, and national staff who were aware of "the possible devastating effects on urban areas" it "never addressed mitigation measures, alternatives or risk to human life and property." 647 F.Supp.2d at 724; *see also id.* at 668.

Over five decades, the decisions made by the Corps' technical staff ignored prevailing engineering principles. "[T]he Corps' defalcations with respect to the maintenance and operation of the MRGO were in direct contravention of professional engineering and safety standards." *Id.* at 705. "By 1972, any layperson, much less an engineer, could see that the dimensions of the channel had

already grown excessively." *Id.* at 708. "At some point, simple engineering knowledge—like wave wake is going to destroy the surrounding habitat and create a hazard—cannot be ignored, and the safety of an entire metropolitan area cannot be compromised." *Id.* at 709. The Corps committed numerous "engineering blunders" that put the unsuspecting population at grave risk. 647 F.Supp.2d at 708.

The Corps' actions and inactions with respect to the MRGO implicated public safety. "Ignoring safety and poor engineering are not policy, and clearly the Corps engaged in such activities." *Id.* at 705. The Corps has offered no defense for its inexcusable, studied indifference to "the value of human life [and] the cost of the destruction of property." *Id.* at 660; *see also* PX91 (Kemp Expert Report (July 2008)) at p. 194. In the final analysis, "[t]here is no policy involved in such immense engineering failures which threatened the safety of a major metropolitan area which duty the Corps is charged with protecting." 647 F.Supp.2d at 708. Nor is the public good served by sustaining a policy that immunizes those responsible for safety from the consequences of "gross negligence."

III. Wetlands Destruction Removed The Natural Storm Buffer

Before the MRGO's construction, Greater New Orleans was protected by miles of wetlands consisting of very dense swamp, marsh, and a forested natural ridge. USCA5 3625-38 ¶¶42-43, 46-49. The Corps initiated a process of destroying the wetlands and lowering the margin of safety in the event of hurricanes. *See* PX2 (1951 MRGO Report) at 43 ¶82; 577 F.Supp.2d at 807 (marsh creates three times the resistance to surge than open channel). The MRGO destroyed tens of thousands of acres of wetlands. 647 F.Supp.2d at 668-70 (19,559 acres or about 14,791.5 football fields).

The Corps dredged the land-cut channel through 46 miles of pristine marshlands and cut through a natural land ridge which acted as a barrier to saltwater contamination from the Gulf into the freshwater wetlands to the north. *See* PX96 (D. FitzGerald Expert Report (July 2008)) at p. 2-13, Fig. 2.18; p. 6-5; PX1516 (Day/Shaffer Expert Report (July 2008)) at pp. 22-23, 26; PX2100 (Susan Hawes Dep. April 17, 2008) at 11:21-14:6. As the Corps well knew, "'[h]igher salinities cause swamps and marshes to convert to more saline vegetation types which are less robust and more susceptible to erosion.'" 647 F.Supp.2d at 669 (quoting 1996 Corps Evaluation Study). Indeed, in the early 1970s, an eminent coastal scientist warned the Corps that the MRGO was rapidly destroying wetlands

and creating a major risk of enhancing hurricane flood risk for the surrounding population. *See* 647 F.Supp.2d at 661, 668; *see also* PX91 (Kemp Expert Report (July 2008)) at p. 25, 188, 192. The Corps' own studies documented the decimation of 100 square miles of protective wetlands. 647 F.Supp.2d at 666-71.

"Nothing was ever done to combat the effects of salinity along the wetlands that bordered the MRGO." *Id.* at 669. The Corps was well aware of feasible mitigation measures by the early 1970s but took no action. *Id.* at 668, 676, 688 (saltwater control structures, preventing channel widening, creating wetlands out of dredging spoil, and planting trees). The loss of surge buffering wetlands was a substantial factor in the inundation of water from Reach 2. *Id.* at 675-76, 681, 697, 716; *see also* PX37 (*An Unnatural Disaster: The Aftermath of Hurricane Katrina* (September 2005)) at (major navigation channels like the MRGO pose a special threat to flood control by sometimes acting as "hurricane highways," allowing storms to sweep inland, past marshland, like liquid bulldozers.) (citation omitted).

IV. The Corps Knew that It Was Expanding the Channel to Multiples of Its Congressionally Authorized Size and Creating a Catastrophic Threat

Beginning in the early 1970s and for decades thereafter, the Corps was warned by coastal scientists and its own staff that the MRGO was also dangerously widening its banks and further exacerbating the hurricane flood risk. *See* 647 F.Supp.2d at 661, 668. "[T]he Corps had knowledge that due to lateral displacement of soil into the channel, the Reach 2 Levee would incrementally lower," thereby increasing the potential for overtopping and wave side erosion. *Id.* at 654. In addition, the Corps knew for decades that the narrow, rapidly eroding land barrier between Lake Borgne and the north side of the Reach 2 channel was highly vulnerable to wave erosion. The Corps was aware that this "land bridge . . . prevented Lake Borgne from flowing directly into the MRGO which could *catastrophically magnify the force and intensity of storm surge and wave propagation* that could occur in the context of a substantial hurricane." 647 F.Supp.2d at 659 (emphasis added).

From a series of its own investigations, the Corps realized the high stakes of taking no remedial action to prevent Lake Borgne from merging with Reach 2. In 1984, the Corps ominously wrote: "'Once the bank is breached, *development to the southwest would be exposed to direct hurricane attacks from Lake Borgne,* the rich

habitat around the area would be converted to open water, and more marsh would be exposed to the higher salinity water.'" *Id.* at 660 (quoting 1984 Initial Evaluation Study) (emphasis added); *see also id.* at 661 (same). The Corps by 1988 discussed closing the MRGO because it would "'*reduce the possibility of catastrophic damage to urban areas by a hurricane surge coming up this waterway . . . .*'" *Id.* at 668 (quoting 1988 Reconnaissance Report) (emphasis added). Despite a "duty to prevent harm caused by a project which it controlled," the Corps never eradicated this known threat of "catastrophic damage to urban areas"—precisely what Katrina wrought seventeen years later. *Id.* at 661.

The Corps also knew that the feasible solution to lateral displacement and bank erosion was armoring through placement of large rocks or concrete. *Id.* The design authorized by Congress acknowledged that foreshore protection would eventually be necessary due to wave wash, and the Chief of Engineers exercised his authority to approve the critical armoring of the south bank *in 1967* as a cost of the MRGO budget. Notwithstanding this authority and the Corps' long-standing knowledge that the MRGO's operation and maintenance placed residents in jeopardy, the Corps took no action for decades. 647 F.Supp.2d at 654*; see also id.* at 657, 665-66. "As to the north shore, the callous and/or myopic approach of the

Corps to *obvious deleterious nature of the MRGO* is beyond understanding." *Id.* at 666 (emphasis added).

With the passage of time and no remediation, the channel as predicted widened over three times its authorized width of 650 feet—and at some places as wide as 3,700 feet. *Id.* at 697; PX90 (Bea Decl., (Oct. 2008)) at ¶12 (f)). In addition, dredging at some locations exceeded the Congressionally-authorized depth of 38 feet, and several of the Reach 2 breached levee locations coincided with areas that had been dredged more than 38 feet. *See* PX216 (Letter from Don T. Riley to Peter Savoy, June 17, 2004) at 3; PX91 (Kemp Report (July 2008)) at 12, 98 at Fig. 6.4; USCA5 12357. By exceeding these two critical dimensions of depth and width, the Corps caused an exponentially greater volume of water (conveyance) and a vast expanse (fetch) for high energy waves to carry water from Reach 2 into residential neighborhoods during hurricanes. *See* 647 F.Supp.2d at 675.

Even by 1975, the Corps could have averted the coming disaster by proper armoring of the banks. *Id.* at 675. This failure to take remedial action was "a substantial factor" in causing the disaster. 647 F.Supp.2d at 656; *see also id*. at 711, 716.

V. Despite Its Knowledge of Mounting Environmental Damage and Safety Hazards, the Corps Never Prepared a Full or Supplemental Environmental Impact Statement

A. Multiple NEPA Violations

Against this backdrop of the Corps' extensive, decades-long knowledge of the MRGO's rapidly deteriorating condition, significant adverse environmental impacts, and potential for causing catastrophic hurricane flooding, the Corps never prepared any environmental assessment of these issues. For 36 years after NEPA's enactment in 1969 and up to Katrina, the agency papered over and covered up what it knew about the "critical" need for "emergency work," the disappearing land bridge protecting against "catastrophically magnif[ied]" storm surge and waves during hurricanes, and the clear and present danger of "catastrophic loss of human life and private property due to this malfeasance." 647 F.Supp.2d at 658-59, 732. "Plaintiffs . . . presented substantial evidence … that the Corps itself internally recognized that the MRGO was causing significant changes in the environment—that is the disappearance of the adjacent wetlands to the MRGO." *Id.* at 725; *see also* 627 F.Supp.2d at 681.

The Corps pretended to comply with NEPA while all along knowing that it was conducting a "paper shuffle." The agency authored a defective Draft

Environmental Impact Statement in 1972 (PX190), completed a woefully inadequate Final Environmental Impact Statement ("FEIS") in 1976 (PX187), filed largely meaningless supplemental information in 1985 (PX194), and thereafter purposefully evaded "the fallout" of a Supplemental Environmental Impact Statement ("SEIS") by issuing 26 piecemeal environmental assessments ("EAs") inaccurately reporting no significant impacts ("FONSIs"). *See* 647 F.Supp.2d at 730; *see also id.* at 704-05; 716-17, 726-30; PXs 735, 937, 1951, 1976; Joint EXs 148-73 (EAs and FONSIs). As the District Court determined, from the completion of the MRGO forward, "any minimally competent engineer" would have recognized (and in this case many did recognize and document) that the MRGO presented a danger, but "no effective, timely corrective action was taken" to avoid a preventable tragedy. USCA5 17277:12 – 17278:1 (Dr. Bea); 647 F.Supp.2d at 730.

The proof was so overwhelming that the district court found that "the Corps was obdurate and *intentionally* violated its NEPA mandate." 627 F.Supp.2d at 687 (emphasis added). Based on a record largely comprised of internal Corps documents, the district court made scores of findings—not challenged on appeal—that:

> [T]he Corps was obdurate and arbitrarily and capriciously violated its NEPA mandate. Clearly, where an agency's own findings and reports

> demonstrate a positive belief and objective recognition that the environmental impact of a project that requires on-going action, such as dredging for its maintenance, has created a new detrimental circumstance, such as the decimation of an extremely large swath of wetlands, a [Supplemental Environmental Impact Statement] would be mandated. Furthermore, the utter failure to ever properly examine the effects of the growth of the channel on the safety of the human environment violates NEPA.

647 F.Supp.2d at 730; *see also* 627 F.Supp.2d at 682 (The "mandate [of the Corps' wetlands conservation policy], as well as NEPA, was simply ignored in the context of the continued dredging that was undertaken in the channel.")

The district court's findings documented three different bases for concluding that the Corps conspicuously violated NEPA: (1) the flawed FEIS prepared in 1976; (2) failure to file a SEIS after 1976 even though it repeatedly acknowledged substantial changes caused by the MRGO's maintenance and operation; and (3) repeated issuance of EAs and FONSIs resulting in improper segmentation of "its reporting guaranteeing that the public and other agencies would remain uninformed as to the drastic effects the channel was causing." 647 F.Supp.2d at 725. In short, the Corps knew that it was obligated to evaluate the MRGO's cumulative environmental impact, and its NEPA violations are clear. 647 F.Supp.2d at 730.

All of these unchallenged findings are supported by substantial evidence in the record, much of which is cited by the district court. *See also* USCA5 12305-12230 (Plaintiffs' Proposed Findings of Fact and Conclusions of Law).

1. The 1976 FEIS Was Fatally Flawed

With the passage of NEPA, the Corps was obligated to prepare an EIS to cover the "major Federal action" represented by its vast, continuing dredging program "that helped cause increased salinity and bank erosion." 647 F.Supp.2d at 720. The Corps produced a FEIS in 1976. Not surprisingly, the district court found that the Corps was "beyond arbitrary and capricious" in omitting crucial information from the document:

> [The FEIS] ignores and does not mention the concept of wave wash, which the Corps knew would be a problem from the outset, something that increased the need for dredging and which was a major impact of the operation of the MRGO by definition. Neither words "wave wash" nor "wave wake" even appear in the 1976 FEIS. *The effect of wave wash has been a factor with respect to the MRGO since its inception. To prepare a document concerning the operation of this channel and not address this factor, particularly in light of the horrific loss of wetlands that it was causing, was arbitrary and capricious.* Indeed, the Corps' own Thomas Podany testified that by 1982, it was widely understood the harmful effect of vessel wave wash and storm wind generated waves on the channel and that as a result the bank had widened. (Trial Transcript, Podany at [USCA5 19576]). This Court cannot but comment that the Corps' approach reminds the Court of the old adage, "Close your eyes and you become invisible." *It is beyond arbitrary and capricious—it flies in the face of the purpose of NEPA and ignores the very heart of what "operation" means.*

647 F.Supp.2d at 726-27 (emphasis added).

Based on the testimony of the Corps' own witness, the trial court found that the Corps simply *ignored* the effect of the MRGO's expansion on human environment and safety. *Id*. at 727 (citing Miller Testimony, USCA5 19386-90); *accord* PX143, 54 (3) (Dr. Gagliano in 1972 warned of the "serious threat … to adjacent densely populated urban areas"). The Corps failed to advise Congress in an EIS about the impact that the MRGO was having on the health and safety of the human environment. USCA5 19403:13-17 (Corps' witness, Miller); *see also* 647 F.Supp.2d at 716-17. The Corps maintained this Sphinx-like silence notwithstanding that the Corps knew as early as 1958 of the threat of probable erosion. UCA5 15308:17-15309:6 (Dr. Gagliano); 647 F.Supp.2d at 654.

The U.S. Environmental Protection Agency and Louisiana Department of Public Works commented on the draft EIS, expressing concern and asking for a fuller analysis, including on the effect of increased salinity. 647 F.Supp.2d at 727-28; PX187 at IX-3(at pdf 203), at IX-7-8 (at pdf 207-08), at IX-8-9 (at pdf 208-09). Instead of an adequate responsive disclosure in the final EIS, the Corps responded that salinity would be controlled by the construction of certain projects which were never built and which were known by the Corps to be at risk. 647 F.Supp.2d at 728 ("Any reliance by the Corps on these locks to be an agent to combat salinity

was highly suspect at that point"). The Corps also violated NEPA by failing in the 1976 FEIS to discuss the MRGO's long term impacts on 23,000 acres of marsh even after the EPA stated that the Corps should discuss these impacts. 647 F.Supp.2d at 728; 627 F.Supp.2d at 682-83; *see also* PXs 190 (1972 DEIS), 191 (1974 DEIS), 187 (1976 FEIS), 184 (Corps' 30(b)(6) designee) at 83:2-19 (known information regarding impact on wetlands should have been disclosed in the EIS).

2. The Corps Should Have Filed a Supplemental EIS

In 1985, 1988, 1991, and 1993, the Corps engaged in extensive studies of bank erosion and the need for stabilization, and internally acknowledged the obligation to alert Congress of the impacts through a full EIS. 647 F.Supp.2d at 668-71, 726-30. The Corps itself knew, recognized, and internally reported that its maintenance activities had caused or would cause significant impact on the wetlands adjacent to Lake Borgne and the MRGO. PX2122 at pdf p. 66 & 3 (1982 communication stating, "It is obvious that this erosion is damage due to operation of the project."); PX1639 (Notice of Study Findings) at 7 (July 1984). The failure to disclose the MRGO's known, significant adverse environmental impacts in an SEIS violated NEPA. 647 F.Supp.2d at 729-30 ("It is truly beyond cavil that with this [1988 Corps Reconnaissance] report, the Corps acted arbitrarily and

capriciously in not filing an SEIS to examine the degradation and problems outlined above.").

The Corps' own forecast of potential doom in a 1988 study never made its way into an SEIS:

> Because erosion is steadily widening the MR-GO, the east bank along Lake Borgne *is dangerously close to being breached. Once the bank is breached, the following will happen: …. development to the southwest would be exposed to direct hurricane attacks from Lake Borgne.*…Based on recent trends, the study area will continue *to experience drastic losses due to erosion*. The MR-GO east bank along Lake Borgne is dangerously close to being breached.... As the marsh within the project area diminishes, *significant losses to marsh dependent fish and wildlife species will also occur.*…Saltwater intrusion also contributes significantly to marsh loss…. Erosion and disintegration of the banks of the MR-GO has created many additional routes for saltwater to intrude into formerly less aline interior marshes. *Consequently, salinity in the marshes has increased significantly in the last 20 years.*…The unleveed banks of the MR-GO will continue to erode in the absence of remedial action. *Currently, banks of the unleveed reaches are retreating at rates varying from five to over 40 feet per year. The average rate of retreat of the north bank in the 41-mile land cut portion of the waterway is about 15 feet per year.*

647 F.Supp.2d at 729 (quoting PX-9 (1988 Recon. Report) at 10-11, pdf at 63-64; *id.* at 23, pdf at 76; *id.* at 27, pdf at 80; *id.* at 30, pdf at 83) (emph. in opinion).

Abundant trial evidence proved that the Corps was aware of environmental devastation subject to mandatory reporting under NEPA. *Id.; see also* PX145, at 1559 (discussing Corps' knowledge of habitat loss due to erosion and salinity, and

concluding that "The MRGO directly destroyed wetlands and caused shifts in habitat types."); PX181, at 280:12-24 (30(b)(6) witness Miller conceded that pursuant to NEPA the Corps was required to report in an EIS that the banks of the MRGO were eroding), 317:17-318:13 (conceding that significant environmental impacts result from erosion, wave wash, drawdown effects from vessel traffic, and saltwater intrusion); PX196, at 18-19 (1990 document recounting Corps' knowledge of extensive land loss); PX203 at 4-22 (at bates 1865) (between 1965 and 1981, "[t]he mean erosion was 240 ft or 15 ft/year."); PX208 at 2 (Army Corps memo stating that "[t]he cumulative impact of all the changes that have already occurred since preparation of the 1976 EIS alone constitutes a significant impact on the environment, compared to the O&M plan described in the EIS, although there has been no supplemental EIS (SEIS) prepared."). This undisputed evidence could lead to only one conclusion:

> Clearly, where an agency's own findings and reports demonstrate a positive belief and objective recognition that the environmental impact of a project that requires on-going action, such as dredging for its maintenance, has created a new detrimental circumstance, such as the decimation of an extremely large swath of wetlands, a SEIS would be mandated.

647 F.Supp.2d at 730; *see also* 627 F.Supp.2d at 684-85. The "exponential increase in the width of the channel" triggered the Corps' obligation to file a more

complete FEIS in 1976 and file a SEIS "on no account later than 1988." 647 F.Supp.2d at 730.

