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Big Storms, Big Debt, and Biggery-Waters: Navigating Florida's Uncertain Flood Insurance Future

Loren M. Vasquez

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Cover Page Footnote

Mr. Vasquez would like to recognize James Graves, Kelsey Peterson, and their staff editors for their superb editorial assistance. He would like to thank Professor Randall Abate, who supervised this article, and Professor Robert H. Abrams, who, along with Professor Abate, supervised his work for NOAA-ECSC and sparked his interest in Environmental Law. Special gratitude is due to his wife, Jenna, for bringing this important issue to his attention and for tirelessly supporting him.

Big Storms, Big Debt, and *Biggert-Waters*:
Navigating Florida’s Uncertain Flood Insurance Future

Loren M. Vasquez[†]

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I. INTRODUCTION

The National Flood Insurance Program (NFIP) began with good intentions. It was first enacted for the purpose of making flood insurance reasonably affordable while protecting against losses after disasters.¹ However, Congress failed to accurately update the program in the face of climate change and new coastal development. Because of this oversight, the overall risk associated with the program outgrew the collection of premiums, which led to an enormous debt to be incurred by the federal government.² Massive storms came and went, repeatedly increasing the program's already insurmountable debt.³ Storms notwithstanding, coastal development in vulnerable areas continued.⁴ Eventually, to address this challenge, the Biggert-Waters Flood Insurance Reform Act of 2012 was passed with the general goal of updating flood maps, removing subsidies that kept customers at the same price for decades, and increasing premiums to accurately reflect current conditions.⁵

Unfortunately, the program failed to make any significant or effective changes for many years. Once changes did finally come, they led to massive increases in insurance rates and a massive public outrage.⁶ Residents of states like Florida faced the possibility of losing their homes because of skyrocketing insurance costs.⁷ As soon as the five-year roll out of the act began, a group of senators and representatives from both parties began to try to halt, delay, or repeal the act.⁸ Eventually, delay of the reform was successful,

1. 42 U.S.C. § 4002(a)(6) (2014).

2. Dominic Spinelli, *Reform of the National Flood Insurance Program: Congress Must Act Before the Next Natural Disaster*, 39 REAL EST. L.J. 430, 441 (2011).

3. Ledyard King, *Rubio says he'll vote to delay flood insurance hikes*, USA TODAY, Jan. 10, 2014, 7:34 AM, <http://www.usatoday.com/story/news/politics/2014/01/10/flood-insurance-florida-rate-hikes/4393799/>.

4. See Christine M. McMillan, *Federal Flood Insurance Policy: Making Matters Worse*, 44 HOUS. L. REV. 471, 497-98 (2007).

5. See Eli Lehrer, *Strange Bedfellows: SmarterSafer.Org and the Biggert-Waters Act of 2012*, 23 DUKE ENVTL. L. & POL'Y F. 351, 352 (2013).

6. See *infra* notes 124-127.

7. See Letter from Gov. Rick Scott, Florida, to President Barack Obama (Jan. 9, 2014), available at <http://www.flgov.com/2014/01/09/gov-scott-obama-failing-to-delay-nfip-law-that-hurts-floridians-yet-delayed-healthcare-law/>.

8. See Christopher Joyce, *Federal Flood Insurance Program Drowning in Debt. Who will pay?*, NPR (Jan. 1, 2014), <http://www.npr.org/2014/01/01/258706269/federal-flood-insurance-program-drowning-in-debt-who-will-pay>.

leading to a return to the former, unsustainable state of the NFIP.⁹ However, avoiding this massive problem is not a solution; this article proposes several viable alternatives that would alleviate these issues and solve the problems of the current NFIP.

First, an examination of the history of hurricane flooding in the United States and its effects on Florida and other Southeastern states is explored, which culminated in the creation of the NFIP. This is followed by a summary of the NFIP's organization and goals, and a discussion of the record-breaking storms and ensuing problems that necessitated the implementation of the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12).

Second, a review of Biggert-Waters, its intended effects on coastal properties, the overwhelming backlash against BW-12, and eventual enactment of the Homeowner Flood Insurance Affordability Act of 2014 (HFIAA), which repealed many portions of BW-12, is presented.

