

ORIGINAL

FILED

IN THE UNITED STATES COURT OF FEDERAL CLAIMS SEP 5 2017

ANGELA BOUZERAND, WAYNE PESEK,
AMY PESEK, and FRED PAUL FRENGER,
individually and on behalf of all others similarly
situated,

Case No.:

U.S. COURT OF
FEDERAL CLAIMS

Plaintiffs,

v.

17 - 1195 C

THE UNITED STATES,

Defendant.

CLASS ACTION COMPLAINT

Plaintiffs Angela Bouzerand, Wayne Pesek, Amy Pesek, and Fred Paul Frenger bring this Class Action Complaint against Defendant The United States to seek just compensation for the taking of Plaintiffs' and the Class's (defined below) private property for public use when the U.S. Army Corps of Engineers flooded their homes by releasing water from the Addicks and Barker reservoirs in Houston, Texas. Plaintiffs, for their Complaint, allege as follows upon personal knowledge as to themselves and their own acts and experiences and, as to all other matters, upon information and belief, including investigation conducted by their attorneys:

STATEMENT OF JURISDICTION

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1491(a)(1) as this action seeks monetary compensation from the United States, pursuant to the Fifth Amendment to the U.S. Constitution, for its taking of Plaintiffs' and the Class's private property for public use, without just compensation.

PARTIES

2. Plaintiff Angela Bouzerand is a citizen of the United States of America and

Received - USCFC

SEP 5 2017

resident of Houston, Texas.

3. Plaintiff Wayne Pesek is a citizen of the United States of America and resident of Houston, Texas.

4. Plaintiff Amy Pesek is a citizen of the United States of America and resident of Houston, Texas.

5. Plaintiff Fred Paul Frenger is a citizen of the United States of America and resident of Houston, Texas.

6. Defendant is the United States of America.

PREVIOUS LAWSUITS

7. Plaintiffs have not filed any other lawsuits in state or federal court dealing with the same or similar facts involved in this action.

STATEMENT OF THE CLAIM

8. On August 25, 2017, one of the worst hurricanes in over a decade made landfall in Southeast Texas. In an effort to prevent catastrophic flooding in Houston, the U.S. Army Corps of Engineers—a U.S. federal agency under the Department of Defense—attempted to control the flow of the storm’s heavy rainfall by releasing water from two nearby dams, the Addicks and Barker reservoirs.

9. As a result of Defendant’s decision to release water from Addicks and Barker, approximately 4,000 homes that were not otherwise going to flood during the storm, were inundated with water and are currently uninhabitable. Thousands of families, including Plaintiffs and the Class, are now displaced from their homes with no assurances from Defendant for when they will be able to return or whether they will be compensated for the damage it caused to their private properties. Therefore, thousands of families are left not knowing where they will sleep,

whether they will be able to afford temporary shelter, or whether they will be able to afford to rebuild their homes after the water recedes.

10. While the release of water from Addicks and Barker was likely necessary to protect downtown and other parts of Houston from even greater damage, Plaintiffs and a Class of similarly situated individuals are now disproportionately burdened by Defendant's intentional flooding of their private properties and, therefore, seek just compensation.

11. The following is an overview of Hurricane Harvey, the Addicks and Barker reservoirs, the decision to release water from Addicks and Barker, and the resulting damage to Plaintiffs' homes.

I. An Overview of Hurricane Harvey.

12. Hurricane Harvey was one of the most devastating hurricanes to make landfall in the United States in over a decade.

13. Harvey first made landfall on August 25, 2017 near Rockport, Texas, approximately 30 miles from Corpus Christi. As Harvey traveled through the southeastern portion of the State, it brought with it tropical storm-force winds and heavy rainfall.

14. In just a four-day period, parts of southeast Texas received 40–52 inches of rain and experienced catastrophic inland flooding that submerged hundreds of thousands of homes, displaced tens of thousands of people, and resulted in dozens of deaths.