3. Improper Segmentation of EAs and FONSIs

Between 1963 and 2005, the Corps engaged in approximately 147 dredging events and removed approximately 492,422,925 million cubic yards of sediment which became spoil. PX206 (Compilation of Dredging Events) at 5. After the inadequate FEIS in 1976 and an under-inclusive supplement in 1985, the Corps prepared nothing other than perfunctory, cookie cutter EAs. Without exception, each of the 26 EAs reported that the operations and maintenance activities had no significant impact on the environment. PXs 735, 937, 1951, 1976, JX 148-173. The trial court found that, "beyond peradventure" the Corps used EAs and FONSIs to avoid discussion of the cumulative environmental impact of the MRGO:

> The testimony of Dr. Day and the demonstrative exhibits used during his testimony demonstrate beyond peradventure that the Corps' use of EAS and FONSIs was a method by which it avoided having to ever produce another EIS or SEIS. (Trial Transcript, Day at [USCA5 16126-31]). Indeed, there was testimony adduced that *the Corps chose not to take a course of action because it did not want to file an EIS and deal with the fallout therefrom.*

647 Supp.2d at 730 (emphasis added); *see also* PX208 (Army Corps 2005 Mem.), at 1-2 (four months before Katrina a Corps environmental compliance official admitted that the dredging methods "bear little resemblance to those described" in

the 1976 EIS, that reporting had been segmented, and that the significant adverse and cumulative impacts of the MRGO were required to be reported in an SEIS, although one had not been prepared). The Trial Court concluded by emphasizing that the Corps' knowledge and its NEPA violations were clear. 647 F.Supp.2d at 730.

B. There Is A Direct Causal Connection Between The Corps' NEPA Violations and Plaintiffs' Harm

The district court found a causal connection between the Corps' chronic "failures to file the proper NEPA reports and the harm which plaintiffs' incurred." *Id.* "[T]he Corps' failure to warn Congress officially and specifically and to provide a mechanism to rectify the problem by properly prioritizing the requested funding to alleviate life threatening harm which the MRGO posed is the key." *Id.* at 706. ("Indeed, . . . Corps' officials admitted at trial that the Corps had a duty to report to Congress the fact that the MRGO was a threat to human life." *Id.* A legally adequate EIS would have exposed the Corps' gross mismanagement of a federal project that jeopardized life and property and squandered taxpayer money.

The Corps assiduously avoided direct communication with Congress to deprive it of the opportunity to evaluate the impact of the Corps' MRGO operations and to mandate and fund timely mitigation measures. *See* USCA5 19396:12-16, 19399:4-16, 19403:13-17 (Miller testimony Corps never informed

Congress). A 1993 Corps internal memo revealed the Corps' belief that *a full EIS would probably prompt questions regarding closure of the MRGO.* PX189 at 1505. The Corps could have gone to Congress at any time to ask for money to remediate the MRGO's known adverse effects, but did not do so. PX182 at 41:9-19, 43:11-45:10 (Montvai 30(b)(6) Dep.).

Congress' historic responses to learning about the MRGO's deficiencies amply substantiate the court's causation finding. Prior to Katrina, Congress had appropriated funds on the rare occasions when it learned of an exigency. 647 F.Supp.2d at 663 ("when the Corps finally deemed something an emergency, Congress came through"), 665 ("once Congress was made aware of the problem by the Corps, Congress instructed the Corps to fix it"). An informed Congress, after Katrina, swiftly moved to close the MRGO and authorize remedial measures. *See, e.g.*, PX11 (Integrated Final Report to Congress and Legislative Environmental Impact Statement for MRGO Deep – Draft De-Authorization Study (December 2007)).

Nor is there any speculation that timely Congressionally-authorized remediation would have averted this disaster. Feasible mitigation measures urged by Dr. Gagliano in 1972 and 1973, had they been implemented at any time well into the 1990s, would have restored the wetlands, halted bank erosion, reinforced

the Lake Borgne shoreline and offset the impacts of Katrina in 2005. USCA5 16092:12 – 16094:16 (Day); 647 F.Supp.2d at 656, 668, 675, 711, 716, 724. These safety precautions would have prevented the catastrophic flooding. PX91 (Kemp Expert Report), at 192, 194; USCA5 16813:1-16814:7, 17277:25-17278:1 (Bea). Accordingly, the record demonstrates—and the government below offered no contrary evidence—that Plaintiffs were harmed by decades of the Corps' contumacious non-compliance with mandatory environmental disclosure laws.

VI. With Regard to the Robinsons' Case, Substantial Evidence Demonstrates That The Corps Was Negligent Independent of Relying on the 1966 Bretschneider and Collins Report

One salient feature of the MRGO is the "funnel" at the point where the MRGO's north-south leg with adjacent levees on the south side (Reach 2) feeds into the Reach 1/G1WW with adjacent levees on both sides. 647 F.Supp.2d at 650. At its mouth, the "funnel" is 12 miles wide and focuses hurricane-driven waters into the constricted Reach 1/GIWW and then into the IHNC at the end of the six mile channel. PX94 (Kemp Declaration (September 2007) at 27-29). The potential for a "funnel effect" in Reach 1 and the IHNC due to the MRGO's configuration was recognized long before Katrina. See PX10 (H.R. Doc. No. 231 (1964)) at p. 17; PX5 (USACE - New Orleans District Corr. to Manuel Pinto) at pp. 1-2, 7-9 (Nov. 1969); 647 F.Supp.2d at 677 (citing reports and testimony from

1973 warning of funnel effect); DX1057 (MRGO, La. Bank Erosion Reconnaissance Report, Feb. 1988) at pp. 10-11, pdf 63, EDP-023-1033-34.

The only pre-Katrina effort to evaluate the MRGO's hydraulics during hurricanes was a 1966 study commissioned by the Corps after Hurricane Betsy. *See* PX68 (Bretschneider and Collins, *Storm Surge Effects of the Mississippi River Gulf Outlet* (1966) ("Bretschneider and Collins Report")). The study concluded that in the vicinity of the IHNC, "the effect of the MRGO was negligible for all large hurricanes accompanied by slow rising storm surges." 647 F.Supp.2d at 677 (citation omitted). In other words, there was no "funnel effect" that would enhance surge, velocity, and volume in Reach 1 during hurricanes.[1] The district court concluded that "plaintiffs did not present sufficient evidence that the Corps was unreasonable or negligent in relying on the conclusions set forth in that report," and "under the circumstances a duty [therefore] did not exist to construct a surge protection barrier" to protect New Orleans East. 647 F.Supp.2d at 696-97. Based on this ruling, the court denied relief to New Orleans East Plaintiffs Monica and Norman Robinson. *Id.* at 697.

[1] In an earlier 702c ruling, however, the District Court had previously noted that the 1966 study also found that the predicted effect with proposed levees and funnel throat in place "is to hasten the onset of peak surge and to lengthen the period of highest water . . .[but] no changes were made in the design of the MRGO even with these findings." 577 F.Supp.2d at 811.

The trial court noted, but did not rule on, causation, §702c, and discretionary function exception issues in the context of the Robinsons' case. 647 F.Supp.2d at 697 & n.50. If this Court reverses and remands on the issue of negligence, there will be an opportunity to present evidence and brief these undecided issues of causation, §702c, and discretionary function exception—none of which Appellees/Cross-Appellants believe present insurmountable obstacles to relief for New Orleans East residents.

In rendering its decision on New Orleans East, the district court did not address two other issues: (1) whether notwithstanding the Corps' reasonable reliance on the Bretschneider and Collins Report *in 1966*, a duty nevertheless arose *thereafter* to reevaluate its conclusions and take remedial action when the Corps received new information casting serious doubt on its initial conclusion about the absence of a funnel effect; and (2) whether independent of the original design omitting a surge reduction barrier, the significant adverse effects of the MRGO's ongoing negligent operation and maintenance (as found by the district court) were a substantial factor in causing the harm because they created increased surge, velocity, and conveyance in MRGO Reach 1 that caused the Reach 1 waters to flood New Orleans East. While not deciding these issues, trial court made

numerous findings supporting the conclusion that the answer to both of these unaddressed questions should be in the affirmative.

A. Failure to Remedy Funnel Effect Based on Post-Design Knowledge

In two separate rulings, the district court acknowledged that the Bretschneider and Collins Report had significant deficiencies. Among other things, the researchers' computer modeling was "rudimentary" and one-dimensional; the funnel throat was not as constrained as it later became; and, most significantly, the graph at page 48 of the Report demonstrated that "enlarging Reach 1 to include MRGO hastened the surge onset[,] . . . creating the Reach 2 funnel with the LPV, also hastened surge onset . . ., [and] both actions—widening of the GIWW to include Reach 1 and the creation of the funnel with levees, lead to the earliest onset of surge ." 647 F.Supp.2d at 677; *see also* 577 F.Supp.2d at 809.

With the passage of time, these shortcomings became more obvious, cast doubt on the reasonableness of the Corps' reliance on the 1966 study's conclusions, and should have caused the Corps to reinvestigate the funnel effect issue and to implement remedial measures. Among other things, the Corps itself in 1967 considered installing a surge reduction barrier across the funnel mouth, and two experts in the early 1970s "raised substantial questions concerning the conclusions of the Bretschneider and Collins report that no additional surge was

created by the funnel, and they raised the issue for the need for some type of surge barrier." 647 F.Supp.2d at 677-78. For four decades, the Corps was warned that without floodgates on the MRGO, it was leaving "a big door open" for catastrophic flooding of New Orleans. PX371 (Letter to Representative Edward Herbert from John L. Crosby (General Contractors and Builders)), Aug. 25, 1969, at AFW-467-000000224-228; *see also* PX91 (Kemp Expert Report (July 2008)) at 21-31; PX180 (Appendix E: Report on the Controlling Elevation of the Seabrook Lock (1966), at 4; PX153 (CRS Report for Congress, *Mississippi River Gulf Outlet (MR-GO): Issues for Congress*, Nicole Carter and Charles V. Stern (Aug. 4, 2006), at 7. By 1988, the Corps itself was recommending that the alternative of completely closing the MR-GO should be evaluated in order to "reduce the possibility of catastrophic damage to urban areas by a hurricane surge coming up this waterway [the MR-GO]. . . ." (PX9, 1988 Recon Report) at Comment 2, MRGOXO438; *see also* 647 F.Supp.2d at 668-69.

Indeed, the District Court itself questioned the Corps' failure to undertake any other study for 33 years in light of the significant new information. 647 F.Supp.2d at 678; *see also id.* 577 F.Supp.2d at 816 (After the LPV was designed, the Corps "took no steps to re-evaluate the LPV to take into account the effects that MRGO had had on the surrounding wetlands and effects on storm surge, in

particular as it related to the 'funnel effect.'") Following Katrina, however, a broad consensus of government and independent forensic investigators, including the Corps-sponsored IPET Report, agreed about "'the channel's funnel effect at the intersection of Reach 1, Reach 2, and the GIWW.'" 577 F.Supp.2d at 811 (citation omitted). With no barrier to prevent the channeling of the floodwaters from Lake Borgne into the narrow confines of Reach 1, a hydraulic connection between Lake Borgne and Lake Pontchartrain and the IHNC allows the waters to be pushed westerly into the interior of New Orleans through a constricted Reach 1 that moved the surging water upward. *Id.; see also* 647 F.Supp.2d at 676-77. "This connectivity is shown [during Katrina] to have both amplified surge level and velocity through the interior of the city, and raised the level of Lake Pontchartrain. *As pressure on the levees through this area increases, structural failures along the IHNC and Lake Pontchartrain canals occurred.*" 577 F.Supp.2d at 811 (quoting Carter and Stern "Issues for Congress" Report) (emphasis added). Thus, the geometry of the unmitigated "funnel" directly influenced surge discharge—both in volume and velocity—in Reach 1/GIWW and IHNC. *See* PX81 (Bea Expert Report (Jan. 2009)) at 6, ¶7, p. 12, Fig. 7; PX91 (Kemp Expert Report (July 2008)) at Chapter 2.

B. MRGO's Adverse Effects Contributed To Catastrophic Flooding In New Orleans East

The Robinsons contend in their cross appeal that, based on the evidence outlined above and further discussed below, they proved their negligence case as to their home in New Orleans East *independent of the original design issues* related to the funnel and failure to install a surge prevention barrier. The district court did not rule on the Plaintiffs' alternative contention that the Corps' many other acts of malfeasance other than the original design were substantial factors in the destruction of the Robinsons' home. This negligence claim is supported by findings that the trial court made with respect to Reach 2 as well as substantial, unrefuted expert testimony. This Court is allowed to decide an issue tendered to, but not decided by, the district court when substantial evidence in the record (and here findings) support the position. *See Grosso v. United States*, 390 U.S. 62, 71 (1968) (finding authority for rendering a decision rather than remanding on a factual issue when the record would permit only one finding); *see also Jenkens & Gilchrist v. Groia & Co.*, 542 F.3d. 114, 118 (5th Cir. 2008) (remand is unnecessary if understanding of the issues may be had without the aid of separate findings and if the record as a whole presents no genuine issue of any material fact); *C&B Sales v. Serv., Inc. v. McDonald*, 177 F.3d 384, 389 (5th Cir. 1999)

(rendering judgment rather than remanding for reasons of judicial economy and because undisputed data in the record indicated the appropriate damage award).

As previously noted, the district court found that the Corps' maintenance and operation of the MRGO over decades caused the channel to substantially exceed the original design dimensions and to destroy the surge buffering wetlands. *See* Statement of Facts, III & IV, *supra*. Plaintiffs' expert testified that *both* Reaches 1 and 2 deteriorated through widening and deepening *after original construction*, and this drastic transformation had a significant effect on surge amplification, volume, and timing along Reach 1 and 2 and IHNC. USCA5 17530:5-11 (Kemp).

The Robinsons were therefore harmed as a result of the Corps' deviations from the originally authorized channel dimensions. *See* USCA5 17531:8-11, 17531:19-25 (Kemp) (unmitigated Reach 1 and Reach 2 combined to cause surge height, volume, and duration in Reach 1 and the IHNC to be dramatically increased and overtop the Citrus Back Levee, *causing the overwhelming majority of flooding in New Orleans East where the Robinsons lived*). The Plaintiffs' expert opinion was therefore not dependent upon the Corps' omission in constructing a surge reduction barrier. In terms of the primary driving factor for the velocity and volume surge in Reach 1, Dr. Kemp definitively stated that the MRGO's post-

construction enlargement was a significant factor *independent of the original design and funnel effect.* This adverse effect included the widening of Reach 1 "a little bit in depth and reach." USCA5 17596:9-15, 17597:5-21 (Kemp); *see also* USCA5 17597:25-17598:9 (Kemp) (New Orleans East flooded as much as it did due to Citrus Back Levee overtopping caused by excess velocity and surge volume shoved down Reach 1 due to "the aggravated MRGO Reach 2" after design and construction.); PX91 (Kemp Expert Report) at 135.

Dr. Kemp quantified the impact of the *post-construction* deteriorated MRGO. Since the MRGO project was authorized, the top-width of Reach 1 enlarged on average by nearly 300 feet to nearly 1,000 feet, due largely to erosion on the south bank, and water volume increased by 90%. PX91 (Kemp Report (July 2008)) at 11, 13 & Fig. 2.4, 113 & (1). Reach 2 had an authorized top width of 650 feet but widened 3,700 feet in places (*id.* at p. 12), and to an average of three times its Congressionally-authorized design width. 647 F.Supp.2d at 671; USCA5 15591. Under Scenario 3, which is the Plaintiffs' computer modeling comparison scenario ultimately found relevant by the trial judge (647 F.Supp.2d at 685, 696), the levees would not have failed, and the water level at the Robinsons' home would have been 50% less *without* the widening of the MRGO and no other remediation (such as a surge prevention barrier). USCA5 17603:2-7, 17603:17–

17604:2; 17604:12-22 (Dr. Kemp). Thus, there was "no question" that "the MRGO Reach 1 and Reach 2, as they both enlarged in depth and width after original design and construction, significantly contributed to the volume and duration of the surge in Reach 1 that overtopped the Citrus Back Levee and contributed to the Robinsons' flooding…." USCA5 17604:12-22. Had the channel been kept to its authorized dimensions, the discharge of water going through Reach 1 would have dropped from 430,000 cubic feet per second to 354,000 cubic feet per second. USCA5 17591:1-13 (Kemp); *see also* PX93 (Kemp Decl. (2008)), at 10 (the nearly 80,000 cfs more surge into the IHNC where it runs over the crowns of the floodwalls and causes flooding is a significant increase that played a substantial role in the catastrophic flooding).

The district court acknowledged Dr. Kemp's testimony, explaining that, "as to plaintiffs, Norman Robinson and his wife, they would have had approximately 6 feet of water if the MRGO had remained as designed and with pristine wetlands. Of course, with the MRGO as widened and deepened and the degradation of the wetlands, the Robinsons received approximately 12 feet of water." 647 F.Supp.2d at 696 (citing Trial Transcript, Kemp at 1851 [USCA 17603]). Another Plaintiffs' expert explained that the Robinsons' home sustained substantially more flooding

"due to th[e] existence of this widened channel and the deteriorated wetlands." USCA5 16251:23-25 (Vrijling).

Accordingly, the uncontradicted evidence shows that the widening of Reaches 1 and 2 and the wetlands decimation—both caused by the Corps' negligence—was a substandard factor in the flooding of the Robinsons' home.

C. Defendant Admitted That the MRGO Caused the Initial Catastrophic Flooding of the Robinsons' Home in New Orleans East

Plaintiffs' expert gave detailed testimony supporting his opinion that the MRGO-enraged floodwaters caused the initial catastrophic flooding in New Orleans East. Had the MRGO been kept to its authorized dimensions, no breaching would have occurred in the vicinity of the New Orleans East LPV, overtopping over the Citrus Back Levee would have been reduced, breaching of the New Orleans East Back Levees would not have occurred, the water volume introduced would have been reduced by approximately 50 percent, and the Robinsons would have sustained 50 percent less water. USCA5 17592:17-17593:1, 17593:17–17594:13; 17596:5-17597:17 (Kemp).

Plaintiffs' expert testimony as to the cause of the flooding in New Orleans East was unchallenged. USCA5 16810:8–16811:2 (no defense expert filed an expert report explaining the flooding in New Orleans East); *see also* USCA5

18760:19-24 (Steven Fitzgerald made no runs, no analysis, and offered no opinion regarding New Orleans East). Indeed, the government stated in post-trial briefing that "it is true that the MRGO did raise the surge elevation within Reach 1 *and thereby did contribute substantially to the overtopping of the Citrus Back Levee and the initial flooding of the Robinson property[.]"* USCA5 22072 (United States' Post Trial Memorandum, Doc. 19160-3, at 113) (emphasis added); *see also id.* at 22073 ("the arrival *first* of floodwaters from Reach 1") (emphasis added). Therefore, it is undisputed that the MRGO caused the initial flooding of the Robinsons' property and that it contributed substantially to the overtopping of the Citrus Back Levee whereby the New Orleans East polder was flooded.

D. The Robinsons' New Orleans East Home Was Destroyed

At the time of Katrina, Norman and Monica Robinson had been married for ten years and resided in their 3,300 square foot home at 6965 Mayo Boulevard in New Orleans East. USCA5 15964:19-20, 15978:13-14, 15986:3-6. Both at the time of Katrina and at the time of trial, Norman Robinson was the senior anchor for the WDSU nightly news. USCA5 15964:3-5. At his employer's instruction, Mr. Robinson had quickly and unexpectedly evacuated to Jackson, Mississippi. USCA5 15969:2-9, 15970:1-2. At the time he was put on the air at the sister

station in Jackson, he did not know the whereabouts of his family. USCA5 15970:16-21.

When Mr. Robinson was finally able to return weeks later, his home was utterly destroyed. USCA5 15973:6-22 ("Everything just totally looked disintegrated….It smelled like a hog pit….It was sickening."). Similarly, Mr. Robinson was appalled by what "looked like a moonscape." USCA5 15988:14-17. In short, the Robinsons' beloved home in their treasured neighborhood was turned into a pestilence-inflicted, mold-infused, mud-covered, malodorous wreck. S*ee also* PX1495, PX1496 (photos).