Lastly, an analysis of the future of flood insurance regulation, taking into account recent climate change reports and their projections about storm events is presented and explored. Considering climate change effects and the state of the NFIP, options for the future of the program are presented. An assessment of whether the HFIAA is a proper solution to the NFIP's various problems is proffered, followed by a proposal for a private flood insurance market with mandatory participation. Finally, a solution is offered in the form of a recommendation that the NFIP be repurposed with an emphasis on land use regulation and retreat to achieve the goal of preparation for and avoidance of hurricane flood losses.

II. THE FEDERAL FLOOD INSURANCE FRAMEWORK

A. The Emergence of the National Flood Insurance Program

At 11:00 a.m. on September 6, 1965, the residents of South Florida were placed under hurricane warning as Hurricane Betsy was steadily making its way through the northern Bahamas.¹⁰ After plowing through the Bahamas, leaving behind a surprisingly low casualty count of only one, the hurricane's eye made its way to the

9. See Homeowner Flood Insurance Affordability Act of 2014, Pub. L. No. 113-89, 128 Stat. 1020 (2014).

10. Arnold L. Sugg, *The Hurricane Season of 1965*, 94 MONTHLY WEATHER REV. 183, 186 (1966), available at http://www.aoml.noaa.gov/hrd/hurdat/mwr_pdf/1965.pdf.

Florida Keys.¹¹ Significant flooding affected the Keys, mainly due to the Northerly winds that preceded the storm's center; several feet of water flooded highways and the first floors of many buildings.¹² While Betsy's forty-mile-wide eye passed over the keys, the bands of the 600-miles-wide storm stretched north to Fort Lauderdale.¹³ The noticeable damage along the Florida Atlantic Coast included considerable flooding of beach roads and low-lying properties in Miami, Key Biscayne, and Fort Lauderdale.¹⁴ Downtown Fort Lauderdale, in particular, was under a foot of water due to a six-foot storm surge with some homes on Las Olas Isles submerged during the storm.¹⁵

Completing its course through Florida, Betsy proceeded into the Gulf of Mexico, where it sped forward directly towards Louisiana.¹⁶ When Betsy made landfall in Louisiana at 135 mph,¹⁷ only foundations and debris were left behind.¹⁸ Overall, around 4,800 square miles of Louisiana were flooded.¹⁹ The total cost of damage caused by Betsy was over \$1.4 billion, with over \$139 million in Florida alone.²⁰ Betsy was the first billion-dollar hurricane.²¹

The compounded damages from Betsy's attack on the Gulf Region led to an influx of unreasonably high premiums for flood insurance from private insurers.²² Because of the unprofitability of underwriting flood policies, few insurance companies offered flood insurance.²³ Therefore, flood victims depended on federal taxpayer-financed disaster programs, prompting Congress to enact the National Flood Insurance Act of 1968 (NFIA).²⁴ In defining the act's purposes, Congress found that it was not economical to burden

11. *Id.* at 186.

12. *Id.*

13. 1965: Hurricane Betsy smashes ashore near New Orleans, THE TIMES-PICAYUNE, Dec. 8, 2011, http://www.nola.com/175years/index.ssf/2011/12/1965_hurricane_betsy_smashes_a.html.

14. Sugg, *supra* note 10, at 187.

15. THE TIMES-PICAYUNE, *supra* note 13.

16. Sugg, *supra* note 10, at 187.

17. THE TIMES-PICAYUNE, *supra* note 13.

18. *Id.*

19. U.S. ARMY ENGINEER DISTRICT, NEW ORLEANS CORPS OF ENGINEERS, REPORT ON HURRICANE BETSY 9 (Sept. 8-11, 1965), available at http://library.water-resources.us/docs/hpdc/docs/19651100_Hurricane_Betsy.pdf.

20. Sugg, *supra* note 10, at 189.

21. THE TIMES-PICAYUNE, *supra* note 13.

22. Spinelli, *supra* note 2, at 435.

23. C.E.R. 1988 v. Aetna, 386 F.3d 263, 266 (3d Cir. 2004).

24. Spinelli, *supra* note 2, at 435.

the private insurance market alone in an effort to make reasonable and affordable coverage available.²⁵ Congress also recognized that annual losses from floods were increasing at an “alarming rate,” and noted that the propensity for tragic loss of life and property caused by flooding was something the “Nation cannot afford.”²⁶ In addressing costly disaster relief benefits, it was noted that most of the victims are still not adequately compensated.²⁷