15. Harvey is being recognized as the worst natural disaster in Texas history.

II. The U.S. Army Corps of Engineers Created the Addicks and Barker Reservoirs to Protect Houston from Catastrophic Floods, Including from Hurricanes like Harvey.

16. The Addicks and Barker reservoirs are part of a flood control system on the west side of Houston, Texas.

17. The dams are owned and operated by the U.S. Army Corps of Engineers, and

were designed specifically to protect downtown Houston from catastrophic flooding after a major flood inundated the City in 1935.

18. The dams protect Houston from floods by controlling the flow of water in the largest waterway running through the heart of the City, the Buffalo Bayou.

19. Addicks and Barker function as “dry reservoirs”, meaning the dams stay open and water is allowed to flow freely until heavy rainfall. Once the system’s flood gauges reach certain levels, the dams’ floodgates close and they begin to fill to prevent the overflow of uncontrollable water in the Bayou.

III. On August 28, 2017, the U.S. Army Corps of Engineers Began Releasing Water from the Addicks and Barker Reservoirs and, In Turn, Flooded Thousands of Nearby Homes that Would Not Have Otherwise Flooded During Hurricane Harvey.

20. As Hurricane Harvey approached, the Addicks and Barker reservoirs were in the middle of a \$75 million repair, after they were deemed to be in “extremely high risk of catastrophic failure” in 2009.

21. While the dams initially took on hundreds of acre-feet of water from Hurricane Harvey, the U.S. Army Corps of Engineers made clear that if the reservoirs’ water levels rose to a certain point, they would begin releasing water rather than risk losing either dam entirely.

22. On August 28, 2017, the U.S. Army Corps of Engineers began releasing water from both Addicks and Barker.

23. As both reservoir gates opened and released storm water into the Buffalo Bayou, adjacent neighborhoods and roadways that were not otherwise flooded became inundated with water.

24. As a result, at least 3,000 homes near the Addicks reservoir and 1,000 homes near Barker were flooded and many remain underwater. Reports indicate that many of these homes

now likely have several feet of water in them and that it could stay that way for months, as the U.S. Army Corps of Engineers continue to release water from both Addicks and Barker over the next several weeks.

25. Unfortunately, without power, many residents, including Plaintiffs and the Class, did not receive notice before the release. Many residents, including Plaintiffs and the Class, were therefore caught off guard and were mostly unable to mitigate the damage to their homes, family heirlooms, and personal belongings.

26. For many people in that area, including Plaintiffs and the Class, once they are able to return to their homes and properties, they will begin a several year long process to salvage and rebuild what is left, if anything.

27. For instance, if water levels stayed under four feet inside homes, the Federal Emergency Management Agency (“FEMA”) recommends to document the damage and then identify what can be saved and what cannot. FEMA then recommends to strip homes of all furnishings and other items impacted by water, rip up carpet, remove the first four feet of drywall and insulation on the ground level and, if the water rose above four feet, to rip entire walls out.

28. Importantly, the Center for Disease Control (“CDC”), together with FEMA, the Environmental Protection Agency, the U.S. Department of Housing and Urban Development, and the National Institutes of Health, specifically recommend that flooded homes be *completely* dried out within 24–48 hours of water exposure in an effort to prevent hazardous mold growth. The CDC also reports that buildings wet for more than 48 hours, like each of Plaintiffs’ homes, will generally support visible and extensive mold growth and should be remediated, and excessive exposure to mold-contaminated materials can cause adverse health effects in susceptible persons regardless of the type of mold or the extent of contamination.