After losing their home, the Robinsons lived for several years in a 700-square-foot apartment. USCA5 15978:18-19. Plaintiffs' expert, Scott Taylor, estimated the Robinsons' financial losses at $398,327. PX1716, at page 2 (Scott Taylor loss report); PX1717 (inventory), PX1718 (receipts). Perhaps more significant for future generations—who will inevitably look back on the effects of this man-made catastrophe—Norman Robinson lost irreplaceable possessions, such as papers he wrote while a Neiman Fellow at Harvard, scripts that he wrote when he was a CBS White House correspondent, mementos signed by the then-President, and family photos of his ancestors. USCA5 15980:1-25.

VII. Catastrophic Flooding Was Unconnected to LPV

In rejecting the applicability of §702c immunity, the district court concluded that the catastrophic flooding caused by the Corps' negligent MRGO operation and maintenance was "'unconnected with flood control projects.'" 577 F.Supp.2d at 820 (quoting *Graci v. United States*, 456 F.2d at 26) (emphasis omitted); *see also* 577 F.Supp.2d. at 825. This Court made the same determination in *Graci* in holding that §702c immunity was not available in an FTCA lawsuit seeking damages from flooding during Hurricane Betsy allegedly caused by the same MRGO. 456 F.2d at 27. The record shows that nothing has changed in the interim four decades to distinguish this Court's conclusion in *Graci* that the Corps' negligent MRGO operation and maintenance is not "reasonably related to government involvement in flood control programs" but rather the imposition of liability for "wrongful acts in [a different] situation[]." 456 F.2d at 27. Indeed, if anything, substantial evidence developed in this litigation bolsters this conclusion.

Liability was imposed here because the Corps' negligent MRGO operation and maintenance caused massive waters carried by the MRGO to flood the area — "negligence which occurred extrinsic to the LPV." 577 F.Supp.2d at 826; *see also* 577 F.Supp.2d at 805, 822, 825, 827; 647 F.Supp.2d at 699. The district court employed an analogy of a federal levee failing because it is rammed and breached

by a negligently-operated Navy vessel, *i.e.*, negligent government conduct independent of the design, construction, or performance of the levee. In our case, "the Corps' activities with respect to the MRGO acted like that Navy vessel destroying the levee." 647 F.Supp.2d at 648-49; *see also id*. at 656 ("[T]he failure to provide foreshore protection worked as the Navy vessel hitting the levee . . . a substantial factor in the failure of the Reach 2 levee . . . .").

Plaintiffs never alleged that their damages were caused by the failure of any flood control project. 471 F.Supp.2d at 690. In fact, the parties agreed that the levees did not fail because of negligent design or construction, and they performed as expected. 647 F. Supp.2d at 656, 681, 692. Plaintiffs maintained that "even if the flood control project had been built perfectly to specifications, . . . because of the surge created by mistakes made with respect to the MRGO, these damages would have happened." 577 F.Supp.2d at 824; *see also* 471 F.Supp.2d at 694.

The MRGO was never a flood control project or part of the LPV or national flood control program, never had any flood control elements or purpose, and never functioned as anything other than a navigation project. *Graci, supra,* 456 F.2d at 22; *see also* 471 F.Supp.2d at 695 (no evidence that MRGO ever "morphed into a hybrid flood control/navigational aid project"); PX8 (30(b)(6) O'Cain Dep.) at 516: 20-24; USCA5 3575 (Defendant's Rebuttal, Mtn. to Certify) at 8. "[T]here

were two projects, with different funding methods and two different concerns driving each. The LPV sought to prevent flooding; the MRGO sought to promote deep draft shipping." 577 F.Supp.2d at 825. The Corps' negligent MRGO management "'was wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization.'" *Graci, supra,* 456 F.2d at 26 (quoting *Peterson v. United States,* 367 F.2d 271, 275 (9th Cir. 1966)). In other words, the negligence here "was extrinsic from and not connected to the expenditure of funds to construct the flood control project." 577 F.Supp.2d at 825; *see also* 647 F.Supp.2d at 699 (foreshore protection was charged to the MRGO budget).

Other than their physical proximity and the use of dredged material from the channel to raise the spoil banks, the two projects had nothing in common. The Corps never factored in any of the MRGO's effects on the LPV, making it impossible to "find that these two projects were or are 'inextricably intertwined.'" 577 F.Supp.2d at 816; *see also id.* at 808-09. Likewise, the Corps never "took any steps in its design and construction of the levee system . . . as it related to the MRGO such that a nexus between the two was created." 577 F.Supp.2d at 811; *see also id.* at 815 ("evidence of this [putative] interrelationship in the actual oversight of the two projects is insignificant."). Nor were the Corps' actions in

failing to prevent the MRGO from becoming a safety hazard related to the LPV. 647 F.Supp.2d at 699 (emphasis added). Indeed, the Corps' tunnel vision in keeping the channel open at all costs recklessly *disregarded* the LPV's stability. 647 F.Supp.2d at 732.

VIII. Undisputed Evidence at Trial Proved that Breaches in MRGO Reach 2 Levees Were a Substantial Factor in Destroying the Franz' Home

The district court awarded Anthony and Lucille Franz $100,000 for the loss of their personal possessions, but denied them recovery for the replacement value of their house, additional living expenses, and inconvenience. 647 F.Supp.2d at 735-36. The trial court concluded that the floodwaters from the two IHNC floodwall breaches reached their home before floodwaters from Reach 2, and the home was already destroyed by the IHNC floodwaters by the time the Reach 2 deluge arrived. The district court rejected Plaintiffs' argument that this was a case of concurrent causation and that the Reach 2 floodwaters were a substantial factor in destroying the Franz' residence.

Before catastrophic flooding of the Lower Ninth Ward, Anthony and Lucille Franz lived along with their son in a two-story duplex at 5924-26 St. Claude Avenue. USCA5 15893:23 – 15894:3; PX115. The floodwater level in the Franz residence was approximately three feet high on the *second* floor. USCA5 15900:24-25. The house was so extensively damaged that it cannot be rebuilt.

USCA5 15902:23–15903:3, 15903:8-10, 15915:13-18. In addition to the irredeemable destruction of their home, the Franzes lost their personal possessions and appliances, almost all of which were kept in their living quarters on the second story. 647 F.Supp.2d at 735; PX1714 (Tayor Final Loss Report); PX1715 (inventory); USCA5 15919:19 – 15920:4 (Anthony Franz). Scott Taylor, the property and casualty adjuster who testified as an expert at trial, estimated a total of approximately $460,000 in losses, including $120,000 for the home's contents. PX1714, at page 2; *see also* PX115, at page 2; USCA5 17291:12-14 (Taylor).

Both Plaintiffs and Defendant agreed that approximately 88 to 90 percent of the Lower Ninth Ward flooding was caused by the MRGO Reach 2 breaches. 647 F.Supp.2d at 698. A report by the government's expert explained:

> While the IHNC breaches caused a rapid rise in water levels in the Lower Ninth Ward, the maximum water surface elevation was primarily influenced by the water from the breaches along the MRGO…. *Even without the IHNC breaches, the maximum water surface elevation in the Lower Ninth Ward area would have been nearly identical.*

PX1487, at 21 (S. Fitzgerald Report) (emph. supp.); *see also* USCA5 18761:15-22 (Fitzgerald).

The Franz' home sustained about eleven feet of floodwater from both flooding sources. PX1771, at fourth page, Figure 5; USCA5 16254:24-16255:2. The maximum water levels in the Lower Ninth Ward were determined by flooding

from Reach 2, and even without the floodwaters originating in the IHNC, the Franz' home would have been catastrophically flooded. PX53 (Delft University Flood Report (July 2007)) at 45; PX1487 (Fitzgerald Report) at 20.

At some point, the floodwaters from the west and east merged and converged on the Plaintiffs' home. After they merged, these floodwaters became effectively indistinguishable as to source—a fact not denied by Defendant's expert. USCA5 18761:9-12 (Fitzgerald).

Anthony and Lucille Franz proved that after the initial flooding, the severe, irreparable water damage from high levels of floodwaters that stagnated in the Franz home for three weeks caused it to be a total loss. PX115 at 1 (Taylor report stating that "wood rot was readily observable"); USCA5 17297:17–17298:5, 17298:22–17299:7 (Taylor); USCA5 17695:1-12 (Rodriquez). In addition to rotting the wood, standing waters will cause upward wicking that destroys the wall and electrical wiring. USCA5 17296:8-14 (Taylor). Such damage does not start until the floodwaters come to rest. USCA5 17297:9-16 (Taylor). Based on this evidence, the Franzes proved that a substantial cause of the total destruction of their home was weeks of stagnation of floodwaters from the MRGO Reach 2 with only relatively minor contribution from the IHNC, *and* that this destruction (*e.g.*, wood rot and wall board) occurred well after the initial flooding. Defendant

offered no expert testimony to rebut this evidence of the cause of the destruction of the home.

Another cause of their home's destruction was damage to the brick foundation when a large object crashed into the house. PX115, at 1; PX1714, at 2. The pictures show that some heavy object–possibly a vehicle–crashed into the house approximately four feet above ground level, leaving a huge hole in the wall on the Gordon Street side. PX1501 (Franz Property Damage Photographs) at 53; *see also* PX115 at 1; USCA5 15899:19–15900:14 (Lucille Franz). The Gordon Street side *faces east toward Reach 2 and away from the IHNC.* PX115 at 1 (Taylor Damage Report) ("The exterior East side of the home suffered major damage in the form of a full breach in the lower brick wall."); *see also* PX1714 at 2 (Taylor Final Loss Report); PX1771 at 1 (aerial view showing location of house); USCA5 22945 (aerial photo identifying MRGO Reach 2 and the 40 Arpent). This hole was so gaping that a large portion of the side foundation was at risk of collapse. PX115 at page 1 (Taylor Report); *see also* PX1714 at page 2 (final Taylor Report); USCA5 15899:23-24 (Lucille Franz). Therefore, the Franzes proved that the foundation of the home was damaged as a result of waters from the east, *i.e.*, from Reach 2 of the MRGO.

SUMMARY OF ARGUMENT

The tragic destruction of the nation's 35th largest city took only one horrific day. But the violent forces that killed over 1,300 people, destroyed 300,000 homes, and forced the emergency evacuation of 1.1 million residents were created over decades by the grossly negligent management of the Mississippi River-Gulf Outlet ("MRGO") by the U.S. Army Corps of Engineers. This appeal involves, as the district court conscientiously chronicled in its meticulously-documented 93-page opinion, "[t]he Corps' lassitude and failure to fulfill its duties [that] resulted in a catastrophic loss of human life and property in unprecedented proportions." *In re Katrina Canal Breaches Consolidated Litigation,* 647 F.Supp.2d 644, 711 (E.D. La. 2009).

The government's appeal challenges neither the trial court's determination of liability nor its myriad findings concerning the Corps' long-time, conscious disregard of public safety as the MRGO morphed into a dangerous navigation facility that the agency's engineers repeatedly recognized could cause catastrophic flooding during hurricanes. Instead, the government appeals the district court's rejection of two immunities that would extricate it from responsibility for the worst engineering system failure and one of the greatest environmental disasters in

American history. The district court's rejection of these defenses should be affirmed.

The Flood Control Act of 1928 (33 U.S.C. §702c) does not apply to the MRGO because it is a navigation channel, not a flood control project, and the Army Corps' negligent operation and maintenance was unrelated to the federal levee system. This Court's controlling precedent in *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971) mandates this conclusion. It is difficult to imagine a decision more "on all fours": *Graci* rejects the same defendant's invocation of the same law (§ 702c) as a defense in a case brought by similarly-situated flood victims over the same project (the MRGO) and alleging the same type of harm—a hurricane surge of MRGO water into the same neighborhoods. In an effort to evade a dispositive Fifth Circuit decision, the Government invokes a fact that both parties agreed not to challenge in the litigation (the LPV design and performance), a 1986 Supreme Court decision favorably citing *Graci*, and a 2001 Supreme Court decision in which the government lost and the defense was narrowed. None of these arguments can defeat a panel opinion directly on point.

Similarly, the government's invocation of the discretionary function immunity under the FTCA (28 U.S.C. § 2680(a)) is negated by controlling Supreme Court and Fifth Circuit precedent. "Certainly, a negligent, on-going

engineering decision to let a navigational channel's contours run amuck so that it becomes a substantial cause in the destruction of another huge, expensive Congressional undertaking—that is the Reach 2 Levee—cannot be the kind of decision 'of the nature and quality that Congress intended to shield from tort liability.'" *In re Katrina*, 647 F.Supp.2d at 710-11 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984)).

The district court correctly determined that the evidence did not satisfy either prong of the discretionary function exception's two-pronged immunity test for the discretionary function exception. *See Ashford v. United States*, 511 F.3d 501, 504-05 (5th Cir. 2007). First, the Corps intentionally violated its reporting requirements under the National Environmental Policy Act (42 U.S.C. § 4321 *et. seq.*), and the decades-long failure to disclose the MRGO's known risk to life and property had a direct causal nexus to Plaintiffs' flood damages. Second, the Corps' failure to undertake timely remedial measures to prevent the MRGO from becoming an instrument of devastation arose from a series of unprotected, non-policy decisions concerning technical, engineering, and professional judgments that directly involved safety. Once the government exercised its discretion to create a navigational channel, "it was obligated to use due care to make certain that [the MRGO] was kept in good working order, . . . to discover [deficiencies] and to

repair [them] or give warning that it was [unsafe]." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

Monica and Norman Robinson cross-appeal the district court's denial of relief based on its ruling that the Corps was not negligent *in 1966* for failing to build a surge barrier across the funnel's mouth at the confluence of Reach 1 and Reach 2 that would have prevented the flooding of New Orleans East. Plaintiffs do not challenge that decision. Plaintiffs do request, however, that this Court reverse because the undisputed evidence and findings demonstrate that (1) independent of its original design decision, the Corps was negligent for failing to investigate and install a surge barrier *after construction*, and (2) the Corps' gross negligence in failing to maintain safely the MRGO (as determined by the district court) was a substantial factor in the overtopping of the Citrus Back Levee and the destruction of the Robinson home. Both these arguments were advanced below but not addressed by the district court. The Robinsons' case should be remanded for further proceedings.

Lucille and Anthony Franz cross-appeal the district court's decision to limit their damages to the lost contents on the second floor of their flooded home in the Lower Ninth Ward. The trial court was clearly erroneous in ruling that only the floodwaters from the breached levees along the IHNC were the cause-in-fact of the

home's destruction. First, undisputed evidence shows that the IHNC floodwaters could not have caused catastrophic damage because they quickly merged with a deluge from Reach 2, creating an indistinguishable 11 feet of floodwaters that stagnated for weeks and caused the permanent, irreparable damage to the house. Second, the irreparably damaged foundation was indisputably struck on the east side by a heavy object propelled by floodwaters that could emanate only from Reach 2, thereby eliminating IHNC floodwaters to the west as the conveyer of the heavy object. The Franz' case should be remanded for a determination of damages for their destroyed home.

STANDARD OF REVIEW

The question whether this suit is barred by the Flood Control Act of 1928 and the FTCA's discretionary function exception is subject to *de novo* review in this Court. *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840, 841 (5th Cir. 2005); *St. Tammany Parish ex rel. Davis v. Federal Emergency Management Agency*¸ 556 F.3d 307, 315 (5th Cir. 2009). Fact findings are reviewed for clear error. *Lehmann v. GE Global Insurance Holding Corporation,* 524 F.3d 621, 624 (5th Cir. 2008).

"Reversal for clear error is warranted only if the court has a definite and firm conviction that a mistake has been committed." *Kleinman v. City of San Marcos*,

597 F.3d 323, 326 (5th Cir. 2010) (citation omitted). Under the Federal Rules, a "reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). "When reviewing a district court's factual findings, this court may not second-guess the district court's resolution of conflicting testimony or its choice of which experts to believe." *Grilletta v. Lexington Ins. Co.*, 558 F.3d 359, 365 (5th Cir. 2009) (citation omitted).

ARGUMENT

I. The Flood Control Act Does Not Bar This Suit.

Defendant seeks to avoid liability by asserting that this lawsuit is barred by a phrase in the Flood Control Act of 1928 that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place...." 33 U.S.C. §702c. The district court rejected this argument four times. *See* 647 F.Supp.2d at 699; 577 F.Supp.2d at 825-26; 471 F.Supp.2d at 690-97; USCA5 3580-86 (Order and Reasons Denying Defendant United States' Motion to Certify for Interlocutory Appeal). As the trial court repeatedly found, the government's defense that the immunity covers any flood waters regardless of the cause of their release "'ignores the fact that the immunity is grounded in the Flood Control Act of 1928.'" 577 F.Supp.2d at 821 (quoting 533 F.Supp.2d at

634). After the bench trial, the court was "even more convinced of the validity of its decision in this regard." 647 F.Supp.2d at 699.

Relying upon *Graci* and *Central Green Co. v. United States*, 531 U.S. 425 (2001), the trial court held that the MRGO was a navigation project and not a flood control project; that Plaintiffs were alleging that the Corps was negligent with regard to the MRGO's operation and maintenance and not the LPV levees' design or construction, and that liability was therefore being imposed for conduct "extrinsic" and unrelated to the LPV. 647 F.Supp.2d at 648-49, 699. The government argues that the "sweeping" statutory language ("damage from or by floods or flood waters") embraces any floodwaters that a flood control project was unable to contain, and the LPV levees failed to contain the Katrina floodwaters that inundated Plaintiffs' homes. Appellant's Br., 22-26. According to the government, the district court "misunderstood" this Court's decision in *Graci* and the Supreme Court's decision in *Central Green* because the United States is immune regardless of whether an independent act of government negligence "extrinsic" to the LPV or flood control work was the cause of the levee's failure to control the floodwaters. Appellant's Br., 26-31. The district court's rejection of §702c immunity should be affirmed.

At bottom, the issue here is whether §702c immunizes the United States from liability for its negligence in operating and maintaining a navigation channel in a dangerous condition that caused storm surge to inundate adjacent neighborhoods. A proper reading of *Graci* and *Central Green* as well as *United States v. James*, 478 U.S. 597 (1986) dictates that the answer is "no." Section 702c was enacted to enable the government to undertake flood control projects without fear of liability *for its work on those projects.* But §702c was not intended to immunize the government from liability for its negligent conduct that was undertaken for purposes unrelated to flood control. The government's negligent conduct here – the MRGO's operation and maintenance – was unrelated to flood control.

A. This Court Expressly Held In *Graci* that Section 702c Immunity Applies Only If The Army Corps' Negligent Conduct Was Undertaken as Part of a Flood Control Project

The government's theory rests on an expansive reading of §702c to mean that immunity attaches whenever damage is caused by floodwater that a flood control project failed to control. However, that simplistic position rests upon an incomplete articulation of the relevant test for immunity under §702c. The fact that the water causing the damage must be "floodwaters" is only the beginning of the analysis. As this Court expressly held in *Graci* and the district court here ruled,

immunity *also* requires that the *negligent conduct* have been undertaken as part of a flood control project. 456 F.2d at 26-27; 577 F.Supp.2d at 824-25. Even beyond this Court's controlling decision in *Graci*, that conclusion follows from the subsequent Supreme Court decisions in *James* and *Central Green* which were anticipated by *Graci*. The government's contrary reading of these three decisions is simply misplaced.