B. Implementing the NFIP

In an effort to address the problem of flood losses and costly inadequate relief, Congress declared people already living in flood-prone areas should have an opportunity to buy insurance and adequate limits of coverage as a matter of public policy.²⁸ Adequate limits were deemed necessary to indemnify these people for losses due to future flood disasters.²⁹ The two main goals of the program were to make flood insurance available across the nation through a cooperative effort between the federal government and the private insurance industry and to provide flexibility.³⁰ A flexible program was desired to allow for insurance to provide an effective strategy of “pooling risks, minimizing costs, and distributing burdens equitably” between those protected by flood insurance and members of the general public.³¹ Thus, it was quite clear from the time of its enactment that Congress intended the NFIP to be a program that adapted to the nation’s circumstances so that it could remain viable and effective. Other enumerated purposes of the NFIA included increasing authorized limits of coverage, identifying flood-prone areas, requiring state and local participation and adoption of flood-plain ordinances, and requiring the purchase of flood insurance by property owners who have received federal assistance in acquiring or improving land in identified flood hazard areas.³²

The NFIP was initially supervised by the Department of Housing and Urban Development. Upon its establishment in 1979 to assist in disaster preparation, prevention, response, and recovery, the Federal Emergency Management Agency (FEMA) was tasked

25. 42 U.S.C. § 4001(b) (2012).

26. 42 U.S.C. § 4002(a)(1), (a)(5) (2014).

27. *Id.*

28. 42 U.S.C. § 4002(a)(6).

29. 42 U.S.C. § 4002(a)(6).

30. 42 U.S.C. § 4001(d).

31. 42 U.S.C. § 4001(d).

32. 42 U.S.C. § 4002 (b).

with administering the NFIP.³³ FEMA was authorized by Congress to prescribe methods for adjusting claims and paying for damages to or losses of covered properties.³⁴ As part of its administration of the NFIP, FEMA created the Write-Your-Own (WYO) program.³⁵ The WYO program allows private insurers to issue policies while acting as fiscal agents of the United States.³⁶

Under the system created by FEMA, NFIP policies may be issued by FEMA directly or by a WYO company, with the private company selling insurance under its own name with the federal government as a guarantor.³⁷ The companies serve as administrators of policies, while the government pays out the claims;³⁸ however, policies may not be altered without express authorization from FEMA.³⁹ Although the private companies that serve as intermediaries for WYO policies give the impression that it is private insurance, the policies, through their rather involved FEMA oversight, remain federal flood insurance policies. The WYO program has gained in popularity and, as of 2004, more than 90% of NFIP policies were WYO.⁴⁰

The NFIP does condition the issuing of these flood insurance policies. Under the NFIP, FEMA must also oversee communities' implementation of flood zone ordinances in order to promote "sound land use by minimizing exposure to flood losses."⁴¹ The purposes of the flood zone ordinances include limiting development on land exposed to flood damage, minimizing flood damage, guiding future construction from flood-prone areas, and authorizing ongoing studies of flood hazards to provide for a continuing assessment of the flood insurance program and evaluation of the program's impact on land use requirements.⁴²

To be eligible for NFIP coverage, structures must be in a community that has adopted floodplain management ordinances and must follow FEMA's minimum standards for construction in flood-prone areas.⁴³ FEMA must approve the building code regulations of the applying

33. Spinelli, *supra* note 2, at 437.

34. C.E.R. 1988 v. Aetna, 386 F.3d 263, 267 (3d Cir. 2004).

35. *Id.*

36. *Id.*

37. Peal v. N. Carolina Farm Bureau Mut. Ins. Co., Inc., 212 F. Supp. 2d 508, 513 (E.D.N.C. 2002).

38. C.E.R. 1988 v. Aetna, 386 F.3d at 267.

39. Mason v. Witt, 74 F. Supp. 2d 955, 960 (E.D. Cal. 1999).

40. *Id.*

41. 42 U.S.C. § 4001(c).

42. 42 U.S.C. § 4001.

43. McMillan, *supra* note 4, at 481.

community.⁴⁴ In an effort to mitigate damage, the NFIP requires construction in one-hundred year floodplains to be elevated higher than the highest recorded floodwaters, prohibits development in floodways, and specifies construction techniques.⁴⁵

In addition to the mandatory requirements of the NFIP, FEMA provides some voluntary options. FEMA has designed a Community Rating System that recognizes and encourages community floodplain management activities above and beyond FEMA's requirements with the granting of incentives.⁴⁶ The incentive comes by way of discounts to premium rates for actions that reduce flood damage, strengthen and support the NFIP's insurance aspects, and encourage a comprehensive approach to floodplain management.⁴⁷ Despite the regulation of land use and the incentives from the Community Rating System, the NFIP's land use framework really only serves as a condition precedent for flood insurance coverage.