29. For Plaintiffs and the Class, because the U.S. Army Corps of Engineers released water from both Addicks and Barker during Hurricane Harvey, their homes, which otherwise would not have flooded, are now underwater. As a result, once they are able to return to their homes, they will need to hire contractors to help rebuild, which may take years and likely cost tens or hundreds of thousands of dollars. Unfortunately, Defendant has not yet assured Plaintiffs or the Class when they will be able to return or whether they will be compensated for the damage it caused to their private properties. As such, Plaintiffs and the Class are left not knowing where they will sleep, whether they will be able to afford temporary shelter, or whether they will be able to afford to rebuild their homes after the water recedes. Because Defendant has not stated whether it will help compensate victims of the Addicks and Barker release, many are unable to start the process of rebuilding their homes and seeking any financial assistance to do so.

IV. Plaintiff Angela Bouzerand's Experience.

30. Plaintiff Angela Bouzerand, along with her husband and their three children, own a single-family home located at 15414 Walkwood Drive, Houston, Texas 77079 (in a neighborhood called Memorial Thicket).

31. Bouzerand's home was built in 1981 and, since then, had never once flooded. In fact, Bouzerand's home survived Hurricane Alicia, Tropical Storm Allison, Hurricane Ike, the Memorial Day flood of 2015, and the Tax Day flood of 2016 without flooding. For that reason, Bouzerand did not maintain flood insurance under the National Flood Insurance Program ("NFIP").

32. Bouzerand's home even survived the first few days of Hurricane Harvey without flooding, even though much of Houston was mostly underwater.

33. Unfortunately, on August 28, 2017 that all changed. Early that morning, when the

U.S. Army Corps of Engineers decided to release water from Addicks and Barker, Bouzerand watched helplessly as water from the dams began creeping towards her home. Worse still, Bouzerand had lost power the evening before and did not know that water was going to be released from Addicks and Barker. Bouzerand's home was not even included in a map printed in the Houston Chronicle as a cautionary zone that would be affected by the release of the reservoirs.

34. Nonetheless, by morning, the water began spilling over the street curb onto their grass. While Bouzerand hoped that the water would stop, it didn't. Faced with the challenges of trying to evacuate safely with small children, Bouzerand and her family made the difficult decision for Bouzerand to stay in the home while her husband sought help.

35. At 7:30 a.m. Bouzerand's husband left their home and with a neighbor waded through the water filling their subdivision in order to seek help. Within a few hours, they came back for their wives and children. They put their young kids—including their 18 month old—in inflatable "kiddie" pools and pushed them while *swimming* to safety.

36. Ultimately, with the continued release of the Barker reservoir over the next few days, the water rose to approximately 4–4.5 feet in Bouzerand's home.

37. As of the date this Complaint was filed, Bouzerand's home was uninhabitable. In fact, a mandatory evacuation for Bouzerand's neighborhood was announced on September 2nd—almost 6 days after Bouzerand and her family escaped the flooding. Bouzerand's home did not flood prior to the Addicks and Barker releases.

V. Plaintiffs Wayne and Amy Pesek's Experience.

38. Plaintiffs Wayne and Amy Pesek own a single-family home located at 11107 Lakeside Forest Drive, Houston, Texas, 77042 (in a neighborhood called Lakeside Forest).

39. The Pesek's home was built in 1973, and during the nearly 45 years since its construction, had never flooded. In fact, the Pesek's home escaped the floodwaters of Hurricane Alicia, Tropical Storm Allison, Hurricane Ike, the Memorial Day Flood of 2015, and the Tax Day Flood of 2016. For that reason, the Peseks did not maintain flood insurance under the NFIP.

40. The Pesek's home even survived the first few days of Hurricane Harvey without any significant flooding, even though the rest of Houston was mostly underwater.

41. Unfortunately, on August 28, 2017 that all changed. After the U.S. Army Corps of Engineers decided to release water from Addicks and Barker, the Pesek's home became inundated with thousands of gallons of water, sewage, and waste.

42. The Peseks were forced to evacuate their home.

43. Ultimately, with the continued release of the Addicks and Barker reservoirs, over the next few days, the water rose to approximately nineteen inches in the Pesek's home. As of the date this Complaint was filed, Pesek's home is uninhabitable.