The government argues that *Graci* is inapposite because the floodwaters in *Graci* were unconnected to a flood control project. Appellant's Br., 28-29. That is clearly not the case. *Graci* did not turn on whether the *floodwaters* were connected to a flood control project. To the contrary, it turned on whether *the government's negligent act* causing the damage was connected to a flood control project. *See* note 6, *infra*.

In *Graci*, flooded homeowners sued the United States under the FTCA for Hurricane Betsy-related property damage resulting from the government's negligent construction of the MRGO. 456 F.2d at 22. The damage—then and now—was unrelated to flood control projects because the damage-inflicting MRGO was solely a navigation aid project with no flood control features or purpose. *See* 456 F.2d at 22; *Graci v. United States*, 301 F.Supp. 947, 948-949 (E.D. La. 1969) ("The government admits the [MRGO] is a 'navigation aid' and

not a flood control project . . . ."); 577 F.Supp.2d at 825; 471 F.Supp.2d at 695; Statement of Facts, VII, *supra*. Thus, this Court conclusively decided nearly 40 years ago that §702c was never intended to grant the government blanket immunity for tort claims arising from its negligent design, construction, operation, and maintenance of the MRGO. 456 F.2d at 21-23.

Based on the Flood Control Act's history and purpose, this Court stated:

> The question then becomes whether it is reasonable to suppose that in exchange for its entry into flood control projects the United States demanded complete immunity from liability for the *negligent and wrongful acts of its employees unconnected with flood control projects*. Judge Heebe answered that it would not be reasonable so to conclude. Our analysis … leads us to agree.

Id. at 26 (partial emphasis added, citation omitted); *see also id.* at 25 ("the purpose of § 3 was to place a limit on the amount of money that Congress would spend in connection with flood control programs."); *accord Seaboard Coast Line Railroad Co. v. United States*, 473 F.2d 714 (5th Cir. 1973) (no §702c immunity for flooding of plaintiff's property caused by construction of defective drainage canal at federal aircraft maintenance center). The negligence alleged as to the MRGO "was 'wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to such authorization.'" 456 F.2d at 26 (quoting *Peterson v. United States*, 367 F.2d 271, 275 (9th Cir. 1966)). In language directly applicable to the *Robinson* case, this Court specifically held that

"when, as here, the plaintiffs allege that they have suffered floodwater damage as a result of the *negligence of the United States unconnected with any flood control project*, § 3 of the [FCA] does not bar an action against the United States under the Federal Tort Claims Act." *Id*. at 27 (emphasis added); *see also Kennedy v. Texas Utilities*, 179 F.3d 258, 263 (5th Cir. 1999) ("In *Boudreau* [*v. United States*, 53 F.3d 81 (5th Cir. 1995)], the alleged negligent conduct of the government, and the accident itself, occurred on flood control waters. The electrical cable that injured Kennedy had no association with flood control, and *the federal government's alleged malfeasance or nonfeasance bore no relation to flood control.*") (emphasis added).

In short, *Graci* held three times that §702c immunity applies only where *the government's negligent act was taken as part of a flood control project.*[2] The United States never forthrightly addresses this explicit holding of *Graci*. Instead, the government either ignores it or suggests that it was implicitly overruled by the decision in *Central Green*. Appellant's Br., 26-29. Neither stratagem provides a basis for this Court to contravene its prior holding in *Graci*.

[2] Counsel for the United States conceded at oral argument on its motion for summary judgment below that "there is not a single reported case where the negligence for which the United States was found immune pursuant to §702c occurred *outside* of the flood control project itself." 577 F.Supp.2d at 825 (footnote omitted; emphasis added).

Graci has stood the test of time as a respected precedent.[3] *See IBP, Inc. v. Alvarez,* 546 U.S. 21, 32 (2005) (Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for decades.) More specifically, a prior Fifth Circuit decision can be disregarded only if "such overruling is *unequivocally directed* by controlling Supreme Court precedent." *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001) (emphasis added, citation omitted); *see also Illusions-Dallas Private Club, Inc. v. Steen,* 482 F.3d 299, 315 (5th Cir. 2007) ("[O]ne panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the court en banc or the Supreme Court." (quotation omitted). Neither *James* nor *Central Green* constitutes such a precedent.

B. The Supreme Court Decisions in *James* and *Central Green* Support *Graci's* Interpretation of §702c

United States v. James, 478 U.S. 597 (1986), applied §702c immunity in a fact context consistent with *Graci*'s statutory interpretation. In *James,* the

[3] The *Graci* opinion has been favorably cited numerous times, including by the Supreme Court in *James* (as discussed below) and this Circuit. *See, e.g., Mocklin v. Orleans Levee Dist.*, 877 F.2d 427, 430 n.6 (5th Cir. 1989); *James v. United States*, 760 F.2d 590, 595, 599 n.16, 601 n.21, 602 (5th Cir. 1985) (en banc), *reversed on other grounds*, 478 U.S. 597 (1986); *Florida East Coast Ry. Co. v. United States*, 519 F.2d 1184, 1191 n. 6, n, 7 (5th Cir. 1975). No court has ever criticized *Graci* as an erroneous application of §702c or inconsistent with *James* or *Central Green.*

government's allegedly negligent conduct—the release of floodwaters that injured recreational users of flood control reservoirs—was undertaken in connection with a flood control project. 478 U.S. at 598. Contrary to the government's assertion that *James* gave the statute a "sweeping" interpretation embracing all floodwaters regardless of the cause of their release (Appellant's Br., 22), *James* applied immunity on the ground that the allegedly negligent *conduct* in question—the failure to convey warnings—was "part of the 'management' of a flood control project." 478 U.S. at 610; *see also id.* at 605 ("flood control projects"); 605 n. 7 ("federal flood control facilities"); 608 ("liability associated with flood control"). Not only did *James* cite *Graci* with approval (*id*. at 601 n.2), it also quoted a Fourth Circuit opinion holding that immunity depended on whether the plaintiff's damages resulted from the nature of the government's allegedly negligent *conduct* – operation of the dam as a recreational facility or as a flood control project (*id*. at 605 n. 7, quoting *Hayes v. United States*, 585 F.2d 701, 702-03 (4th Cir. 1978)). The Supreme Court quoted the Congressional Record as revealing a legislative intent to insure against liability for undertaking flood control projects. 478 U.S. at 607 ("If we go down there and furnish protection to these people…. I … do not want to [cause lawsuits]") (quoting 69 Cong. Rec. 6641 (1928)). Accordingly,

James was fully consistent with, and reinforced, the Fifth Circuit's opinion in *Graci*.

James included a sentence that "the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." *Id*. at 605. Lower courts subsequently construed this to mean that as long as the government's negligent act was undertaken as part of a flood control project, or was not wholly unrelated to flood control, §702c immunity applied even if the damage was caused by waters that could not be deemed "floodwaters." *Central Green, supra,* 531 U.S. at 430-31. *Central Green* clarified this "admittedly confusing dicta." *Id.* at 430. The Supreme Court corrected the confusion as to whether, once it is established that the negligent conduct was part of a flood control project, immunity attaches to all injury from that conduct or only to injury caused by floodwater. The Court concluded that immunity was limited only to the latter situation.

In *Central Green*, the plaintiff sued the United States alleging that its negligent design, construction, and maintenance of the Madera Canal caused subsurface water flows that damaged the plaintiff's orchards. 531 U.S. at 427. Noting that flood control along with irrigation was one of the purposes of the

project that included the canal, the lower courts held that the government necessarily was immune for all water that escaped from the canal, regardless of whether the water that had caused the damage was "floodwater" or irrigation water. *Id*. at 427-28. The Supreme Court reversed, narrowing the lower court's construction of the immunity.

The "narrow question presented" in *Central Green* was whether §702c encompasses "all the water that flows through a federal facility" operated for flood control purposes. *Id*. at 427. Analyzing the *James* dicta (as quoted above) that created confusion among the lower courts (*id*. at 430), the Court observed that the text of §702c does not say that immunity extends to all damage from a flood control project, but rather only to "damage from or by floods or flood waters." *Id*. at 434. Thus, as the district court held, *Central Green* "*narrowed* the immunity granted by §702c." Doc. 6194, Order and Reasons, dated July 2, 2007 at 4 (emphasis added)); *see also* 577 F.Supp.2d at 824; *accord Sanko Steamship Co., Ltd. v. United States*¸272 F.3d 1231, 1232 (9th Cir. 2001) (*Central Green* "established a more restrictive test for determining sovereign immunity.").[4]

[4] Justice Stevens, who dissented in *James*, authored the unanimous opinion in *Central Green.* Stevens was a long time critic of this "harsh immunity doctrine" that he viewed as "an anachronism" and "an obsolete . . . engine of injustice." *Hiersche v. United States*, 503 U.S. 923, 926 (1992) (Stevens, J., respecting the denial of certiorari).

Central Green did not overrule *Graci*'s express holding, which remains binding authority in this Circuit. *Graci* holds that §702c does not apply if the negligent conduct was not part of a flood control project. *Central Green* finds that, even if that requirement is met, §702c applies only if the damage resulting from that negligent conduct was caused by floodwater. Read in tandem, *Central Green* and *Graci* establish that §702c has two requirements, both of which must be satisfied for immunity to exist: (1) the negligent conduct that caused the harm must have been undertaken as part of a flood control project and not some other government activity; *and* (2) the damage resulting from that conduct must have been caused by floodwater. 577 F.Supp.2d at 824; *see also Henderson v. United States*, 965 F.2d 1488, 1492 (8th Cir. 1992) ("We do not believe that section 702c bars Henderson's cause of action in this case because the dam activity here was related to generating electricity and not to flood control."). Thus, in *Graci*, immunity did not apply because the negligent conduct was not part of a flood control project but instead a navigation project, even though the damage was caused by floodwater. In *Central Green*, even though the negligent conduct was part of a flood control project, immunity did not apply to the extent that it could be established that damage was not caused by floodwater.

Applying the *Central Green*/*Graci* test to the facts, the district court properly concluded on the undisputed evidence that "[s]imply because the waters involved crossed a flood control project should not eliminate the remedies which Congress has fashioned for a navigational aid project that allegedly 'went wrong.'" 577 F.Supp.2d at 826; *see also McClaskey v. United States*, 386 F.2d 807, 808 n. 1 (9th Cir. 1967) ("It does not follow that the mere happening of a flood insulates the Government from all damage claims flowing from it."). "Clearly, there are circumstances where the United States may be held liable for damage resulting from flood water caused by its acts of omission or commission." 577 F.Supp.2d at 824-25.[5] The bottom line is that "[e]ven in environments made more dangerous by flood control activity, the United States is liable under the FTCA for negligent *acts* unrelated to efforts to control floods or to maintain flood control waters." *Cantrell*

[5] Well reasoned cases cited by *Graci*, *James*, and the district court here support this sensible limitation on the reach of §702c immunity. *See e.g., Boyd. v. United States,* 881 F.2d 895, 900 (10th Cir. 1989) ("We believe Congress' concern was to shield the government from liability associated with flood control operations, *see James*, 478 U.S. at 608, not liability associated with operating a recreational facility."); *Morici Corp. v. United States*, 681 F.2d 645, 646 (9th Cir. 1982) (immunity statute "applies only when the flood damage is caused by a project related to flood control, and does not apply when the flood damage is 'wholly unrelated to any act of Congress authorizing expenditure of federal funds for flood control.'") (quoting *Aetna Insurance Co.* v. *United States*, 628 F.2d 1201, 1203 (1980) (further cit. om.)); *Hayes v. United States*, 585 F.2d 701, 702-03 (4th Cir. 1978) (no §702c liability if damage to plaintiff's farm was caused by a dam's operation as a recreational facility "without relation to the operation of the dam as a flood control project"); *Peterson*, 367 F.2d at 272 (United States Air Force engineers' decision to dynamite an ice-jam causing a sudden discharge of water that damaged plaintiff's property not immunized under §702c); *Valley Cattle Co. v. United States*, 258 F.Supp. 12 (D. Hawaii 1966) (United States could be held liable for flooding of property downstream from negligently maintained drainage ditches on United States Air Force facility).

v. United States, 89 F.3d 268, 274 (6th Cir. 1996) (emphasis in original) (fisherman injured in a crash in a boat driven by an Army Corps driver to a marina after his boat malfunctioned on a lake used as a flood control reservoir but alleged negligent conduct was not related to management of a flood control project).[6]

C. The Government's Addition of Flood Control Elements Did Not Retroactively Immunize Its Negligent Non-Flood-Control-Related Conduct

The government errs in contending that the Plaintiffs implicitly are challenging the government's conduct in constructing the LPV flood control system. Appellant's Br., 30-31. This has never been Plaintiffs' argument. First, as repeatedly explained by the trial judge, *all parties* conceded in the district court that the LPV levees' design and performance were not at issue. 647 F.Supp.2d at 656 ("all parties maintain [the Reach 2 Levee was] built to grade"); 672 n.27 ("the United States represented to the Court that on no account would they argue that the levees did not perform to design specifications."); 692 (citing "Corps' consistent

[6] The government strives to distinguish *Graci* on the ground that its "unconnected with flood control projects" language refers to the fact there were no LPV levees at the time of the Betsy flooding and "the MR-GO was a navigation channel that, at the time, had no connection to any federal flood control project." Appellant's Br., 27. This is a distinction without a difference. The existence of levees is irrelevant to *Graci's* holding. Immunity from liability must be withheld "for the negligent and wrongful acts of [government] employees *unconnected with flood control projects.*" 456 F.2d at 26 (emphasis in original). Thus, like *Peterson* and *Valley Cattle Co.* discussed in *Graci*, the MRGO's operation "was wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization." *Id.* (citation omitted).

pre-trial position that the levees were built to design and performed as designed"); Statement of Facts, VII, *supra.* After making this concession, the government cannot base its appeal on the contrary premise that this case is about the LPV.

Second, whether or not the LPV levees were constructed, Plaintiffs would still contend that the Corps' negligent operation and maintenance of the MRGO caused the destruction of their neighborhoods. The government is liable to plaintiffs on the basis of the Corps' negligence in the MRGO's maintenance and operation—regardless of whether the Corps was negligent a *second* time in its design and construction of the LPV, regardless of whether that second negligence was *also* a proximate cause of the Katrina flooding, and regardless of whether the United States is immune from any liability for that *second* negligence. Section 437 of the Restatement (Second) of Torts provides:

> If the actor's negligent conduct is a substantial factor in bringing about harm to another, the fact that after the risk has been created by his negligence the actor has exercised reasonable care to prevent it from taking effect in harm does not prevent him from being liable for the harm.

Applying that principle here, because the Corps' negligent conduct in operating and maintaining the MRGO was a substantial factor in the destruction of Plaintiffs' neighborhoods, the question of whether, after that risk was created by the Corps' negligence, it exercised reasonable care in adding floodwalls to prevent the risk

from taking effect does not prevent the United States from being held liable for the harm that actually occurred.

II. The FTCA's Discretionary Function Exception Is Not Applicable Here

The discretionary function exception to FTCA liability (28 U.S.C. § 2680 (a)) immunizes federal employees' conduct only if both of two conditions are satisfied. *See Ashford*, 511 F.3d at 505. Based on substantial and largely undisputed evidence, the district court ruled that neither prong of the two-prong test was established. 647 F.Supp.2d at 703-32. The Corps' grossly negligent conduct was not protected because (1) the Corps violated mandatory legal duties, and (2) independently, the Corps' conduct in perpetrating engineering malpractice for forty plus years, in the face of a known catastrophic threat to safety, was not a protected policy choice or the kind of decision that Congress intended to shield from liability. *Id.*

A. The First Prong Is Not Satisfied Because the Corps Violated Mandatory Legal Duties

The Corps did not have the legal right to create a mass catastrophe by ignoring the authorized project dimensions and violating environmental laws. The discretionary function exception does not protect the government unless the conduct was a "matter of choice for the acting employee." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). "The exception covers only acts that are

discretionary in nature, acts that 'involve an element of judgment or choice.'" *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz*, 486 U.S. at 536). "The requirement of judgment or choice is not satisfied," and the discretionary function exception does not apply, "if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536). As this Court has recently explained:

> Just because the discretionary function exception would generally shield the government from FTCA liability otherwise arising from [a] policy decision, it does not follow that the government is automatically shielded from such liability when the acts of the particular agents seeking to implement that policy violate another federal law, regulation, or express policy. Actions taken to carry out a discretionary policy must be taken with sufficient caution to ensure that, at a minimum, *some other federal law is not violated in the process*.

Spotts v. United States, 613 F.3d 559, 568 (5th Cir. 2010) (int. quot. om.) (emphasis added).

The "some other federal law" violated here by the Corps is the National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4370f ("NEPA"). The Corps had no discretion because it was not legally permitted to make decisions about the MRGO without first complying with NEPA's mandatory requirements. As

discussed below, the Corps flagrantly violated these legal obligations for decades, thereby depriving it of the exception's sanctuary because it had no rightful option but to adhere and thus no discretionary function to protect. *See Berkovitz*, 486 U.S. at 536. Moreover, not every decision, even if it has some policy implications, is the kind of decision "of the nature and quality that Congress intended to shield from tort liability." *Varig Airlines*, 467 U.S. at 813.

The United States sets up a straw man by arguing that "NEPA did not require foreshore protection." Appellant's Br., p. 39. The district court did not find, and Plaintiffs do not argue, that NEPA requires foreshore protection. The court found that the Corps repeatedly over decades' time violated NEPA in three fundamental ways as proven by the agency's own internal documents and employees' testimony. 647 F.Supp.2d at 717-31; *see also* 627 F.Supp.2d 656 (court's decision on the discretionary function exception). The Corps knew that it was inflicting massive environmental destruction destined to cause catastrophic damage but nonetheless failed decade after decade to report this looming disaster or recommend remedial measures to Congress as required by federal law, and *this* failure was determined by the trial judge to be a cause of the Plaintiffs' harm. 647 F.Supp.2d at 730-31. The district court further found that the Corps was without authority to maintain the channel at triple its Congressionally-authorized

dimensions and that south bank protection authorized and approved in the 1960s was inexcusably not built until the mid-1980s. 647 F.Supp.2d at 656, 665-66, 702.

The government does not justify how these amply substantiated findings could be reversed but instead hopes that they will be ignored. As discussed below, the government is wrong as a matter of law by proposing that NEPA violations are inherently disqualified from discretionary function exception relevance. No authority supports the government's theory that NEPA is categorically excluded from the Supreme Court's list of federal statutes, regulations and policies, either because NEPA is "procedural" or because it fails to grant an independent, private right of action. The government's only other argument is to deny that the Corps' decades of violating environmental laws was a cause of Plaintiffs' harm, but the government can point to no evidence, and there is none, to contradict the district court's finding of fact on this issue.

1. The Government's Arguments About Armoring the Banks Are Contrary to the Findings of Fact and Substantial Evidence

The facts here foreclose the discretionary function exception. "[T]he Government needs to establish there was 'room for choice' in making the allegedly negligent decision." *Ashford,* 511 F.3d at 505 (fn. om.). A decision that violates the law is not discretionary. *Gaubert,* 499 U.S. at 322*; see also, Ashford,* 511 F.3d

at 505 (step one of the test was not satisfied where prison policy constrained prison officials' discretion under the facts pled).