However, the NFIP's slack is picked up in some areas by the Coastal Barrier Resources Act of 1982 (CBRA).⁴⁸ CBRA serves as a direct response to the permitting of coastal development that has resulted in the "loss of barrier resources, threats to human life, health, and property, and the expenditure of millions of tax dollars each year."⁴⁹ The CBRA does not explicitly outlaw development in barrier areas, but excludes flood coverage under the NFIP and thereby halts development in these sensitive coastal areas.⁵⁰ This statute does not necessarily have an expansive effect on the NFIP's issuing of policies because it is focused solely on undeveloped coastal barriers along the Atlantic and Gulf Coasts and the Great Lakes shores, not all flood-prone areas.⁵¹

44. *Id.*

45. *Id.* at 501. Some examples include elevating the first floor to protect development that proceeds in the area. *Id.*

46. *National Flood Insurance Program Community Rating System*, FEMA, (Mar. 19, 2014, 1:56 PM), <http://www.fema.gov/national-flood-insurance-program-community-rating-system>.

47. *Id.*

48. 16 U.S.C. § 3501 (2014).

49. *Id.*

50. Martin M. Randall, *Coastal Development Run Amuck: A Policy of Retreat May Be the Only Hope*, 18 J. ENVTL. L. & LITIG. 145, 159 (2003).

51. 16 U.S.C. § 3501 (2014). The act defines "undeveloped coastal barriers" as depositional geologic features that are subject to wave, tidal, and wind energies, and protect landward aquatic habitats from direct wave attack. § 3501. The definition also includes all associated aquatic habitats. § 3501.

C. Big Storms Test the NFIP

In August 1992, the NFIP encountered a major test when Hurricane Andrew struck South Florida and Louisiana.⁵² Hurricane Andrew destroyed more than twenty five thousand homes, damaged one hundred thousand others, killed sixty-five people, and caused \$41 billion in damage in South Florida alone.⁵³ While greater Miami averted major damage, the storm introduced to South Florida citizens and governmental officials the potential destruction that a storm like Hurricane Andrew could leave in its path.⁵⁴ Decades of minimal hurricanes and tropical storms made Hurricane Andrew a wakeup call for South Florida's coastal residents.⁵⁵ It was estimated that major damage to South Florida might have tripled Hurricane Andrew's immense cost.⁵⁶ Hurricane Andrew's intensity, power, and sustained force over land were much greater than calculated.⁵⁷

Hurricane Andrew was the most expensive natural disaster in U.S. history for thirteen years.⁵⁸ While the NFIP somehow managed to keep afloat after 1968 and survive Hurricane Andrew, nothing could have prepared the program and FEMA for the 2005 hurricane season. A few short months after Hurricane Dennis reached the Florida panhandle as a Category 3 storm, Tropical Storm Katrina became Hurricane Katrina just off the coast of the Miami-Dade/Broward County line on August 25, 2005.⁵⁹ Hurricane Katrina crossed Florida over the following day, entering the Gulf of Mexico and gaining strength to become a Category 5 by August 28.⁶⁰

On August 29, Hurricane Katrina's center made landfall in Louisiana, bringing with it a maximum wind speed that was estimated at 125 mph.⁶¹ Hurricane Katrina made a second landfall near the Mississippi/Louisiana border and led to storm surge

52. John Kostyack, *Reforming the National Flood Insurance Program to Confront Global Warming and Other Environmental Realities: A Win-Win for People and Wildlife*, 40 NO. 2 ABA TRENDS 12, 13 (2008).

53. *Id.*

54. Jonathan Brennan Butler, *Insurers Under Fire: Assessing the Constitutionality of Florida's Residential Property Insurance Moratorium After Hurricane Andrew*, 22 FLA. ST. U. L. REV. 731, 732 (1995).

55. *Id.*

56. *Id.*

57. *Id.*

58. Kostyack, *supra* note 52, at 13.

59. *Hurricanes in History: Hurricane Katrina 2005*, NATIONAL HURRICANE CENTER, <http://www.nhc.noaa.gov/outreach/history/#katrina> (last modified May 30, 2012).