VI. Plaintiff Fred Paul Frenger's Experience.

44. Plaintiff Dr. Fred Paul Frenger owns a single-family home located at 814 Silvergate Drive, Houston, Texas 77079 (in a neighborhood called Fleetwood), and has lived there for over twenty years. Dr. Frenger proudly served as Lt. Colonel in the United States Air Force and is a partially disabled Vietnam veteran.

45. Dr. Frenger's home was built in 1976, and during the nearly 42 years since its construction, had never flooded. The home survived Hurricane Alicia, Tropical Storm Allison, Hurricane Ike, the Memorial Day flood of 2015, and the Tax Day flood of 2016 without flooding. For that reason, the Dr. Frenger did not maintain flood insurance under the NFIP.

46. Dr. Frenger's home even survived the first few days of Hurricane Harvey without flooding, even though the rest of Houston was mostly underwater.

47. Unfortunately, on August 28, 2017 that all changed. After the U.S. Army Corps of Engineers decided to release water from Addicks and Barker, Dr. Frenger's home became inundated with thousands of gallons of water, sewage, and waste, and he evacuated his home.

48. Ultimately, with the continued release of the Addicks and Barker reservoirs, over the next few days, the water rose significantly in Dr. Frenger's home.

49. As of the date this Complaint was filed, Dr. Frenger's home is still flooded and uninhabitable, and Dr. Frenger is unable to return to it. Worse still, the intentional dam release caused the loss of Dr. Frenger's priceless articles including original photos, antiques, and software in addition to the substantial property damage, which is ongoing. Dr. Frenger's home did not flood prior to the Addicks and Barker releases.

CLASS ALLEGATIONS

50. **Class Definition:** Plaintiffs bring this action on behalf of themselves and a Class of similarly situated individuals, defined as follows:

All persons or entities whose private properties were flooded as a direct result of the drainage of the Addicks and Barker reservoirs after U.S. Army Corps of Engineers discharged water from them beginning August 28, 2017.

Excluded from the Class are (1) Defendant or Defendant's agents, (2) the Judge to whom this case is assigned and the Judge's immediate family, (3) persons who execute and file a timely request for exclusion from the Class, (4) persons who have had their claims in this matter finally adjudicated and/or otherwise released, and (5) the legal representatives, successors, and assigns of any such excluded person.

51. **Numerosity:** The exact number of members of the Class is unknown and is not

available to Plaintiffs at this time, but individual joinder in this case is impracticable. The Class likely consists of thousands of individuals.

52. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiffs and the other members of the Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include but are not limited to the following:

- a) Whether Plaintiffs and the Class have been deprived of the use, occupancy, and enjoyment of their homes and other property as a result of Defendant's conduct described above;
- b) Whether Defendant's conduct described above constitutes a taking of private property for public use and without just compensation under the Fifth Amendment to the U.S. Constitution; and
- c) Whether Plaintiffs and the Class are entitled to just compensation for Defendant's conduct described above.

53. **Typicality:** Plaintiffs' claims are typical of the claims of the other members of the Class. Plaintiffs and the Class sustained damages as a result of Defendant's uniform wrongful conduct.

54. **Adequate Representation:** Plaintiffs will fairly and adequately represent and protect the interest of the Class, and have retained counsel competent and experienced in complex litigation and class actions. Plaintiffs have no interests antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiffs. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the members of the Class, and have the financial resources to do so. Neither Plaintiffs nor their counsel have any interest adverse to

those of the other members of the Class.

55. **Policies Generally Applicable to the Class:** This class action is appropriate for certification because Defendant has acted or refused to act on grounds generally applicable to the Class as a whole, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class, and making final injunctive relief appropriate with respect to the Class as a whole. Defendant's policies challenged herein apply and affect members of the Class uniformly and Plaintiffs' challenge of these policies hinges on Defendant's conduct with respect to the Class as a whole, not on facts or law applicable only to Plaintiffs. The factual and legal bases of Defendant's liability to Plaintiffs and to the other members of the Class are the same, resulting in injury to the Plaintiffs and to all of the other members of the Class. Plaintiffs and the members of the Class have suffered harm and damages as a result of Defendant's conduct.