The government would evade the fact findings by distorting them, and to this end the Appellant's Brief argues that armoring allegedly was omitted from the MRGO's design, that "[t]he district court expressly held that these design features were 'shielded by the discretionary function exception,'" and that this allegedly express ruling "cannot be reconciled with the court's theory of liability." Appellant's Br., pp. 35-36 (quoting 647 F.Supp.2d at 702). There is nothing to reconcile; the government manufactures a purported conflict by confining its analysis to the 1950s when the MRGO was being planned. The government invokes 1950s documents (*see* Appellant's Br., p. 35), ignoring the district court's finding that District Engineer reports in the 1960s stated that "[r]iprap foreshore protection against *erosion by wave wash from shipping* ***will be provided***,"[7] and that armoring of the south bank was approved and authorized in the 1960s but inexcusably not completed until 1986.[8] The government's representation to this

[7] 647 F.Supp.2d at 656 (emphasis in original) (quoting a Report of District Engineer).

[8] 647 F.Supp.2d at 656 ("the original MRGO authorization by Congress contemplated armoring the south bank" and such action was officially authorized and approved in 1967); 658 (funding for "the foreshore protection which had been a part of the relevant GDM since 1968" was requested for fiscal year budget 1985); 662 ("the Corps had acknowledged that south shore foreshore protection was to be charged against the MRGO as early as 1967 and again recognized in 1968"); 665-66 ("Even though it was determined unequivocally in 1968 that the funding for the South Bank would be under the MRGO rubric, until 1982 nothing was done and it was not

Court that "armoring was deliberately omitted from MR-GO's design" (Appellant's Br., p. 35) is therefore a misleading, incomplete statement. The district court clearly chronicled the Corps' wrongful conduct a*fter* the 1950s, including its failure to armor the banks over four decades when the Corps knew that the widening channel and disappearing wetlands were creating a serious risk of catastrophic flooding that should be ameliorated. *See* Statement of Facts III & IV, *supra*.

The government argues that the Corps did not contravene any mandate. *See* Appellant's Br., pp. 36-38. The district court, however, considered and rejected the government's attempts to prove that the MRGO was operated and maintained in a manner authorized by Congress. 647 F.Supp.2d at 702. Rejecting the government's argument that the "plaintiffs failed to present any evidence that the Corps deviated in any way from the statute authorizing the construction of the MRGO," (*id.)* the district court explained that the government's position "clearly misses the mark and misinterprets the claims brought against it" because:

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completed until 1986."); 698 (describing "the Corps' lassitude in building the foreshore protection that was needed and was authorized in the initial legislation"); 699 ("by 1967, as noted, the Chief of Engineers in Washington, D.C., apparently aware of the need, ultimately decided that all of the cost of foreshore protection, not only on the south bank of the MRGO but also on the north bank of the GIWW, should be charged to the MRGO project"); 708 ("Clearly by 1968, the Corps even recognized that the cost of that protection was properly charged to the MRGO from which the Court can infer that it recognized that such protection was needed, and still the Corps did nothing to protect the berms and south shore of the channel until 1982."). The government offers no reasons why these findings are incorrect, much less clearly erroneous.

> The channel was to be 36 feet deep and 500 feet wide, increasing at the Gulf of Mexico to 38 feet deep and 600 feet wide…. *Nothing was presented at trial that convinced this Court that with this mandate, the Corps was also given the latitude to allow the channel to multiply in width and negatively impact the Reach 2 Levee in the manner in which it did*. This grant did not and could not have given the Corps the ability to ignore the unbridled growth of the channel. Foreshore protection and actions to relieve the effects of the increased salinity on the surrounding marshes, which were the causes of that growth, were recognized as probable from its inception. By 1967, the Corps recognized the need for that foreshore protection at least for the south shore of the MRGO and simply did not act on the knowledge.

Id. (emphasis added); *see also id.* at 664 (quoting 1996 report that describes the increase in width from 650 to 1,500 feet on average and the erosion beyond the existing channel right-of-way); 671 (it was "overwhelmingly demonstrated at trial" that as of Katrina harm was caused by the "width of the channel increasing by more than 3 times its authorized width"); 697 (channel grew to "two to three times its design width"); 699 (describing the "exponential growth of the channel far beyond that which was approved by Congress").

2. The Corps Violated Specific, Mandatory Provisions of NEPA

In addition to disregarding the 650 foot width in Congress' project authorization, the Corps destroyed tens of thousands of acres of wetlands without filing the statements mandated by environmental laws before it could dredge hundreds of millions of cubic yards of spoil material and operate the MRGO in an

unsafe manner. *See* 647 F.Supp.2d at 668 ("By 1973, 47,000 acres of wetlands had been destroyed by the MRGO and an additional 73 square miles of wetlands were lost from 1973 to the time of Katrina."); *see also* Statement of Facts, III, *supra*. The DFE's first prong is not satisfied because "failure to comply with NEPA meant that the agency had no discretion—it could not proceed until it complied with NEPA." *Adams v. United States*, 2006 WL 3314571, * 2 (D. Idaho Nov. 14, 2006); s*ee also Adams v. United States,* 622 F.Supp.2d 996, 1001 (D. Idaho 2009) (referencing earlier decision and stating that because the FEIS omitted language evaluating the impact of a herbicide, the BLM cannot rely on the FEIS to create the "'discretion' it needs for the exception."). The Supreme Court in *Berkovitz* analogously explained that the exception's protection would be forfeited as a result of a failure to follow pre-conditions for vaccine licensing:

> The statute and regulations [regarding vaccine manufacture]… require, as a precondition to licensing, that the DBS [Division of Biologic Standards] receive certain test data from the manufacturer relating to the product's compliance with regulatory standards…. *The DBS has no discretion to issue a license without first receiving the required test data; to do so would violate a specific statutory and regulatory directive.* Accordingly, to the extent that petitioners' licensing claim is based on a decision of the DBS to issue a license without having received the required test data, the discretionary function exception imposes no bar.

486 U.S. at 542-43 (citations omitted) (emphasis added). Here it was proven that the Corps pervasively did not follow the reporting requirements that were a

mandatory federal pre-condition to the Corps' continued dredging and operations. *See* Statement of Facts V.A, *supra.*

The government seemingly labors under the misconception that NEPA compliance is optional or discretionary. Defendant's statement that NEPA "does not dictate a particular course of conduct" (*see* Appellant's Br., p. 42), is wrong: NEPA's reporting requirements are mandatory. *See* 42 U.S.C. § 4332(2); 40 C.F.R. §§ 1500-1518; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("The *statutory requirement* that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's '*action-forcing'* purpose in two important respects.") (emphasis added; citations omitted); *O'Reilly v. United States Army Corps of Eng.*, 477 F.3d 225, 228 (5th Cir. 2007) ("NEPA's central requirement is that federal agencies *must*, except in certain qualifying situations, *complete a detailed environmental impact statement ('EIS')* for any major federal action significantly affecting the quality of the human environment.") (citing 42 U.S.C. § 4332(2)) (emphasis added).

The Supreme Court has characterized "the strong precatory language of § 101 of the Act and the requirement that agencies prepare detailed impact statements" as "inevitably bring[ing] pressure to bear[.]" *Robertson*, 490 U.S. at

349. The government's attempt to dismiss NEPA as "procedural" overlooks the Supreme Court's emphasis that NEPA's *mandatory* procedures are "action-forcing," that "broad dissemination of relevant environmental information" is required, and that "uninformed" actions are indeed prohibited. *Id.* at 349-51. Thus, this Circuit has consistently held that NEPA "imposes procedural *requirements* on federal agencies, *requiring* agencies to analyze the environmental impacts of their proposals and actions." *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 224 (5th Cir. 2006); *see also O'Reilly*, 477 F.3d at 228.

The trial judge correctly determined that "the NEPA mandates are clear and unambiguous" and rejected the government's argument that Plaintiffs were relying on general guidelines. 647 F.Supp.2d at 718.[9] As the district court found, and as conspicuously ignored in Appellant's Brief, 40 C.F.R. §§ 1500-1518 prescribed a specific course of action for the Corps such that it had no choice but to issue environmental impact statements with respect to the cumulative impacts of its annual dredging and operations that were significantly affecting the environment

[9] The Government's reliance on *Freeman v. United States*, 556 F.3d 326 (5th Cir. 2009) (cited Appellant's Br., p. 39) is misplaced. The *Freeman* plaintiffs cited "generalized, precatory, or aspirational language" in federal emergency response plans. 556 F.3d at 338. *Contrast also Spotts v. United States*, 613 F.3d 559, 569-71 (5th Cir. 2010) (cited at Appellant's Br., pp. 32, 44) (the *Spotts* plaintiffs (1) tried unsuccessfully to invoke the Eighth Amendment in the context of the exception for the first time on appeal; (2) did "not state which provisions of the [Safe Drinking Water] Act, or regulations promulgated under the Act, were violated"; and, (3) cited superseded prison standards that either were not mandatory or were not violated).

and enhancing the risk of disastrous flooding. 647 F.Supp.2d at 725-30; 627 F.Supp.2d at 681-82.

It is cavalier of the government to tout the putative right of administrators "'to act according to one's judgment of the best course,'" (Appellant's Br., p. 32 (quoting *Dalehite v. United States*, 346 U.S. 15, 34 (1953)), and to describe the Corps' engineering malpractice as "the means that it found most appropriate" (Appellant's Br., p. 38). Rather than attempting the "best" and "most appropriate" judgment, the Corps *failed to consider* the danger to the local residents whom it was charged to protect: "there was *no* balancing or weighing of countervailing considerations." 647 F.Supp.2d at 732 (emphasis added); *see also* PX91 (Kemp Report) at 185-95; PX92 (Kemp Appendix B) (Chief of Engineers never made a policy-based decision or analysis about how to address the MRGO's worsening defects and did not communicate to Congress.). "For *over forty years*, the Corps was aware that the [Reach 2] levee protecting Chalmette and the Lower Ninth Ward was going to be compromised by the continued deterioration of the MRGO[.]" 647 F.Supp.2d at 732 (emphasis added). The Corps not only failed, but its "*utter failure* to *ever* properly examine the effects of the growth of the channel on the safety of the human environment violates NEPA." *Id*. at 730 (emphasis added). Nothing resembling "best" judgment on how to abide by NEPA

was exercised; rather, the Corps' recalcitrance spanned decades of willful disobedience of environmental laws in disregard for the resulting catastrophic destruction. *See* 647 F.Supp.2d at 717-31; 627 F.Supp.2d at 681-98.

Before trial, the trial judge found that, "[a] review of the evidence presented leads this Court to believe that the Corps was obdurate and *intentionally* violated its NEPA mandate." 627 F.Supp.2d at 687 (emphasis added). The Corps' own documents revealed dangers that it unjustifiably omitted from mandatory reporting:

> Squarely stated, *where there is evidence that the Corps itself knew, recognized and even internally reported that there had been or would be significant impact on the wetlands adjacent to Lake Borgne and the MRGO*, the Court must find that the Corps failed to follow a mandate or a prescribed course of action rendering the discretionary function inapplicable to those actions.

627 F.Supp.2d at 681-82 (emphasis added). The court nonetheless gave the Corps the chance to "adduce evidence to the contrary" at trial. *Id*. at 687.

The trial exposed the government's resounding inability to rehabilitate the Corps' environmental compliance record. The bench trial culminated in the opinion that:

> Plaintiffs have presented substantial, clear and convincing evidence… that the Corps itself internally recognized that the MRGO was causing significant changes in the environment -- that is, the disappearance of the adjacent wetlands to the MRGO and the effects thereof on the human environment -- which triggered reporting requirements. *The Corps cannot ignore the dictates of NEPA and then claim the*

> *protection of the discretionary exception based on its own apparent self-deception.*

647 Supp. 2d at 725 (emphasis added).

3. The Corps Had No Discretion to Ignore NEPA

As outlined above at Statement of Facts V. A., the district court made extensive findings describing three independent ways in which the Corps violated NEPA. The government asserts that the district court's analysis is "flawed" (Appellant's Br., p. 42), but fails to address the evidence relied on by the court, the court's credibility determinations based on the witness testimony at trial, most of the sources of environmental law applied in the judge's opinion, and the court's application of the law to the facts in deciding that NEPA was clearly violated in these three ways. The government argues instead that "the NEPA process itself entails the exercise of significant agency discretion," citing a footnote in *Spiller v. White,* 352 F.3d 235, 244 n.5 (5th Cir. 2003) (Appellant's Br., p. 42). Rather than supporting the proposition that the Corps' NEPA compliance was somehow not for the trial judge to adjudicate, *Spiller* adds: "That is not to say that any such judgment calls must be rubber-stamped by a reviewing court; they are still subject to the arbitrary and capricious standard of review." 352 F.3d at 244 n.5.[10] This is

[10] *See also Marsh v. United States,* 490 U.S. 360, 378 (1989) (cited at Appellant's Br., p. 42) (explaining that courts ensure that agency decisions are founded on a reasoned evaluation of the

the standard of review correctly applied by the trial judge here, and the government does not remotely show how the decision was incorrect. *See* 647 F.Supp.2d at 725.

The government ignores *O'Reilly*, a leading Fifth Circuit case relied on by the district court. *O'Reilly* found that the Corps acted arbitrarily in the issuance of a finding of no impact statement where the Corps failed to explain the basis for its bare assertion that mitigation would ameliorate the impacts of major dredging activities. *See* 647 F.Supp.2d at 721-22 (discussing *O'Reilly*, 477 F.3d at 235). Thus, the Corps did not have the power to dismiss cavalierly the EPA's and the Louisiana agencies' concerns in the 1976 FEIS by omitting disclosure of major impacts, a failing reminiscent of the adage, "Close your eyes and you become invisible." 647 F.Supp.2d at 727.

The omissions in the 1985 supplemental information report also violated *O'Reilly*'s interpretation of NEPA's mandate. 647 F.Supp.2d at 728. A regulatory mandate conspicuously and repeatedly violated by the Corps is that "'*[an] agency bears a continuing obligation to up-date its environmental evaluation in response to substantial changes to the proposed action or significant new circumstances.*"

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relevant factors); *Vieux Carre Property Owners, Residents and Assoc., Inc. v. Pierce*, 719 F.2d 1272, 1279-80 (5th Cir. 1983) (cited at Appellant's Br., p. 43) (describing, in contrast to the Corps' conduct here, the City's "extensive consideration," consideration of "the possible environmental ramifications," and its execution of "all reasonable methods of limiting and mitigating any adverse environmental effects").

647 F.Supp.2d at 723 (citing 40 C.F.R. § 1502.9(c)(1) (1992) (emphasis added; citations omitted). Accordingly, a Supplemental Environmental Impact Statement (SEIS) "shall" be prepared if there are "substantial changes in the proposed action that are relevant to environmental concerns" or if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). Statements in the Corps' own documents describing exposure to "direct hurricane attacks from Lake Borgne" demonstrated "a positive finding by the Corps that removes its 'discretion' and mandates the filing of a SEIS." 627 F.Supp.2d at 687.

The Corps also violated the cumulative impact and improper segmentation rules outlined in 40 C.F.R. § 1508.7. 647 F.Supp.2d at 721-22 (citing *O'Reilly*, 477 F.3d at 234-35, 236 n.10). The Corps failed to satisfy its mandatory obligation to address "the cumulative impact of the operation of the MRGO, the dredging required by virtue of the failure to provide foreshore protection in a timely fashion." 647 F.Supp.2d at 722. Indeed, its own NEPA compliance official also reached this conclusion in 2005. *See* PX208 at 1-2 (admitting significant changed circumstances since 1976, segmentation of reporting, and need for an SEIS to report the MRGO's significant and cumulative impacts).

In sum, the district court scrupulously applied the controlling law to the largely undisputed trial evidence in deciding that the Corps acted arbitrarily and capriciously—indeed, intentionally violated NEPA—in several different respects over three decades.

4. Because NEPA Is a "Federal, Statute, Regulation, or Policy," the Corps Could Not Violate NEPA with Impunity

The government fails to identify error in the trial court's application of NEPA to the facts, proclaiming instead that "if the district court were correct that the Corps' environmental analyses were not entirely adequate," then "at most" the Corps erred in exercising discretion. Appellant's Br., p. 43. To discuss the Corps' environmental compliance as "not entirely adequate" is an understatement akin to saying that the Titanic's maiden voyage experienced customer service challenges. It is obvious—and not denied on appeal—that the Corps did not take environmental laws seriously. Thus, the Appellant's Brief sets up a straw man, ignores the district court's findings of decades of violations of federal mandates, and suggests that as a matter of law violations of NEPA are somehow irrelevant to the discretionary function exception. *No authority* supports the supposition that NEPA is a dead letter in the context of the FTCA such that the Corps may violate environmental laws with impunity while destroying tens of thousands of acres of wetlands and ultimately entire urban neighborhoods. *See Adams*, 2006 WL

3314571 at *1-2 (Bureau of Land Management's failure to comply with NEPA before using a herbicide defeated the first prong).

The FTCA's statutory language, as interpreted by the Supreme Court, squarely undercuts the government's attempts to carve NEPA violations out of the discretionary function exception's calculus. *Gaubert* states that "[i]f the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." 499 U.S. at 324. The first prong of the discretionary function exception as defined by the Supreme Court looks to whether any "'federal statute, regulation, or policy'" provides a mandate. *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536). The Appellant's Brief expects that this Court will carve NEPA violations out of the Supreme Court's recitals of the source of federal mandates, yet no authority supports this idiosyncratic interpretation of the Supreme Court's clear language. To the contrary, the Supreme Court has repeatedly rejected the government's attempts to impose categorical limits extraneous to the statutory "language of the exception." *See Berkovitz*, 486 U.S. at 538; *see also id.* at 539 & n.5 (Court noted it had repeatedly rejected a variant on the government's position attempting to categorically limit its FTCA liability to core governmental functions). The government cites no authority to justify the conclusion that the words "federal

statute, regulation, or policy" somehow mean "federal statutes, regulations, or policies *but not* NEPA."

The government's promoted extension of *Noe v. Metro. Atlanta Rapid Transit Auth.*, 644 F.2d 434 (5th Cir. 1981), is equally groundless. The government reasons that because *Noe* found that NEPA did not create a private right of action, the district court's reliance on decades of the Corps' patent NEPA violations was allegedly "rejected three decades ago in *Noe*." Appellant's Br., at 44. This argument is a red herring because Plaintiffs are using NEPA "not to recover any remedy but to argue that [the Corps] was under a mandatory duty." *Adams*, 2006 WL 3314571, *2; *see also* 647 F.Supp.2d at 718. Plaintiffs are not arguing that NEPA creates a private right of action because here *the FTCA does*. Congress enacted *the FTCA* to provide rights of action.

The government fails to cite a single decision in which violations of a federal statute are ignored for FTCA purposes merely because that statute does not create a private right of action separate and in addition to the FTCA. Again, such a restriction of the discretionary function exception runs counter to the unequivocal language of both *Gaubert* and *Berkovitz*, which recognized not just statutes and regulations but also federal *policies* as a potential source of federal mandate. *Gaubert*, 499 U.S. at 322 ("'federal statute, regulation, or policy'") (quoting

Berkovitz, 486 U.S. at 536). The Supreme Court could not possibly have meant only policies that (somehow) create an independent private right of action, nor has the Court found in its discretionary function decisions that a separate, extra-FTCA right of action was required. *Accord Berkovitz*, 486 U.S. at 533 (not discussing whether the "violated federal law and policy regarding the inspection and approval of polio vaccines" alleged created a private right of action). Instead, Plaintiffs invoke NEPA as "the some other law" violated by the Corps and not as a basis for damages. *Spotts*, 613 F.3d at 568.