60. *Id.*

61. *Id.*

flooding of twenty-five to twenty-eight feet above normal tide levels along the Mississippi coast and storm surge flooding of ten to twenty feet above normal tide levels along the Louisiana coast.⁶² South Florida collected ten to fourteen inches of rain, while the rest of the inland track along the Gulf received eight to twelve inches of rain.⁶³ Hurricane Katrina left behind over \$81 billion in damages, making it the costliest storm in United States history.⁶⁴ Additionally, Hurricane Katrina's death toll neared approximately 1,830, making it one of the deadliest storms in the nation's history.⁶⁵

No more than a month later, a Category 3 hurricane named Rita made landfall on the Texas/Louisiana border, resulting in approximately \$11.68 billion in damage and 120 casualties.⁶⁶ Hurricane Rita devastated portions of Texas and Louisiana, after first impacting the Florida Keys.⁶⁷ Still, there was more to come, as Hurricane Wilma caused \$30 billion in damages and 63 casualties exactly one month after Hurricane Rita.⁶⁸

However, no matter how fearsome the 2005 hurricane season was, coastal residents in the Gulf Region were not frightened away. In 2006, speaking to the *New York Times*, Philip J. Klotzbach, a hurricane researcher at Colorado State University, said, "[t]here is likely to be an increase in destructiveness from tropical cyclones regardless of whether they are getting more intense or not . . . largely due to the increase in coastal population and wealth per capita in hurricane-prone areas."⁶⁹ Professor Klotzbach and other climate experts stated that the main hurricane problem facing the United States was unabated coastal development in vulnerable places, which was supported by a failure to change government policies and corporate and individual behavior.⁷⁰ At the time, Gulf and Atlantic coastal construction was still going strong.⁷¹

62. *Id.*

63. *Id.*

64. Kimberly E. Smith, *The Go Zone Act: An Innovative Mechanism for Promoting Economic Recovery for the Gulf Coast*, 77 MISS. L.J. 807, 809 (2008).

65. *Id.*

66. *Id.*

67. *Hurricanes in History: Hurricane Rita 2005*, NATIONAL HURRICANE CENTER, <http://www.nhc.noaa.gov/outreach/history/#rita> (last modified May 30, 2012).

68. Smith, *supra* note 64, at 809.

69. Andrew C. Revkin, *Climate Experts Warn of More Coastal Building*, N.Y. TIMES, July 25, 2006.

70. *Id.*

71. *An Examination of the Availability and Affordability of Property and Casualty Insurance in the Gulf Coast and Other Coastal Regions: Hearing Before the S. Comm. on Banking, Housing and*

Coastal population growth is expected to continue, with three-quarters of the U.S. population expected by some to live within fifty miles of a tidal or Great Lakes shoreline.⁷² Worse still, it was projected that the nineteen hurricane-exposed states would be home to more than half of the U.S. population growth between 2000 and 2030.⁷³ There are many reasons why people choose to take up residence near the coasts. Historically, this development had to do with water-based transportation and commercial endeavors.⁷⁴ Currently, the popularity of coastal development has some economic reasoning, but the benefits are primarily aesthetic.⁷⁵ Development near the coasts is not a new trend by any means, and its dangers are not a surprise, but the choice to continue to move into flood-prone areas despite the continued risk of intense storm events does cause a rise in flood risks in these areas.⁷⁶

There was no relief in sight for those who opted to develop in those vulnerable coastal locations.⁷⁷ The year of 2008 brought Tropical Storm Fay, Hurricane Gustave, and Hurricane Ike, which, along with the rest of the fifteen storms that season, caused an aggregate amount of \$54 billion of damages and at least \$10.6 billion in losses for the insurance industry.⁷⁸ The damage directly affected Florida, Georgia, Mississippi, Alabama, and Texas.⁷⁹

These storms helped to expose the various problems with the NFIP. Many financial problems were present, which stemmed primarily from the subsidies provided to properties that suffered repetitive losses, as well as the many grandfathered properties in existence, whose premiums did not accurately reflect the true risk.⁸⁰ These financial concerns led the U.S. General Accounting Office to determine that the National Flood Insurance Program was not actuarially sound.⁸¹ An insurance program deemed to be actuarially unsound suggests that the premiums collected for the policies are insufficient to serve as a reserve for paying out potential catastrophic

Urban Affairs, 110th Cong. 6 (1997) (Statement of Robert Hartwig, President and Chief Economist of Insurance Information Institute).

