

Shore Damage/State of Louisiana Damage Claim: Federal Appellate Court Addresses Whether U.S. Corps of Engineers Has Sovereign Immunity



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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Co-Author: Hannah Hines

The Fifth Circuit Court of Appeals (“Court”) addressed in a January 21st opinion issues associated with a federal district court action in which the State of Louisiana alleged shore damage caused by waterways maintained by the United States Corps of Engineers (“Corps”). See *Louisiana v. United States*, 948 F.3d 317 (5th Cir. 2020).

Issues addressed by the Court included:

- Did the United States waive sovereign immunity for these claims?
- Is the claim that the Corps failed to act subject to judicial review under the Administrative Procedures Act?

The State of Louisiana filed a lawsuit in federal district court seeking injunctive relief against the Corps. The state alleged that the Corps failed to maintain the Gulf Intercostal Waterway (“Waterway”) in compliance with the River and Harbor Improvements Act (“Act”).

The Act authorized a Waterway that stretches from New Orleans to Galveston. The width was authorized at 125 feet.

The State alleged that the Corps failed to confine the Waterway to the land it controlled. Further, it alleged that the Waterway spilled onto land owned by the State. Therefore, the state argued the Corps should be required to confine the Waterway to its authorized width and restore the State’s property to its prior condition.

The Court first addressed whether the Corps had sovereign immunity. Section 702 of the APA allows a limited waiver of sovereign immunity:

1. when a person has been adversely aggrieved by agency action,
2. is not seeking money damages, and
3. is stating a claim that an agency acted or failed to act in an official capacity, causing the injury at hand.

The Court held that the term ‘action’ as used in the APA is a term of art that does not include all conduct. Examples cited include:

- constructing a building,
- operating a program,
- or performing a contract.

“Agency action” did not permit programmatic challenges – challenges that seek a wholesale improvement of an agency’s programs through judicial order, rather than through the legislature or the agency itself. Louisiana was deemed to be essentially seeking a wholesale improvement of the Corps programs in maintaining waterways. Therefore, the Court held that Louisiana did not point to any identifiable agency action on the part of the Corps which permitted the waiver sovereign immunity.

The Court further held that Louisiana had not been “adversely aggrieved” by the Corps. The state could not establish that the encroachment of its land was within the “zone of interests” the River and Harbor Improvements Act was designed to protect.

The purpose of the Act was to promote commerce and facilitate the transport of materials and supplies for the military during World War II. This was stated to not include protecting the interests of landowners along the Waterway.

Louisiana could not point to an “agency action.” Therefore, it could not show that the encroachment was within the “zone of interests” of the Act. Consequently, sovereign immunity was not deemed waived.

Finally, the Court noted the language of the statute authorized a width of 125 feet for construction of the Waterway. It stated that “no provision of the Act requires the Corps to maintain the Waterway at that width.”

While the Act authorized the Corps “to take measures to prevent or mitigate shore damage caused by the Waterway[,] it does not direct them to take such measures.” Even if the Corps decided to take these measures, the language of the statute required the State to operate and maintain those preventative measures. Therefore, because there was no action that the Corps failed to take and the United States maintained sovereign immunity, Louisiana’s claim was dismissed.

A copy of the decision can be downloaded [here](#).