Looking beyond the inherent illogic of the government's over-extension of *Noe*, the government overlooks that the decision below preserves the very purpose of NEPA that underlies *Noe*'s reasoning. The *Noe* plaintiff's only excuse for being in federal court was the defendants' alleged violation of an environmental impact statement's projected noise levels. The *Noe* decision describes NEPA's "statutory purpose of providing decision-makers with the best available information," (644 F.2d at 439) – a salutary objective that the Corps deliberately subverted by failing to report the grave threats identified in the Corps' own documents. Thus, to the extent the *Noe* decision speaks to upholding the purpose of NEPA, it counsels against the government's bold contention that the Corps may commit numerous

willful violations of NEPA's mandatory disclosures with impunity under the FTCA regardless of the consequences.

In association with its attempt to misapply *Noe*, the government complains that NEPA determinations are subject to judicial review under the Administrative Procedures Act ("APA") (Appellant's Br., p. 44). The fact that action may be reviewable under the APA, however, does not foreclose the possibility that tort liability may also lie under the FTCA. *See FDIC v. Irwin*, 916 F.2d 1051, 1054-55 n.4 (5th Cir. 1990) (tort damages are not incompatible with judicial review under APA); *Payton v. United States*, 679 F.2d 475, 481 (5th Cir. 1982) (discretionary function exception not available if parole board did not follow the required steps of its decision-making process even though it has discretion whether to grant or deny parole).

5. The Issue Is Not Whether the Corps Exercised Some Engineering Discretion But Whether It Violated NEPA and Congress' Authorization

The government's observation that NEPA is triggered when a proposed action involves the exercise of substantial discretion (Appellant's Br., at 41) misses its mark. Neither the trial court nor the Plaintiffs denied that discretion is the NEPA trigger. Rather, the issue here is whether, once NEPA's requirements *are* triggered, did the Corps comply with those requirements, or did the Corps' refusal

to comply cause the destruction of entire neighborhoods in a major metropolitan area.

The Corps' invocation of *United States Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004) on this point is puzzling. *Public Citizen* stands for the proposition that where a federal actor has no control over a decision (there whether to allow Mexican trucks into the country), the actor need not report on the environmental effects of a decision not made by him in the first instance. *See id.* at 768. *Public Citizen* would be relevant here only if the Corps had somehow been forced into decades of engineering malpractice without ever making its own engineering decisions—an argument the government cannot possibly advance. In the district court, the Corps claimed that the Chief Engineer exercised discretion. *See, e.g.*, 647 F.Supp.2d at 662 (the Corps used the Chief's "discretionary authority" to make plan changes); PX184 at p. 183:12-20 (Corps' 30(b)(6) witness stating the district engineer and his team had discretion in composing the environmental impact statements). Rather than admitting that it was intentionally not complying with NEPA, the Corps feigned compliance by issuing dozens of ostensibly complying documents from 1974 through 2004 that were utterly inadequate. *See* PXs. 187, 190, 194, 735, 937, 1951, 1976, Jt. Exs. 148-73; 647 F.Supp.2d at 724-30.

The government is perhaps conflating "discretion" to make engineering decisions (which the Corps claimed to possess) with "discretion" to violate NEPA (which the Corps could not possibly possess). Even if the Corps had discretion to make some engineering decisions, this does not mean that all decisions were made without violating a federal mandate.[11] Any attempt by the government to now rely on *Public Citizen* and a variant of "Congress made the Corps do it" is absolutely foreclosed by the trial court's findings of facts. The Corps tried to argue at trial that lack of funding was an obstacle, but the district court rejected that argument after analyzing the evidence, including the witnesses' credibility.[12] Similarly, the Corps endeavored to argue at trial that the expansion of the channel to triple its Congressionally authorized width was somehow consistent with the Corps'

[11] *See, e.g., Bolt v. United States*, 509 F.3d 1028, 1032-33 (9th Cir. 2007) (the court rejected the argument that policy ranking, whereby a decision had been made to prioritize snow removal operations, alleviated the Army from the obligation to meet its yearly deadline; at most, the sequential ranking gave the Army the discretion to change the dates, but not the discretion to change the mandatory time frame); *Navarette v. United States*, 500 F.3d 914, 917-18 (9th Cir. 2007) (concluding that Army's obligation to "properly mark[ ] or fence[ ]" dangerous conditions was mandatory and explaining that it "retained discretion as to *how* to mark or fence drop-offs, but that does not mean it retained discretion *whether* to do so"); *accord Soldano v. United States*, 453 F.3d 1140, 1150 (9th Cir. 2006) (holding that flexibility in Park Service's standards for establishing speed limits did not mean that "the Standards' basic, scientific safety specifications may be disregarded").

[12] 647 F.Supp.2d at 662 (Corps' argument that any measure to take foreshore protection required approval of Congress was inconsistent with the testimony of its witness, Podany); 663 ("when the Corps finally deemed something an emergency, Congress came through"); 665 ("once Congress was made aware of the problem by the Corps, Congress instructed the Corps to fix it"); 709 ("[O]nce an 'emergency' was recognized, the Corps found funding…."); 709 (analyzing testimony).

discretionary dredging policies, but the district court found by contrast that the Corps did not have the authority to maintain the channel in its unsafe and perilously expanded state.[13]

In sum, the Corps transmogrified a 650-foot-wide channel into a catastrophe triple the size authorized by Congress while failing to undertake south bank foreshore protection when authorized *and* while failing to comply with NEPA. *See* 647 F.Supp.2d at 656, 665-66, 702, 717-31. The government offers no persuasive reason for this Court to conclude otherwise. These findings are not clearly erroneous because they are based on substantial evidence and the trial court's determination of lack of credibility of the Corps' witnesses. On this record, the Corps clearly violated the law.

6. The District Court's Findings of Fact on Causal Connection

NEPA "provide[s] for broad dissemination of relevant environmental information" for public comment to help educate governmental bodies about "the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *Robertson*, 490 U.S. at 350. NEPA was also

[13] 647 F.Supp.2d at 702; *see also id.* at 671 (it was "overwhelmingly demonstrated at trial" that as of Katrina harm was caused by the "width of the channel increasing by more than 3 times its authorized width"), 699 (describing the "exponential growth of the channel far beyond that which was approved by Congress"); *see also* USCA5 22266-67 & n.30 (Plaintiffs' response explaining why the evidence of the Corps' dredging policies introduced at trial did not justify the channel expansion).

intended "to provide Congress (and others receiving such recommendation or proposal) with a sound basis for evaluating the environmental aspects of the particular project or program." *Envtl. Def. Fund, Inc. v. Corps of Eng'r of U.S. Army*, 492 F.2d 1123, 1140 (5th Cir. 1974). A fundamental premise for NEPA's strict requirement of full and timely disclosure is the demonstrated fact that knowledge about a federal project's potential adverse environmental impacts, alternatives, and feasible mitigation measures can and does precipitate Congressional action and funding for remediation. Not surprisingly, if a full-fledged environmental impact statement is required, this requirement "has been the kiss of death to many a federal project[.]" *Sabine River Auth. v. United States Dep't of Interior*, 951 F.2d 669, 677 (5th Cir. 1992).

The district court found a "causal connection between the Corps' failures to file the proper NEPA reports and the harm which plaintiffs' incurred." 647 F.Supp.2d at 730. Without any support, the Appellant's Brief characterizes this finding as "conjectural" (Appellant's Br., at 46). Through such a limited challenge, the government appears to concede that the only way it can succeed on the defense would be if it did not bear the burden of proof—a dubious proposition at best. *See Ashford v. United States*, 511 F.3d 501, 505 (5th Cir. 2007) ("*[T]he Government needs to establish there* was 'room for choice' in making the allegedly

negligent decision.") (fn. om.) (emphasis added). In any event, the government offered no evidence to rebut a causal connection, but the Plaintiffs made such a cause-and-effect showing.

This Court need not resolve the burden of proof issue here because the Plaintiffs proved their point and the district court's finding is not clear error. [14] Factual findings supported by recorded history are anything but conjecture. *See* Statement of Facts, V. B, *supra.* The trial court identified instances in the MRGO's history in which Congress *did act* when it learned of an exigency. 647 F.Supp.2d at 663 ("when the Corps finally deemed something an emergency, Congress came through"), 665 ("once Congress was made aware of the problem by the Corps, Congress instructed the Corps to fix it"), *see also id.* at 709 ("[O]nce an 'emergency' was recognized, the Corps found funding within the extent operating budget to install foreshore protection on the north shore…. [T]he Corps was able to fund foreshore protection through the maintenance and operation budget when the exigencies were sufficient"). The government's argument that "the court did not suggest that Congress was *unaware* …" (Appellant's Br., at 46 (emphasis in original)), ignores that the trial court specifically rejected the defense argument

[14] The district court acknowledged a split of authorities but decided that Plaintiffs prevail regardless of which party shoulders the burden. 647 F.Supp.2d at 701.

that some politicians had limited knowledge. 647 F.Supp.2d at 717 ("such general knowledge does not alleviate the Corps' professional duty and obligation to give a specific and detailed accounting of the potential for catastrophe that could occur by virtue of the continual deterioration caused by the MRGO.").

In short, an informed Congress acted promptly to fund remediation. Tragically, however, Congress was largely kept in the dark, and none of the proven feasible mitigation measures—that could have averted the catastrophe—were undertaken. *See* Statement of Facts, III, IV & V, *supra.* On this record, it is impossible to conclude that a proper "NEPA analysis would make no difference…." *Adams,* at *2. "Had the Corps adequately reported under NEPA standards, their activities and the effect on the human environment would have had a full airing." 647 F.Supp.2d at 731.

The First Circuit's decision in *Montijo-Reyes v. United States,* 436 F.3d 19 (1st Cir. 2006) (cited at Appellant's Br., at 42), fails to rescue the government from these facts. In *Montijo-Reyes,* the plaintiffs did not even "attempt to make [a] showing" that the Corps' conduct "was not at least susceptible to policy related judgments." *Id.* at 25 n.7. The *Montijo-Reyes* plaintiffs failed to allege any causal connection between the water quality permit provisions and the damage to their homes, but for causation, or forbidden negligent conduct causing damages. *Id.* at

25, 26. Here, by contrast, causation was proven in a bench trial and the district court's findings are substantiated by the record.

B. The Second Prong Is Not Satisfied Here Because the Corps' Violation of Professional Engineering Standards And Ignoring Safety Concerns Are Not Policy Choices Protected By the Discretionary Function Exception.

Under the second prong, "even 'assuming the challenged conduct involves an element of judgment,'" and does not violate a nondiscretionary duty, the Court must still decide whether the "'judgment is of the kind that the discretionary function exception was designed to shield.'" *Gaubert*, 499 U.S. at 322-23 (quoting *Berkovitz*, 486 U.S. at 536); *see also United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984); *Ashford*, 511 F.3d at 505 (5th Cir. 2007). "Because the purpose of the exception is to 'prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort,' when properly construed, the exception 'protects only governmental actions and decisions based on considerations of public policy.'" *Gaubert*, 499 U.S. at 323 (quoting *Berkovitz*, 486 U.S. at 537; *Varig Airlines*, 467 U.S. at 814 (citations omitted)); *see also Commerce & Indus. Corp. v. Grinnell Corp.*, 280 F.3d 566, 575 (5th Cir. 2002) ("As the *Berkovitz* Court explained, the discretionary function exception applies only when a court determines that … the actor's conduct was

grounded in social, economic or public policy."). Thus, the district court correctly concluded that it "cannot accept on the record before it that all actions done by the Corps were based on policy determinations." 471 F.Supp.2d at 699.

The "broad and just purpose" of the FTCA is "to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws." *Indian Towing Co*., 350 U.S. at 68-69 (1955). The district court found that if a private person had negligently committed the same devastation, the Department of Justice would unquestionably seek remuneration. 647 F.Supp.2d at 711. "Certainly, a negligent, on-going engineering decision to let a navigational channel's contours run amuck so that it becomes a substantial cause in the destruction of another huge, expensive Congressional undertaking … cannot be the kind of decision 'of the nature and quality that Congress intended to shield from tort liability.'" *Id.* at 710-11 (quoting *Varig Airlines,* 467 U.S. at 813). The district court noted the critical role that the FTCA plays in holding federal agencies accountable. The broad shield sought by the Corps from its admitted gross negligence would mean that "there is no oversight at all available to the taxpaying citizens of this area as well as the nation to insure that the Corps does its job. Congress cannot have meant the shield to be

so great." 647 F.Supp.2d at 711; *see also Denham v. United States*, 834 F.2d 518, 520 (5th Cir. 1987) (government's position on the discretionary function exception would "vitiate the FTCA"); *Smith v. United States*, 375 F.2d 243, 246 (5th Cir 1967) (rejecting government's expansive view of discretionary function exception).

After weighing the facts, the district court agreed with plaintiffs that "[i]gnoring safety and poor engineering are not policy, and clearly the Corps engaged in such activities." 647 F.Supp.2d at 705. *See* Statement of Facts, II, *supra*. "[M]atters of scientific and professional judgment—particularly judgments concerning safety—are rarely considered to be susceptible to social, economic, or political policy." *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005).[15] "Engineering judgment" is not a matter of policy or an "exercise[] of policy judgment." *Cope v. Scott*, 45 F.3d 445, 452 (D.C. Cir. 1995); *see also*

[15] *See also, e.g., Indian Towing*, 350 U.S. at 69 (failure to maintain lighthouse in good condition subjected the government to suit under the FTCA); *Denham*, 834 F.2d at 521 (5th Cir. 1987) ("The Corps here was performing an operational function, and it did not have the discretion to do so negligently.") (citing *Seaboard Coast Line*, 473 F.2d at 716); *Navarette v. United States*, 500 F.3d 914, 919 (9th Cir. 2007) (holding that United States was not immune because decision to warn involved "safety considerations under an established policy rather than the balancing of competing public policy considerations" (quot. om.)); *Soldano v. United States*, 453 F.3d 1140, 1150-51 (9th Cir. 2006) (decision whereby speed limit for road was negligently set was circumscribed by objective safety criteria and not the result of a protected policy decision); *Marlys Bear Medicine v. United States*, 241 F.3d 1208, 1215 (9th Cir.2001) ("The Government cannot claim that both the decision to take safety measures and the negligent implementation of those measures are protected policy decisions."); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018 (9th Cir. 1989) (technical considerations of canal construction were not based on policy and therefore not subject to the discretionary function exception).

Alabama Electric Cooperative, Inc. v. United States, 769 F.2d 1523 (11th Cir. 1985) (the discretionary function exception did not shield the Corps from liability caused by engineering errors). The district court made voluminous findings chronicling decades of unsafe engineering practices that were not grounded in public policy concerns. 647 F.Supp.2d at 653-76, 705-12, 714-17. Instead, "the Corps' defalcations with respect to the maintenance and operation of the MRGO were in direct contravention of professional engineering and safety standards…." *Id.* at 705; *see also* Statement of Facts, II, *supra*.

By their very nature, matters of how to maintain an existing government project are not protected by the exception because they generally do not involve policy-weighing decisions or actions. For example, in *Indian Towing*, 350 U.S. at 69-70, the Supreme Court held that the Coast Guard could be sued under the FTCA for failing to maintain a light house. In *Sheridan Transportation Co. v. United States*, this Court held that the government was liable where the Coast Guard had placed a buoy to mark a submerged obstruction, the government had published a chart showing the buoy's location, and the Coast Guard then moved the buoy without providing any notice to mariners. 897 F.2d 795, 798 (5th Cir. 1990). Similarly, in *Seaboard Coast Line*, this Court affirmed the government's FTCA liability for damages caused by a drainage ditch, reasoning that, "[o]nce the

government decided to build a drainage ditch, it was no longer exercising a discretionary policy-making function and it was required to perform the operational function of building the drainage ditch in a non-negligent manner." 473 F.2d at 716.[16] Thus, "[o]nce the government makes a discretionary decision, the discretionary function exception does not apply to subsequent decisions in carrying out that policy, 'even though discretionary decisions are constantly made as to how those actions are carried out.'" *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1484 (5th Cir. 1989) (quoting *Wysinger v. United States*, 784 F.2d 1252, 1253 (5th Cir. 1986)).[17]

"[I]f the [Government's] policy leaves no room for an official to exercise policy judgment in performing a given act, *or if the act simply does not involve the*

[16] *See also, e.g.*, *Denham*, 834 F.2d at 520-21 (finding liability where plaintiff "was injured because the Corps chose to ring the swimming site with concrete blocks and then failed to ensure that they did not drift into an area where they would endanger swimmers."); *Collins v. United States*, 783 F.2d 1225, 1230 (5th Cir. 1986) (finding no immunity for acts of negligence in annulling an imminent danger order applicable to a gassy mine because the decision was "only remotely related, if related at all, to social, economic, or political policy."); *Bolt v. United States*, 509 F.3d 1028, 1034 (9th Cir. 2007) (snow removal from a parking lot is "maintenance work," which is "'not the kind of regulatory activity' to which the Supreme Court envisioned the discretionary function exception applying") (quoting *ARA Leisure Servs. v. United States*, 831 F.2d 193, 195 (9th Cir. 1987)); *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002) (holding that Bureau of Indian Affairs' failure to repair an irrigation system "involve[d] a mundane question of routine ditch maintenance" and was "not the sort of public policy issue that the discretionary function exception is designed to protect"); *Whisnant*, 400 F.3d at 1181-83 (claims against a naval commissary for failing to eradicate a mold problem in its meat department not protected by discretionary function exception).

[17] This restriction on the discretionary function exception has been consistently applied in this Circuit. *See, e.g.*, *Denham*, 834 F.2d at 520; *Butler v. United States*, 726 F.2d 1057, 1962 (5th Cir. 1984); *Payton*, 679 F.2d at 480.

exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful." *Berkovitz*, 486 U.S. at 546-47 (emphasis added). "Viewed from 50,000 feet, virtually any action can be characterized as discretionary. But the discretionary function exception requires that an inquiring court focus on the specific conduct at issue." *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009) (citing *Berkovitz*, 486 U.S. at 546-47; *Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474, 1484 (5th Cir. 1989)); *see also Lively v. United States*, 870 F.2d 296, 299 (5th Cir. 1989) (because the exception cannot swallow the rule, the court examines the nature and quality of the activity).

Instead of focusing on the conduct at issue, the government here changes the subject. First, it argues that certain Flood Control Acts connote policy (Appellant's Br., 47-48). The MRGO, however, was a navigation rather than flood control project. *See* 577 F.Supp.2d at 822, 825 (district court rejected government's argument that MRGO and LPV are "inextricably intertwined"); *accord* 647 F.Supp.2d at 656.

Next, citing the district court's findings on "Height *Reduction*," the government relies on the purported facts that "the Corps chose to ensure the effectiveness of the levees by repeatedly raising their height," that the MRGO maintenance "rais[ed] the levees," and that the Corps was "maximiz[ing] its

limited resources … to continue operating the MR-GO as a shipping channel as Congress charged it to do." (Appellant's Br., 51 (citing 647 F.Supp.2d at 672-73)). Not only is this argument wrong for three reasons, but it also contravenes the district court's factual findings without attempting to demonstrate that the court clearly erred in making them.