56. **Superiority:** This case is also appropriate for certification because class proceedings are superior to the other available methods for the fair and efficient adjudication of this controversy. Absent a class action, it would be difficult for the individual members of the Class to obtain effective relief from Defendant. Even if members of the Class themselves could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties and the court and require duplicative consideration of the legal and factual issues presented herein. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort, and expense will be fostered, and uniformity of decisions will be ensured.

57. Plaintiffs reserve the right to revise the foregoing "Class Allegations" and "Class

Definition” based on facts learned through additional investigation and discovery.

FIRST CAUSE OF ACTION
Violation of the Takings Clause
(On behalf of Plaintiffs and the Class)

58. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

59. The Fifth Amendment to the United States Constitution prohibits the Government from taking private property for public use without just compensation.

60. Plaintiffs and the Class have a legally-protectable property interest in their homes and other properties located near the Addicks and Barker reservoirs.

61. Plaintiffs and the Class had distinct, reasonable, and investment-backed expectations that their properties would only be subject to flooding in line with historical flooding patterns established over the decades.

62. As a direct result of the U.S. Army Corps of Engineers’ decision to discharge water from the Addicks and Barker reservoirs on August 28, 2017, Plaintiffs’ and the Class’s homes and other private properties were flooded, which deprived Plaintiffs and the Class of the use, occupancy, and enjoyment of their homes and other properties.

63. Specifically, Defendant’s conduct described above constitutes a temporary taking of Plaintiffs’ and the Class’s private property because starting on August 28, 2017 and continuing for weeks water will continue to be released from Addicks and Barker and, in turn, flood Plaintiffs’ and the Class’s homes and properties. As a result, Plaintiffs and the Class will not be able to return to their homes and properties, and will be deprived of the use, occupancy, and enjoyment of their private property.

64. Defendant’s conduct described above also constitutes a permanent taking of Plaintiffs’ and the Class’s private property because after they are able to return to their homes

and properties, the intentional discharge of water from Addicks and Barker will have caused permanent damage to their private property that will cost tens or hundreds of thousands of dollars to repair.

65. Plaintiffs' and the Class's private property would not have otherwise flooded but for the U.S. Army Corps of Engineers' decision to discharge water from the Addicks and Barker reservoirs.

66. The U.S. Army Corps of Engineers' decision to discharge water from the Addicks and Barker reservoirs was for public use.

67. Plaintiffs and the Class have not been compensated for temporary or permanent taking of their homes and other private property by the U.S. Army Corps of Engineers.

68. The Fifth Amendment is intended to prevent the public from burdening one individual, such as Plaintiffs and the members of the Class, with the costs of furthering public interest.

69. Therefore, on behalf of themselves and the Class, Plaintiffs seek just compensation for the temporary and permanent takings of their homes and other property in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Angela Bouzerand, Wayne Pesek, Amy Pesek, and Fred Paul Frenger, on behalf of themselves and the Class, respectfully request that this Court enter an order:

A. Certifying this case as a class action on behalf of the Class defined above, appointing Plaintiffs as representatives of the Class, and appointing their counsel as Class Counsel;

B. Declaring that Defendant's actions, as set out above, constitute a taking under the Fifth Amendment to the United States Constitution;

C. Ordering Defendant to notify Plaintiffs and the Class of its intention to compensate them for its taking under the Fifth Amendment to the United States Constitution;