72. McMillan, *supra* note 4, at 497-98.

73. Hartwig, *supra* note 71.

74. McMillan, *supra* note 4, at 497-98.

75. *Id.*

76. *Id.*

77. Spinelli, *supra* note 2, at 439.

78. *Id.* at 439-440.

79. *Id.* at 439.

80. *Id.* at 440.

81. Randall, *supra* note 50, at 153.

losses.⁸² The unsound actuarial practices of the program are evidenced by the fact that the program has suffered net annual losses as high as \$600 million.⁸³ In addition to the NFIP's financial problems, participation was shown to be an issue after the 2005 Hurricane Season. It became evident that homeowners in certain high risk areas were failing to comply with the mandatory coverage requirements.⁸⁴

Furthermore, FEMA has failed to accurately predict which communities are more flood-prone than others.⁸⁵ This has much to do with another significant problem exposed by Hurricane Katrina: inaccurate and out of date flood maps.⁸⁶ Without updated maps, residents are unable to base their decisions to build or not build in certain areas on the flood risk, in turn making many policies actuarially unsound.⁸⁷ While it is expected that flood maps will be updated every three to five years under the NFIP, some maps in the Gulf Coast were nearly twenty years out of date when Hurricane Katrina struck.⁸⁸ This twenty-year period without an update is significant, considering the fact that during that time, roads, homes, and businesses were constructed that served to alter the coastal landscape.⁸⁹ Coastal development such as this can lead to higher floodwaters that extend farther than the maps depict.⁹⁰ With all of these problems exposed, it quickly became clear to lawmakers that the time had come for drastic reform to the NFIP.

III. THE BIGGERT-WATERS FLOOD INSURANCE REFORM ACT OF 2012

A. Introducing Reform to the NFIP

[T]he National Flood Insurance Program was not intended to be a *static*, never-changing concept; instead, as is apparent from 42 U.S.C. § 4001(a)(4), the Program was intended and designed to respond flexibly to the reasonable needs of those for whose protection

82. *Id.*

83. *Id.*

84. Spinelli, *supra* note 2, at 440.

85. *Id.*

86. *Id.*

87. *Id.*

88. Spinelli, *supra* note 2, at 445.

89. *Id.*

90. *Id.*

the Program, and the insurance policies issued under it, were addressed.⁹¹

It became apparent in the years from 2005 to 2008 that the circumstances encountered in many coastal areas now required the NFIP to show its true flexibility. The residents of coastal areas desperately needed protection from the program. Thus, in 2012, Congress passed and President Obama signed the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12).⁹² BW-12, which extended the NFIP for five years, required changes to flood insurance, flood hazard mapping, grants, and the management of floodplains.⁹³

Congress had several reasons for reforming the NFIP. First and foremost, the program was in substantial debt leading up to BW-12. After 2005, the NFIP borrowed over \$17 billion to pay for claims stemming just from Hurricane Katrina.⁹⁴ Hurricane Sandy hit the Atlantic Coast in 2012, leaving the program with a debt of \$30.4 billion that had been growing for nearly a decade.⁹⁵ Thus, since 2006, the NFIP was considered a “high-risk” governmental program by the Government Accountability Office.⁹⁶

Another focus of the congressional reform of the NFIP was its lack of actuarial soundness. Increasing this soundness required a balance between cost and risk for all policyholders.⁹⁷ A large obstacle that needed to be overcome was the removal of subsidies and grandfathered rates, which were originally implemented to improve the affordability of high-risk areas.⁹⁸ By 2012, about 20% of all NFIP policies had subsidized rates.⁹⁹ The main problem with

91. *Quesada v. Dir., Fed. Emergency Mgmt. Agency*, 577 F. Supp. 695 (S.D. Fla. 1983), *aff'd*, 753 F.2d 1011 (11th Cir. 1985) (emphasis in original).

92. FEMA, QUESTIONS ABOUT THE BIGGERT-WATERS FLOOD INSURANCE REFORM ACT OF 2012 1 (2013), available at http://www.fema.gov/media-library-data/20130726-1912-25045-9380/bw12_qa_04_2013.pdf.

93. *Id.*

94. Spinelli, *supra* note 2, at 441.

95. WETLANDS WATCH, BIGGERT-WATERS ACT REVIEW IN BRIEF 1 (July 2013), available at <http://www.wetlandswatch.org/Portals/3/WW%20documents/insurance/nfip-changes-initial.pdf>.