First, the negligent acts and ensuing catastrophe did not result from the Corps' decisions on how to allocate limited resources. There is no evidence that the Corps failed to implement feasible remedial measures because of budgetary constraints or that it ever performed a cost-benefit analysis. "Here, there was no balancing or weighing of countervailing considerations." 647 F.Supp.2d at 732. A tragic *failure to act without deciding how to handle a known threat to public safety* is not protected under the discretionary function exception.[18] The government can almost always claim that a budget issue was involved, but this fact alone does not prove that resources were truly limited or that the decision was one of exempted

[18] *See Francis v. United States*, 2009 WL 236691, *9 (D. Utah 2009) ("no decision was ever actually made about how to handle this threat to public safety…. [T]his was a simple and tragic failure to act, which does not fall under the discretionary function exception to the FTCA. Even if a decision had been made (*i.e*., to do nothing), such a decision is simply not susceptible to a policy analysis, and thus fails the second prong of the *Berkovitz* test."); *contrast St. Tammany Parish ex rel. Davis v. Fed. Emergency Mgmt. Agency*, 556 F.3d at 325 (FEMA engineers made an affirmative decision on a disaster relief issue that was subject to policy analysis regarding disaster relief eligibility, distribution of limited funds, and funding of eligible projects).

policy or that in fact a decision was ever made based on limited resources.[19] Indeed, *the Corps had excess funding* and had the time and the ability to obtain additional funding and, in fact, obtained some funding.[20]

It is undisputed that when the Corps in 1991 specifically asked Congress for funds for limited foreshore protection along four miles of the North Bank, the money was appropriated. 647 F.Supp.2d at 663. This is one material fact distinguishing the emergency response cases in which federal officials' management of relief operations, evacuations, and limited resources within the exigencies of an emergency were sheltered from suit. *Spotts*, 613 F.3d at 572

[19] *See Bolt*, 509 F.3d at 1033-34 (rejecting the argument that "the Army considers its limited financial resources in making snow removal decisions."); *O'Toole*, 295 F.3d at 1037 ("Every slip and fall, every failure to warn, every inspection and maintenance decision can be couched in terms of policy choices based on allocation of limited resources.... Were we to view inadequate funding alone as sufficient to garner the protection of the discretionary function exception, we would read the rule too narrowly and the exception too broadly."); *Whisnant*, 400 F.3d at 1184 ("we decline to permit the government to use the mere presence of budgetary concerns to shield allegedly negligent conduct from suit under the FTCA"); *Kennewick Irrigation Dist.*, 880 F.2d at 1031 (citing *ARA Leisure* and *Varig Airlines* in rejecting the government's budget argument); *Downs v. United States Army Corps of Engineers*, No. 07-11827, 333 Fed.Appx. 403, 409 (11th Cir. 2009) ("Because budgetary constraints are almost always important to government decisions, however, not every choice that implicates such constraints is a policy judgment shielded from liability through the operation of the discretionary function exception.").

[20] 647 F.Supp.2d at 663 ("Never was any direct funding approach taken even when the Corps knew it had triggered catastrophic erosion caused by the very channel it had created."), 709 ("[I]t became clear through testimony that the Corps was able to fund foreshore protection through the maintenance and operation budget"); USCA5 19726:12-19 (U.S. witness Naomi admitting to millions of unspent carryover funds which could have been spent on the project the following year); USCA5 19851:20 – 19853:18 (U.S. witness Luisa describing (as asked about by the trial court) how money is provided immediately in imminent peril situations); USCA5 19870:1-4 & 22-24 (Louisa states there is a process for acquiring funds for exigent circumstances and that Congress relied on Corps for guidance); USCA5 19874:4-7 & 12-19 (Corps failed to inform Congress about the problem with the MRGO).

(citing *Freeman v. United States*, 556 F.3d 326, 340 (5th Cir. 2009)). This Court emphasized in particular that these cases addressed the "'mobiliz[ation of] federal resources in the aftermath of a national disaster.'" *Spotts*, 613 F.3d at 572 (quoting *Freeman*, 556 F.3d at 341).[21] In this case, by contrast, the Corps spent *decades* wasting resources on failed engineering and ignoring chronic safety issues—and *created a national disaster*.

The second problem with the government's version of the facts is that the Corps did *not* raise levee height *but rather caused 15.5 feet of settlement* by a veritable Greek tragedy of cyclical engineering blunders: "Lateral displacement along the MRGO is not unlike the myth of Sisyphus and his rock." 647 F.Supp.2d at 674. Because it was proven that the levee heights were reduced rather than raised, the government is debating inapposite conduct.

The third, independent error in the factual premise upon which the government launches its legal arguments is that the Corps was *not* "operating the…

[21] In contrast to the case at bar, the *Freeman* plaintiffs failed to develop a factual record to support their arguments under the second prong of the *Berkovitz* test. *See* 556 F.3d at 340-41 ("Although Plaintiffs contend that complying with the NRP was not policy-related, they formulate no legal argument or factual development to support their conclusion."); c*ontrast also Davis v. United States*, 597 F.3d 646, 650 (5th Cir. 2009) (explaining that Navy had discretion in conducting emergency rescue operations and quoting *Freeman's* reasoning that the allocation of resources *within the exigencies of an emergency* constitutes a protected policy decision), *cert. denied*, 130 S. Ct. 1906 (2010). *Davis* reasons that in the emergency "rescuers *had to* allocate their time and resources." *Id.* at 650-51 (emphasis added). In this case, however, the facts proved, and the district court found, that the Corps had ample time to act, and it could have and should have acted differently.

shipping channel as Congress charged it to do" (Appellant's Br., 51). Rather, the harm here arises from the fact that the Corps *exceeded* Congressionally-authorized design parameters by allowing the MRGO to expand to an average of three times its Congressionally authorized design width. *See* 647 F.Supp.2d at 671, 673.

As meticulously detailed in the trial court's findings, this tragedy was caused by "the negligence of the Corps… [which] was not policy, but insouciance, myopia and shortsightedness." 647 F.Supp.2d at 732. "It was as if the Corps built a factory; it knew after a period of time it would produce deadly emissions; but instead of checking the emissions and correcting its ill-effects before people died of its fumes, the Corps stood by noticing the horrible nature of the air and the soot-ridden nature of that factory and did nothing." *Id.* at 708.

No policy purpose is served by perpetuating unsafe conditions that have become obvious. "Plaintiffs have proven that the Corps knew the dangers that the MRGO was creating by virtue of its own engineering mistakes," 647 F.Supp.2d at 706, and the government on appeal fails to justify how this district court finding could be considered clear error. Imposing tort liability under circumstances in which the Corps knows of the danger does not lead to judicial second-guessing of a policy decision. *See Bolt*, 509 F.3d at 1034-35 ("Bolt presented evidence that several other residents had slipped…rendering inapplicable any public policy

consideration to which the Army might now point. In these circumstances '[i]mposing tort liability will not lead to judicial second-guessing of [the Army's] policy decisions.'") (quoting *ARA Leisure,* 831 F.2d at 196); *see also Oberson v. United States Dept. of Agric. Forest Serv.*, 514 F.3d 989, 998 (9th Cir. 2008); *Jones v. United States*, 691 F.Supp.2d 639, 643 (E.D. N.C. 2010).

The government invokes *Dalehite,* ignoring the Court's later decision in *Indian Towing* that a project once undertaken could not be negligently maintained:

> [T]he Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light ..., it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.

350 U.S. at 69. Reconciling *Dalehite* and *Indian Towing,* the decision in *Payton v. United States* explained that once the decision to undertake a project is made, the government is not free to negligently perform its operational functions. 679 F.2d 475, 479, 480 (5th Cir. 1982); *see also, Berkovitz,* 486 U.S. at 538 n. 3 (citing *Indian Towing* for the proposition that failure to maintain the lighthouse in good condition was not a "permissible exercise of policy judgment"); *Gaubert,* 499 U.S. at 326 (same); *Seaboard Coast Line,* 473 F.2d at 716. *Dalehite* also is factually distinguishable in that the challenged decisions had been "all responsibly made"

and the acts were performed according to specific plans and regulations. *Dalehite*, 346 U.S. at 42.[22]

This case presents an extraordinary set of facts such that allowing the government to mischaracterize the Corps' unyielding commitment to obviously failed engineering as "policy" is akin to rewriting the FTCA. "In the event the Corps' monumental negligence here would somehow be regarded as 'policy' then the exception would be an amorphous incomprehensible defense without any discernable contours." 647 F.Supp.2d at 717. After cataloguing forty years of policy-free inaction—where the "Corps had an opportunity to take a myriad of actions to alleviate this deterioration or rehabilitate this deterioration and failed to do so"—the trial court explained that if the defense succeeded here, the FTCA would be limited to car crashes and medical malpractice:

> In the event the gross negligence of the Corps in maintaining the MRGO would be regarded as policy, then the discretionary function exception would swallow the Federal Torts Claim Act leaving it an emasculated statute applying to automobile accidents where government employees are involved or medical malpractice where a government physician is involved. This was clearly not the intent of Congress. Safety concerns are not a talisman in deciding whether to

[22] Contrary to the Government's argument (*see* Appellant's Br., 49), *Gaubert*'s discussion of *Dalehite* is inapposite. *Gaubert* cites *Dalehite* as an example in which "a regulation mandates particular conduct, and the employee obeys the direction." *Gaubert*, 499 U.S. at 324 (citing *Dalehite*, 346 U.S. at 36). In *Dalehite*, the fertilizer "had been manufactured, packaged, and prepared for export pursuant to detailed regulations as part of a comprehensive federal program…." *Gaubert*, 499 U.S. at 323 (citing *Dalehite*, 346 U.S. at 19-21).

> apply the discretionary function exception, but certainly are a very significant consideration

647 F.Supp.2d at 732.[23]

Finally, the government argues (Appellant's Br., 53) that "the executive branch's decisions about how and when to communicate with Congress" fall under the rubric of policy. This argument is untenable for two reasons. First, this argument is merely a restatement of the repudiated notion that the Corps had the discretion to violate NEPA and its Congressional reporting requirements. Second, this contention ignores the Corps' violations of its own standards. "Corps' officials admitted at trial that the Corps had a duty to report to Congress the fact that the MRGO was a threat to human life." 647 F.Supp.2d at 706; *id.* at 707 (citing trial testimony at USCA5 15821, 15826). Counsel for the United States also admitted that there was *no policy reason* for letting the MRGO "get wider and threaten people" and that if the Corps decided there was a threat to human life, it would have informed Congress. 627 F.Supp.2d at 690 n.17. Thus, the Corps

[23] Contrary to the government's argument (Appellant's Br., 48), the district court did not decide that the exception was inapplicable in every case involving public safety. As quoted, the court specifically acknowledged that safety was not a talisman. *See also* 647 F.Supp.2d at 705 ("While the Corps maintains that all of its decisions were policy driven, when those decisions concern safety and engineering judgments, this exception is not an absolute shield.").

admittedly violated its own code of conduct in failing to communicate with Congress.[24]

In sum, no legitimate government policy was potentially advanced by the Corps' entrenched, pointless commitment to substandard engineering that jeopardized public safety and directly contributed to this cataclysm, and the government cites to no policy decision that is consistent with the trial record and the factual findings. Unable to link any *apposite* policy to the *proven* facts, the government relies on generalized arguments about flood control projects (which the MRGO was not), a purported decision to maintain the MRGO by raising levees (which in truth were lowered), and the prospect of limited resources (which was not proven and is contrary to the evidence). The policy rationales promoted by the government *post hoc* are inconsistent with the trial court findings and evidence. Therefore, the only way for the government to secure a reversal on the second prong is for this Court to hold that several decades' perpetuation of patently unsafe and scientifically unsound engineering is protected federal policy.

[24] *Contrast National Union Fire Ins. v. United States*, 115 F.3d 1415, 1421-22 (9th Cir. 1997) ("People at the planning level" had made an affirmative judgment to combine a smaller repair into a bigger improvement, "[n]o individual violated any specific regulation or policy," and the applicable statute "expressly gave the Corps discretion.").

III. Undisputed Facts And Governing Law Demonstrate That The Corps' Negligent Conduct Was A Substantial Factor In The Catastrophic Flooding Of New Orleans East Independent Of The Failure To Build A Surge Barrier To Combat The Funnel Effect

The district court ruled against Norman and Monica Robinson on the issue of negligence:

> [T]he Court finds that under the circumstances a duty did not exist to construct a surge protection barrier. Thus, there could be no breach of that duty and no liability on the part of the Corps for the flooding in the New Orleans East Polder….
>
> To the degree that plaintiffs' claims rest on the proposition that a "funnel" caused an increase in volume of surge and velocity, that funnel was inherent in the original design.

647 F.Supp.2d at 697. The court also stated that there were substantial causation issues but did not resolve them because the court's finding of no negligence mooted the point. *Id.*

Contrary to the district court's above-quoted conclusion, the Robinsons' case did not depend upon either a finding of negligent failure to construct a surge protection barrier or a challenge to the original design. To be sure, Plaintiffs' experts criticized the Corps on this basis, *but* Plaintiffs also proved their case independent of the surge reduction barrier/original design issue. Plaintiffs established the Corps' affirmative acts of negligence that were not a part of—and in fact deviated from—the MRGO's original design. The district court's finding of

no negligence overlooks evidence that is undisputed in the record. As to the negligent acts that caused Plaintiffs' damages—the widening of the Reach 1 and 2 channels beyond their authorized dimensions and the destruction of tens of thousands of acres of protective wetlands contrary to environmental laws and regulations—the district court ruled that the Corps breached duties owed to the Robinsons. 647 F.Supp.2d at 733.

A. The District Court Erred in Believing that the Plaintiffs' Proof Depended on the Failure to Construct a Surge Protection Barrier

As noted, the district court found that the Robinsons did not prevail because the Corps did not breach a duty when it failed to construct a surge protection barrier prior to Katrina. The Robinsons' proof, however, was not limited to the Corps' omissions. As outlined at length in the Statement of Facts, VI, B, *supra*, the Robinsons introduced undisputed evidence that the Corps' affirmative acts of negligence standing alone caused substantial flooding of the inhabited parts of New Orleans East *independent of* the criticism that the Corps should have constructed a surge reduction barrier to correct the funnel effect of the original design. USCA5 17531:8-25, 17596:9-15, 17597:5-20, 17597:25 – 17598:9, 17603:2-7, 17604:12-22. This question was specifically put to Plaintiffs' expert, Dr. Kemp, who answered "That's correct" to the question "So we're very, very clear here, while the funnel existed, and the Corps should have known it, in your

opinion, when they built the MRGO, the *primary driving factor* from a standpoint of driving the velocity and volume of the surge under the Paris Road bridge in Reach 1 *was the enlargement of the MRGO* over the decades in width and depth, and even then the enlargement of the Reach 1 a little bit in depth and reach?" USCA5 17597:5-12 (emphasis added).

The district court overlooked the import of Dr. Kemp's testimony, but did not reject his opinion *in toto*, nor did the district court reject his qualifications. In fact, the decision cites Dr. Kemp's testimony that the greatest cause of the added number of hours of surge was the widening of the channel itself and that the expanded MRGO and degraded wetlands caused the Robinsons to receive an additional six feet of water.[25]

As discussed in the Statement of Facts, VI, C, *supra*, Plaintiffs' expert testimony as to the cause of the flooding in New Orleans East was unchallenged by any defense expert report. USCA5 16810:8 – 16811:2; *see also* USCA5 18760:19-24. The government conceded that "the MRGO did raise the surge elevation within Reach 1 and thereby did contribute substantially to the overtopping of the

[25] 647 F.Supp.2d at 677 (citing Trial Transcript, Kemp at 1751 (*see* USCA5 17503)); *see also* 647 F.Supp.2d at 696 (citing Dr. Kemp's testimony in support of the explanation that, "as to plaintiffs, Norman Robinson and his wife, they would have had approximately six feet of water if the MRGO had remained as designed and with pristine wetlands. Of course, with the MRGO as widened and deepened and the degradation of the wetlands, the Robinsons received approximately 12 feet of water. (Trial Transcript, Kemp at 1851).")

Citrus Back Levee and the initial flooding of the Robinson property[.]" USCA5 22072; *see also id.* at 22073 ("the arrival *first* of floodwaters from Reach 1") (emphasis added).[26] Under Louisiana law, the government is liable because its negligence was a substantial factor causing the Robinsons' damages. *See Rando v. Ancon Insulations Inc.*, 16 So. 3d 1065, 1088 (La. 2009) ("When multiple causes of injury are present, a defendant's conduct is a cause-in-fact if it is a substantial factor generating plaintiff's harm.") (citations omitted); *see also* authorities cited in Section IV, A, 2, *infra*, for a legal discussion of concurrent causation.

The record as affects the Robinsons is that no defense expert report rebutted Plaintiffs' expert opinion regarding the cause of flooding in New Orleans East, and that the government's post-trial brief concedes facts that standing alone establish that MRGO Reach 1 via the Citrus Back Levee flooded the home.

B. The Trial Record and the District Court's Factual Findings Prove the Corps' Negligence

As established above, because the Plaintiffs proved that the Corps' affirmative acts *post design and construction* were a substantial factor in the

[26] The Government's post-trial briefing also argued without citation that, "First, the additional surge elevation in Reach 1 resulted from the initial construction of the deep-draft channel, not from any subsequent maintenance or operation." USCA5 22072. The Corps' brief proceeded from this speculation to its second point, which was to concede the causation element of the Robinsons' case by agreeing that the "overtopping of the Citrus Back levee peaked" and that the floodwaters from Reach 1 (over the Citrus Back levee) arrived "first". USCA5 22072-73.

destruction of the Robinsons' home, and because Defendant did not rebut this evidence with expert proof regarding the mechanics of the flooding of the New Orleans East, the district court erred in ruling solely on the basis of the surge protection barrier issue. Related to this understatement of the Plaintiffs' undisputed proof, the district court found that "plaintiffs did not present sufficient evidence that the Corps was unreasonable or negligent in relying" on the conclusions set forth in the Bretschneider & Collins Report (in evidence at PX68). 647 F.Supp.2d at 697. This no negligence finding bears upon the failure to build a barrier issue that, as described above, is unnecessary to proving the Robinsons' case.

Independently, the district court's conclusion that the Corps reasonably relied on the Bretschneider & Collins Report is plain error in light of the evidence and the district court's findings of fact. The district court's own factual findings reveal that the Report did *not* establish that the MRGO was harmless in the event of a hurricane. A graph in the report demonstrates that surge onset was in fact hastened by the MRGO. 647 F.Supp.2d at 677 (citing Trial Transcript, Kemp, at 1750 (*see* USCA5 17502); Kemp Demonstrative Slide No. 5; PX-68 (Bretschneider and Collins Report), at 48)).

Nonetheless, in addition to the danger revealed in the Report's graph, *after-*

acquired knowledge independently and definitively proved the risk of harm. By 1973 at least two experts had raised substantial questions undercutting the proposition that no additional surge was created. 647 F.Supp.2d at 677. In response, the Corps took the position – repeated like a "drumbeat" through 1999 – that the 1966 study was definitive. 647 F.Supp.2d at 678. Notwithstanding the district court's conclusion of no negligence, the fact section of the opinion criticizes the Corps for clinging to its interpretation of a 1966 report for so long after the dangers became known. *See id.* at 678, 816; Statement of Facts, VI, A, *supra*.. The court also criticized the Corps' failure to acknowledge the obvious expansion of the channel from the "as designed" parameters relied on in the Report. 647 F.Supp.2d at 708 ("By 1972, any layperson, much less an engineer, could see that the dimensions of the channel had already grown excessively.").

