

## Hurricane Harvey: Analysis of Subrogation Opportunities for Upstream and Downstream Losses

Just over five years ago, on August 25, 2017, Hurricane Harvey made landfall as a Category 4 hurricane with wind gusts in excess of 130 mph. The storm produced more than four days of torrential rain: in the aggregate, in excess of 50 inches, that led to catastrophic flooding in the Houston area. In advance of and in an effort to alleviate the anticipated flooding, the U.S. Army Corp of Engineers had to decide how to best handle two reservoirs located on the west side of the Houston metropolitan area. These reservoirs are referred to as the Addicks and Barker reservoirs. The reservoirs are flood control structures that act to prevent downstream flooding of Buffalo Bayou, Houston's principal river.

As part of its flood control efforts, the Corp was confronted with whether it should release pooling water from the reservoirs since both reservoirs reached capacity during the storm. Prior to any intentional release of water, water began overflowing from the reservoirs and began flooding adjacent structures upstream from the reservoirs. Properties affected by the overflow event (but prior to the ensuing intentional release of water), are referred to as the "upstream claimants." Recognizing that the reservoirs could no longer handle additional rain (and to alleviate the upstream flooding that was already occurring), the Corp ultimately decided to intentionally release water from the reservoirs that subsequently flooded properties downstream from the reservoirs. These affected properties are referred to as the "downstream claimants."

Litigation ensued almost immediately on both sets of claims. The primary claim asserted is that the actions of the Corp effectively constituted a temporary "taking" under the Fifth Amendment to the U.S. Constitution, and that affected property owners are entitled to just compensation for the government's actions. Extensive discovery and motion practice were conducted regarding both sets of claimants. Interestingly, the outcomes were initially the polar opposite. After a bench trial regarding 13 upstream "bell-weather" claimants, the judge presiding over the upstream case ultimately found that the actions of the Corp constituted a taking, and that affected property owners were entitled to compensation. Conversely, the judge overseeing the downstream claimants found that the claimants were owed no duty of perfect flood control on the part of the Corp and dismissed the downstream claims. An appeal was taken by the downstream claimants and the dismissal was subsequently reversed by the appellate court. The downstream claims have since been remanded to the trial court for further proceedings.

The following provides a concise summary of the current status of the upstream and downstream litigation. Since "takings" claims have a six year statute of limitations, there is still time to intervene in the pending litigation and assert any applicable subrogation claims.

### Upstream Claims

As previously discussed, the trial court ruled in favor of the upstream bell-weather claimants finding that a constitutional "taking" had occurred and that the plaintiffs were entitled to compensation. The trial to determine the amount of compensation was concluded on June 10, 2022. Following the damages trial, the judge issued the following post-trial briefing schedule:

Plaintiff's post-trial brief: August 1, 2022

Defendant's response: September 9, 2022

Plaintiff's reply: September 23, 2022

Post-trial argument: September 29, 2022 at 2:30 p.m.



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### Related Practice Areas

- Subrogation & Recovery

An opinion outlining the amount of damages for the bell-weather claimants is expected shortly after post-trial arguments and hopefully, by year's end. The general upstream claim zip codes are **77041, 77084, 77094, and 77450**. It is important to remember that the zip codes provided experienced varying degrees of flooding.

### **Downstream Claims**

As noted, the judge dismissed the downstream claims. An appeal was taken and the U.S. Court of Appeals for the Federal Circuit reversed and held that the downstream property owners can pursue their claims that the government has a constitutional obligation to compensate for a temporary taking once the U.S. Army Corp of Engineers elected to open the Addicks and Barker reservoirs. The case was then remanded to the Court of Federal Claims to consider the merits of the claims and the Corps' defenses. The general downstream zip codes are **77077, 77079, 77063, 77057, 77056, 77048, 77042, and 77024**. The only caveat is that the flooding in these zip codes must have occurred *after* the reservoir release on August 27, 2017.

As previously noted, it is not too late to intervene in the litigation since the statute of limitations has not yet expired. It is imperative to determine whether any applicable claim falls within the upstream or downstream category so that the claim may be asserted in the correct litigation. Please do not hesitate to reach out to us should you have any questions about potential Hurricane Harvey claims.

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