96. J. Kevin A. McKechnie, Senior Vice President & Director ABA Office of Insurance Advocacy, Testimony to NAIC Examination Oversight (E) Task Force, Climate Change and Global Warming (E) Working Group: Mortgage Servicing: Flood Insurance Administration after Biggert-Waters 4 (Aug. 26, 2013) (transcript available at <http://www.aba.com/ABIA/Documents/McKec hnieNAICTestimonyIndy8-26-13.pdf>).

97. WETLANDS WATCH, *supra* note 95, at 1.

98. *Id.*

99. *Id.*

these subsidized rates (known as “pre-FIRM”¹⁰⁰ rates) is that they do not reflect the actual risk associated with the properties.¹⁰¹ In 2006, the Congressional Budget Office (CBO) estimated that only about 60% of the premiums needed to achieve actuarial balance were collected due to subsidized rates.¹⁰²

The planned implementation of rates under BW-12 is a 25% increase per year on pre-FIRM, non-primary residences beginning in 2013 until the rate reflects true risk.¹⁰³ Overall, BW-12 has four major elements.¹⁰⁴ First, some “non-conforming properties” with below-market rates (since their communities first joined the program) will have their rates increased.¹⁰⁵ In an attempt to reach full risk, grandfathered rates will be periodically discontinued.¹⁰⁶ Full risk will be reflected in new policies for any new policyholders.¹⁰⁷ Second, improved maps will be used to define flood rates, incorporating “the best available science,” including science related to possible climate change.¹⁰⁸ Third, the amount of charged premiums will be raised based on these improved maps.¹⁰⁹ Lastly, the program may begin to implement reinsurance to transfer a portion of the nation's flood risk to the private sector.¹¹⁰

These drastic changes all intended to secure the stability of the NFIP as well as the financial futures of its policyholders. However, it soon became evident that this new reform had its own set of issues.

B. Biggert-Waters Backlash

It may have seemed that homeowners and lawmakers were desperate for reform to the NFIP and that BW-12 provided the much-needed solution. After all, homeowners and lawmakers alike in coastal states had suffered through the challenges of massive storm and flooding events. Yet, as much as these storms led to catastrophic effects on homes in coastal regions, a new catastrophe

100. Pre-Flood Insurance Rate Map.

101. WETLANDS WATCH, *supra* note 95, at 1.

102. Spinelli, *supra* note 2, at 442.

103. FEMA, *supra* note 92, at 1.

104. Lehrer, *supra* note 5, at 352.

105. *Id.*

106. FEMA, *supra* note 92, at 3.

107. FEMA, *supra* note 92, at 2. A full risk rate in flood insurance reflects both the risk assumed by the program by the full range of possible losses, including catastrophic floods, and all administrative expenses. *Id.* at 2-3.

108. Lehrer, *supra* note 5, at 352.

109. *Id.*

110. *Id.*

soon became the focus of residents and politicians: increased insurance premiums. This concern was expressed in the following open letter to President Obama, penned by Florida Governor, Rick Scott.

Dear Mr. President:

Your decision to sign the Biggert-Waters Flood Insurance Reform Act of 2012 has had devastating consequences for Florida's families.

Over the past 35 years, Floridians have paid over \$16 billion into the National Flood Insurance Program—roughly four times more than they have received in payments. Yet, as a result of Biggert-Waters, today many Floridians are facing the horror of losing their homes due to soaring flood insurance costs.

Act now and undo the effects of this mistaken law before it cripples Florida's real-estate market, harms even more Floridians, and reverses our state's burgeoning economic recovery.

Sincerely,
Rick Scott
Governor [of the State of Florida]¹¹¹

In 2013, FEMA began phasing in higher premiums as part of BW-12.¹¹² These initial increases applied primarily to second homes and properties that had been transferred from one owner to another.¹¹³ BW-12 initially had broad and enthusiastic support from liberal environmentalists and fiscal conservatives alike.¹¹⁴ Conservatives liked the Act's plan to rapidly curb government spending on flood insurance.¹¹⁵ Environmentalists liked the inclusion of a reflection of the true cost of climate change, which scientists say is "ushering in an era of rising sea levels and more damaging extreme weather, including more flooding."¹¹⁶

However, in 2013, coastal homeowners saw new flood insurance rates that were as much as ten times higher than before.¹¹⁷ Some premiums

111. Letter from Gov. Rick Scott, Florida, to President Barack Obama, *supra* note 7.

112. *Flood Insurance Reform*, FEMA (Apr. 16, 2014, 5:16 PM), <http://www.fema.gov/flood-insurance-reform>.