In addition to the Corps' knowledge of what it had done to expand the channel, the Corps was specifically warned about the dangers caused by its destruction of the ecosystem. In the 1970s, both EPA and the Louisiana Department of Public Works warned the Corps of the dangers of salinity changes. 647 F.Supp.2d at 727. For example, EPA recommended that "to minimize the existing adverse and future long-term (secondary) impacts of the MR-GO," mitigative measures to reduce salinity "be incorporated into the operation and

maintenance of the MRGO project." *Id*. In response, the Corps touted the ameliorative effect of structures that were in truth never built and were known to be at risk. *Id.* at 728.

Once it is clarified that the Corps' affirmative post-construction acts expanding the channel in excess of its authorized design dimensions and wetlands' destruction are the acts proven to have caused substantial flooding, there is no evidentiary dispute as to the Corps' knowledge. As found by the district court based on the trial evidence, the Corps knew of risks that, standing alone, were proven by Plaintiffs to have destroyed the New Orleans East residential neighborhood much beloved by the Robinsons. The Corps is negligent for its failure to act on its after-acquired knowledge. *See Duvernay v. Louisiana*, 433 So. 2d 254, 258 (La. Ct. App. 1983). Under Louisiana law, a land owner owes a duty to discover any unreasonably dangerous condition and either correct that condition or warn of its existence. *Pitre v. Louisiana Tech Univ.*, 673 So.2d 585, 590 (La. 1996); *Socorro v. City of New Orleans*, 579 So.2d 931, 939 La. 1991); *Shelton v. Aetna Casualty & Surety Co*., 334 So.2d 406, 410 (La. 1976). The district court recognized this duty. 647 F.Supp.2d at 733. Therefore, even assuming the Corps' initial reliance on the Report was reasonable, the Corps breached its duty by failing to act on substantial, specific after-acquired knowledge that the MRGO posed a

serious threat to life and property.

The judgment against the Robinsons should be reversed and the case remanded for further proceedings.

IV. Because The Undisputed Evidence Proves That The MRGO Reach 2 Breaches Were A Substantial Factor In Destroying Anthony And Lucille Franz' Lower Ninth Ward Home, The District Court Erred In Limiting Their Damages To The Value Of The Second Story Contents

The district court awarded Anthony and Lucille Franz damages for the loss of the contents of the second story of their home because water from MRGO Reach 2 caused the water levels to reach the second story. However, the district court did not award damages arising from the destruction of the home itself because (1) a Plaintiffs' expert admitted that the IHNC would have breached without the MRGO (647 F.Supp.2d at 735); (2) the foundation was destroyed by IHNC waters before the Reach 2 waters arrived (*id.*); and (3) Plaintiffs failed to prove that the collision creating a hole in the property occurred after 9:30 am when Reach 2 floodwaters hit the house (USCA5 23099 (order on rehearing)).

On their cross-appeal, the Franzes challenge the second and third findings as clearly erroneous on the facts and the applicable Louisiana causation law.[27] As to

[27] While the Franzes believe that the district court incorrectly determined that the increased surge from the MRGO that rushed down Reach 1 and into the IHNC was not a substantial factor in the demise of the two IHNC eastern floodwalls, there was testimony from their expert and a defense

the timing of the home's destruction, the evidence shows that (1) water traveling from Reach 1 and then through the two IHNC breaches did not destroy the home during the brief period of time before the far greater deluge from Reach 2 arrived and (2) the Reach 1 and Reach 2 floodwaters indistinguishably merged, making the Reach 2 floodwaters (the result of the Corps' negligence as found by the trial court) a concurrent cause of their home's loss. With respect to proving the cause of the foundation's demise, the trial court clearly erred in ignoring the undisputed evidence that the foundation collided with a heavy object flowing from the Reach 2-facing side and that the collision plus the stagnant floodwaters were both causes of the home's destruction. In addition, as a matter of law, the district court incorrectly placed the burden of proof on Plaintiffs on the issue of timing of the collision.

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expert that the IHNC floodwaters "did not contribute greatly to the Lower Ninth Ward being flooded" *due to those breaches.* 647 F.Supp.2d at 698. Even excusing the MRGO from any responsibility for IHNC floodwaters, as discussed below, there is compelling evidence that floodwaters emanating from MRGO Reach 2—which were caused by the Corps' "gross negligence"—were a substantial factor in the destruction of the Franz residence.

A. The Floodwaters From Reach 2 Were a Substantial Factor in and Concurrent Cause of The Franz' Home's Destruction

1. Three Causes Contributed to the Total Loss of the Home and Its Contents

Based on the record, one thing is clear: multiple causes—the heavy colliding object, the IHNC floodwaters, and the Reach 2 floodwaters—concurred to bring about the total loss of the home and its contents. Two of these forces (the IHNC and Reach 2 floodwaters) merged and were actively and simultaneously operating together for three weeks to rot the wood and wick up the walls, rendering the house a total loss. And two of these forces (Reach 2 floodwaters and the heavy object propelled into the MRGO-facing-side of the house) were caused by the government's negligence in causing the flooding of the St. Bernard Polder from Reach 2. *See* Statement of Facts, III & IV, *supra.*

The district court singled out only one of these causes as the reason for destroying the house. "The destruction of the home was caused by the six feet of water that rushed through the breaches of the IHNC floodwall causing the destruction of the foundation of the Franz home." 647 F.Supp.2d at 735. The record does not support this finding that the IHNC floodwaters were *the sole cause*. No testimony or documentary evidence proves that the IHNC waters had

already destroyed the house beyond repair before the arrival of the MRGO Reach 2 waters and the heavy object that those raging waters propelled into the foundation.

Both Plaintiffs' and Defendant's experts agreed that the IHNC breaches did not contribute as much to the flooding of the Lower Ninth Ward as the Reach 2 breaches and that approximately 88 percent to 90 percent of the flooding was instead caused by the Reach 2 breaches. *See* 647 F.Supp.2d at 698. Anthony and Lucille Franz proved that after the initial flooding from both directions, the severe, irreparable water damage from high levels of *merged floodwaters* that *stagnated in the Franz home for three weeks caused it to be a total loss.* PX115 (Taylor Report) at 1; USCA5 17695:1-12 (Rodriguez). Such damage does not start *until* the flooding waters have come to rest. USCA5 17297:9 (Taylor). Therefore, the Plaintiffs' expert report proves that a substantial causative factor damaging the home occurred well *after* the day on which the levees broke.

In stark contrast to rebutting Taylor's expert report on the cause of the home's destruction, Defendant's expert actually agreed that "[e]ven without the IHNC breaches, the maximum water surface elevation in the Lower Ninth Ward area would have been nearly identical." PX1487 (S. Fitzgerald Report) at 21. Nor did the government offer any evidence to refute the fact that the home's loss was

attributable to the merged Reach 2 and IHNC waters that stagnated over three weeks.

Independent of the undisputed evidence regarding this cause of the destruction of the home from wood rot and wicking over three weeks' time, the district court erred in discounting the undisputed photographs proving impact of a large object on the Reach 2 side—not the IHNC side. *See* PX115; PX1714. The court found that Plaintiffs did not prove precisely when the heavy, large object hit. USCA5 23099 (Order and Reasons 12/29/09). Timing is irrelevant because the large hole was made on the east, Reach 2-facing side of the house. Whenever the object came, it had to have come from Reach 2 as a matter of science and logic.

The district court concluded that the IHNC waters arrived first based on expert projections of flood depths whereby it appears that IHNC waters started arriving only a brief time before the Reach 2 waters at the particular location of the Franz home (*e.g.*, PX1771 at Figure 5). However, it does not follow that these waters—literally in a mere twenty-five or thirty minutes—had *already* destroyed the home since the massive flooding of the polder was caused by the MRGO (88%) and the comparatively meager volume of IHNC water (12%) was admitted by defense expert Fitzgerald to have no significant effect on maximum water elevation. *See* 647 F.Supp.2d at 698; Statement of Facts, VIII, *supra.* Plaintiffs'

unrefuted expert opinion proved that both the wood rot/wicking and the Reach 2-side collision were substantial factors.

2. The Reach 2 Floodwaters Were a Concurrent Cause of The Franz' Losses

The district court's determination that the IHNC floodwaters were a substantial factor does not exculpate the government. Under Louisiana law, the Reach 2 floodwaters must be deemed a concurrent cause of the loss of the Franz' home. Both the heavy object propelled by westward-rushing Reach 2 floodwaters *and* the Reach 2 floodwaters that inundated the house qualify as a substantial factor satisfying the cause-in-fact requirement. Since the Reach 2 floodwaters are a cause-in-fact of the harms, the government is liable for the flooding.

Where there is more than one possible cause-in-fact, Plaintiffs do not carry a "but for" burden of proof. *See In re Katrina Canal Breaches Consolidated Litigation,* 2009 WL 1033783 *3, *6 (E.D. La. 2009); *see also In re Manguno,* 961 F.2d 533, 535 (5th Cir. 1992) (Louisiana law does not require proof that defendant alone would have caused the harm); *Perkins v. Entergy Corp.*,782 So.2d 606, 612 (La. 2001) ("The court has also applied the substantial factor test by asking whether each of the multiple causes played so important a role in producing the result that responsibility should be imposed upon each item of conduct, even if it cannot be said definitively that the harm would not have occurred 'but for' each

individual cause.") (citations omitted); *LeJeune v. Allstate Ins. Co.*, 365 So.2d 471, 476-77 (La. 1978); Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN L. REV. 60, 89 (1956) ("[A] fire started through the negligence of a railroad may merge with a fire of undetermined origin and the two together destroy plaintiff's property. Under such facts the wrongdoer will not be allowed to show that his fire was not a cause by establishing that the other fire would have destroyed the property even without his participation.").

The proper inquiry in a concurrent cause case is whether the conduct in question was a substantial factor in bringing about the accident. *Bonin v. Ferrellgas, Inc.*, 877 So. 2d 89, 94 (La. 2004); *see also Perkins*, 782 So. 2d at 611 n. 4 (stating that the substantial factor test is the preferred test for causation when there are multiple causes). When multiple causes of injury are present, a defendant's conduct is a cause-in-fact if it is a substantial factor generating Plaintiffs' harm. *Rando*, 16 So. 3d at 1088. "A substantial factor need not be the only causative factor; it need only increase the risk of harm." *Hennegan v. Cooper/T. Smith Stevedoring Co.*, 837 So. 2d 96, 102 (La. Ct. App. 2002) (citations omitted); *see also Simmons v. CTL Distrib.*, 868 So. 2d 918, 925 (La. Ct. App. 2004) ("To the extent that *a defendant's actions had something to do with the injury the plaintiff sustained*, the test of a factual, causal relationship is met.")

(citing *Roberts v. Benoit*, 605 So.2d 1032, 1042 (La. 1991) (emphasis added)). The substantial factor determination includes consideration of "whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm. . . ." *LeJeune*, 365 So.2d at 475 (quoting RESTATEMENT (SECOND) OF TORTS § 433(b)); *see also In re Katrina*, 2009 WL 1033783, *3 (E.D. La. 2009), *6; *Chaisson v. Avondale Indus., Inc.*, 947 So.2d 171, 188 (La. Ct. App. 2006) (quoting *LeJeune*, 365 So. 2d at 475). The government has acknowledged that the substantial factor test applies if concurrent causes combined to cause an accident. USCA5 23043.

Here, too, Plaintiffs were not required to prove that but for the Reach 2 waters, the home would not have been destroyed. *Manguno*, 961 F.2d at 535 "(The long-recognized principle of Louisiana law that causation is not defeated by the possibility that the injury would have happened without the defendant's involvement has never been relegated to only those cases in which a plaintiff first proves that the defendant alone would have caused the harm.") All the Plaintiffs had to show was that the Reach 2 floodwaters played an important role—"had something to do"—with respect to the Franz' home's destruction. On this record, there can be no question that six feet of Reach 2 floodwaters and the heavy object propelled by those turbulent floodwaters played a role in the home's demise.

Finally, it is legally irrelevant that one of the causes (Reach 1 floodwaters from the IHNC) was not the result of Defendant's negligence vis à vis the MRGO. "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about." RESTATEMENT (SECOND) TORTS § 432(2)[28]; *see also LeJeune,* 365 So. 2d at 475 (citing RESTATEMENT (SECOND) OF TORTS § 433(b)).

A corollary of this rule is that the Defendant is liable for the entire harm to the Franzes without apportionment of fault. Defendant's expert agreed that once these floodwaters merged, they were effectively indistinguishable. USCA5 18761:9-12 (Fitzgerald); *see also* PX1771 at fourth page, figure 5 and USCA5 16255:3-7 (Vrijling) (Showing Reach 2 floodwaters prevented the Reach 1 floodwaters from receding below a catastrophic level). Because these concurrent causes are indistinguishable, the resulting harm is indivisible, and Defendant who played a substantial role in the harm is liable for the entire amount of damages to

[28] "Louisiana courts have frequently quoted and cited with approval the first and second Restatements of Torts." *Banks v. Hyatt Corp.*, 722 F.2d 214, 221 (5th Cir. 1984). Indeed, according to the Reporter's Notes, Illustration 3 of Section 433B is taken from *Reynolds v. Texas & Pacific R. Co.*, 37 La. Ann. 694 (1885), and Illustration 7 of Section 433B is based in part on *Phillips Petroleum Co. v. Hardee*, 189 F.2d 205 (5th Cir. 1951), which interpreted Louisiana law.

the Franz home. *See* RESTATEMENT (SECOND) TORTS § 433A(2); *id.* at cmt. i ("Where two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm…. Such entire liability is imposed where some of the causes are innocent, as where a fire set by the defendant is carried by a wind to burn the plaintiff's house[.]").

B. The District Court Erred in Ruling that Plaintiffs Bore the Burden of Proof.

Assuming that the Defendant *could* evade liability by assigning blame to a concurrent cause, the district court erred as a matter of law by imposing the burden of proof as to timing on Plaintiffs. *See* USCA5 23098-23099 (Order and Reasons 12/29/09). As described above, Plaintiffs met their initial burden of proof of cause-in-fact through their unrebutted expert report that the stagnation of the house in water over time and the Reach 2-facing-damage to the foundation destroyed the house beyond repair. PX115, PX1714. The threshold for proving cause-in-fact is a low one. *See Simmons,* 868 So. 2d at 925 ("To the extent that a defendant's actions had something to do with the injury the plaintiff sustained, the test of a factual, causal relationship is met.") (citing *Roberts,* 605 So. 2d at 1042).

Because Plaintiffs proved that the MRGO was a substantial factor in destroying the home, the burden shifted to the Defendant to show apportionment between the concurrent causes. RESTATEMENT (SECOND) OF TORTS § 433B(2) ("Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor."). Where, as here, innocent third parties are injured by the coming together of two causes, both are presumed negligent, and the burden of proof shifts to the defendant to exculpate itself from negligence proximately causing the injury. *See Dolmo v. Williams*, 753 So. 2d 844, 846 (La. Ct. App. 1999). The district court's mistaken imposition of the burden of proof on Plaintiffs directly affected the outcome. The government did not offer any evidence seeking to allocate or apportion fault, thereby rendering it liable for 100% of the loss.

A Restatement illustration describes the application of this rule in a flood damage case:

> Through the negligence of defendants A, B, and C, water escapes from irrigation ditches on their land, and floods a part of D's farm. In D's action against A, B, and C, or any of them, each defendant has the burden of proving the extent to which his negligence contributed to the damage caused by the flood, and *if he does not do so is subject to liability for the entire damage to the farm.*

RESTATEMENT (SECOND) OF TORTS § 433B cmt. d, illus. 7 (emphasis added).

This rule is true even where, as here, the defendant contends that the cause for which it is not responsible allegedly happened first. *See Dolmo*, 753 So. 2d at 846; *Hillburn v. Johnson*, 240 So. 2d 767, 771 (La. Ct. App. 1970). In *Dolmo*, the evidence at trial of a car crash was unclear as to whether the first car was hit by the second before or after the second car was hit by the third. The *Dolmo* court quoted *Hillburn* in finding that whether the injuries sustained by a party are the result of a first or a subsequent impact was not dispositive. 753 So. 2d at 846. It did not matter "whether Harris hit the Dolmos first and then was impacted by the Williams' vehicle forcing Harris again into the Dolmos or whether Williams hit Harris first who then was shoved by the impact into the Dolmos. Either way, both drivers are at fault." *Id.; accord also Hopkins v. Coincon*, 911 So. 2d 302, 304 (La. Ct. App. 2005) (citing *Dolmo*). Because neither carried their burden, both drivers under the law were presumed negligent, and the court assessed each as 50% at fault. 753 So. 2d at 847. Here, too, the government was not free from liability based on the Plaintiffs' failure to prove when the large object collided with the house. It was the government's burden of proof, and it was not satisfied.

Similarly, as this Court has described concurrent causation, application of the concurrent causation line of authority does not require simultaneous causes.

See Phillips Petroleum Co., 189 F.2d at 212 ("concurrent or successive acts"); *see also Wilson v. Scurlock Oil Co.*, 126 So. 2d 429, 436 (La. Ct. App. 1960) ("Concurrent acts of negligence which may impose liability on two parties acting separately need not necessarily occur simultaneously if they are so related to directly contribute to the accident.") (citations omitted); *accord* RESTATEMENT (SECOND) OF TORTS § 433A, cmt. i ("It is not necessary that the misconduct of two or more tortfeasors be simultaneous."); RESTATEMENT (SECOND) OF TORTS § 433B, cmt. h (cases involved conduct simultaneous in time "or substantially so"); RESTATEMENT (SECOND) OF TORTS § 433 (lapse of time is listed third out of three factors).

In sum, chronological synchronicity is not a *sine qua non* for application of the substantial factor test. The district court erred in determining that a few minutes' difference in floodwater arrival negated the undisputed proof that the MRGO Reach 2 waters catastrophically flooded the Lower Ninth Ward and constituted a substantial factor in the destruction of the Franz' home. The district court should be reversed on this issue and the case remanded for determining the Franz' damages for the loss of their home.

CONCLUSION

The judgment of liability against the United States should be affirmed, the judgment dismissing the claims of Norman and Monica Robinson should be reversed and remanded for further proceedings, and the judgment as to the damages of Anthony and Lucille Franz should be modified to add the value of their home as determined on remand.

Dated: February 18, 2011

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I hereby certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), this brief uses proportionately spaced font and contains 32,673 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. Pursuant to Fifth Circuit Rule 25.2.13, I have complied with this Court's privacy redaction requirements;

3. Pursuant to Fifth Circuit Rule 25.2.1, the electronic version of this brief has been scanned for viruses using the McAfee Enterprise, 8.7i virus detection program, updated on February 15, 2011 which detected no viruses.

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No. 10-30249, In Re: Katrina Canal Breaches
USDC No. 2:05-CV-4182
USDC No. 2:06-CV-2268
USDC No. 2:08-CV-1707

The following pertains to your brief electronically filed on 2/18/2011.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Failure to timely provide the appropriate number of copies will result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3.

Sincerely,

LYLE W. CAYCE, Clerk

By: Sabrina Hains
Sabrina M. Hains, Deputy Clerk

cc:
Mr. Eric Fleisig-Greene
Ms. Alisa Beth Klein
Mr. Daniel Joseph Lenerz
Mr. Robin D Smith
Mr. Mark Bernard Stern
Ms. Abby Christine Wright

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