D. Awarding just compensation in an amount to be determined at trial;

E. Awarding Plaintiffs and the Class their reasonable litigation expenses and attorneys' fees;

F. Awarding Plaintiffs and the Class pre- and post-judgment interest, to the extent allowable; and

G. Awarding such other and further relief as equity and justice may require.

Respectfully submitted,

**ANGELA BOUZERAND, WAYNE PESEK,
AMY PESEK, and FRED PAUL FRENGER,**
individually and on behalf of all others similarly
situated,

Dated: September 5, 2017

By: 

Jay Edelson*
jedelson@edelson.com
EDELSON PC
350 North LaSalle Street, 13th Floor
Chicago, Illinois 60654
Tel: 312.589.6370
Fax: 312.589.6378

*Attorney of Record for Plaintiffs and the Putative
Class*

Rafey S. Balabanian*
rbalabanian@edelson.com
Benjamin H. Richman*
brichman@edelson.com
EDELSON PC
350 North LaSalle Street, 13th Floor

Chicago, Illinois 60654
Tel: 312.589.6370
Fax: 312.589.6378

Jeff Raizner*
efile@raiznerlaw.com
Andrew Slania*
aslania@raiznerlaw.com
Amy Hargis*
ahargis@raiznerslania.com
RAIZNER SLANIA LLP
2042 Dunlavy Street
Houston, Texas 77006
Tel: 713.554.9099
Fax: 713.554.9098

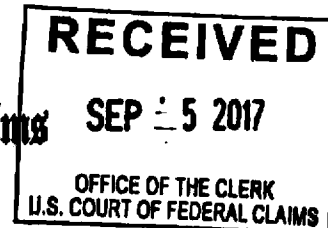
Of Counsel for Plaintiffs and the Putative Class

*Admission to be sought.

ORIGINAL

In The United States Court of Federal Claims

Cover Sheet



Plaintiff(s) or Petitioner(s)

Names: Angela Bouzerand, Wayne Pesek, Amy Pesek, and Fred Paul Frenger, individually and on behalf of all others similarly situated,

Location of Plaintiff(s)/Petitioner(s) (city/state): Houston, Texas.

(If this is a multi-plaintiff case, pursuant to RCFC 20(a), please use a separate sheet to list additional plaintiffs.)

Name of the attorney of record (See RCFC 83.1(c)): Jay Edelson (admission to be sought)

Firm Name: Edelson PC

Contact information for pro se plaintiff/petitioner or attorney of record: **17-1195 C**

Post Office Box: _____

Street Address: 350 North LaSalle Street, 13th Floor

City-State-ZIP: Chicago, Illinois 60654

Telephone & Facsimile Numbers: Tel: 312.589.6370; Fax: 312.589.6378

E-mail Address: jedelson@edelson.com

Is the attorney of record admitted to the Court of Federal Claims Bar? Yes No

Nature of Suit Code: 514

Select only one (three digit) nature-of-suit code from the attached sheet. See attached sheet for three-digit codes. If number 213 is used, please identify partnership or partnership group:

Agency Identification Code: DOD

Number of Claims Involved: Not yet known

Amount Claimed: \$ \$5,000,000+
Use estimate if specific amount is not pleaded.

Bid Protest:

Indicate approximate dollar amount of procurement at issue: \$ _____

Was this action preceded by the filing of a protest before the GAO? Yes No

If yes, was a decision on the merits rendered? Yes No

Takings Case:

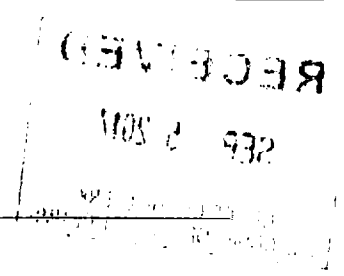
Specify Location of Property (city/state): Houston, Texas

Vaccine Case:

Date of Vaccination: _____

Related Case:

Is this case directly related to any pending or previous cases? Yes No
If yes, you are required to file a separate notice of directly related case(s). See RCFC 40.2.



ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Hurricane Harvey: Second Lawsuit Filed Against United States Over Addicks, Barker Water Releases](#)