113. *Id.*

114. Coral Davenport, *Popular Flood Insurance Law Is Target of Both Political Parties*, N.Y. TIMES, Jan. 28, 2014, at A14.

115. *Id.*

116. *Id.*

117. *Id.*

increased by thousands of dollars.¹¹⁸ Many of these unexpected rate increases were a result of 2012's Hurricane Sandy. The storm wreaked havoc on the northeast United States, especially New York and New Jersey, and was consistent with a pattern of climate change producing more severe weather.¹¹⁹ Although only a Category 1 storm, Sandy still managed to produce around \$33 billion worth of damage.¹²⁰ According to certain estimations, had Sandy reached Category 4, she could have caused nearly \$500 billion worth of damage.¹²¹

Sandy was a wake-up call to many residents who had been affected by the destruction, leaving them to choose between two difficult realities: accept a rate increase of up to \$30,000 a year, or pay the necessary amount to rebuild a home to FEMA's necessary standards.¹²² Being confronted with this dilemma was shocking to the people of New York, many of whom had built their homes well before the first flood maps were drawn in 1974 and, thus, had always been protected by subsidized rates.¹²³ No longer could these residents rely on comfortably reasonable premiums; BW-12 was changing their flood insurance policies in a dramatic way.

In response to numerous complaints, Congress called in the director of FEMA, Craig Fugate, to demand a stop to the law it had passed just a year before.¹²⁴ Most surprisingly, Representative Maxine Waters of California, a sponsor of the original law and one of its namesakes, had become one of the most outraged parties.¹²⁵ She now sought to gut the law she had sponsored, which she described as having been "well-meaning," adding, "Never in our wildest dreams did we think the premium increases would be what they appear to be today."¹²⁶ Rep. Waters told Director Fugate at a congressional hearing, "Let me just say, all of the harm that has been caused to thousands of people across the country —[who] are calling us, [who] are going to lose their homes, [who] are placed in this position — is just unconscionable."¹²⁷

118. Joyce, *supra* note 8.

119. Erica Mattison, *Underwater: The Need for Massachusetts to Become Climate Ready*, 8 FLA. A & M U. L. REV. 327, 328 (2013).

120. *Id.*

121. *Id.*

122. Tara Siegel Bernard, *Rebuilding After Sandy, but With Costly New Rules*, N.Y. TIMES, May 10, 2013, at B1, available at http://www.nytimes.com/2013/05/11/your-money/after-hurricane-sandyrebuilding-under-higher-flood-insurance.html?pagewanted=all&_r=0.

123. *Id.*

124. Joyce, *supra* note 6.

125. *Id.*

126. Davenport, *supra* note 114.

127. Joyce, *supra* note 8.

C. Homeowner Flood Insurance Affordability Act of 2014

In response to the public outcry over increased flood insurance premiums, lawmakers began actively working towards a delay of BW-12. On January 30, 2014, the Senate passed a bill known as the Homeowner Flood Insurance Affordability Act of 2014 (HFIAA).¹²⁸ Passing by sixty-seven to thirty-two and co-sponsored by Robert Menendez, Democrat of New Jersey, and Johnny Isakson, Republican of Georgia, the bill was to delay rate increases and effectively gut BW-12.¹²⁹ Four-year retention of flood insurance subsidies was to halt premium hikes and give FEMA time to conduct an affordability study and check the accuracy of its flood maps.¹³⁰ Homeowners who were never previously in a high-risk flood zone would be grandfathered into lower rates.¹³¹

Many were in strong opposition to the HFIAA. Because the bill aimed to delay most increases for four years (beyond the five-year extension the initial act created), budget watchdogs, insurance groups and environmentalists argued that the effort to delay BW-12 “would bankrupt the program and leave coastal property owners more vulnerable to future damages, and that taxpayers would be forced to pay the bill.”¹³² Before the Senate passed the bill, the White House released a statement saying that gutting BW-12 would further erode the financial position of NFIP, reducing the government’s ability to distribute future flood claims.¹³³ Senator Patrick J. Toomey of Pennsylvania, who alternately proposed an amendment to BW-12, criticized the bill passed by the Senate, saying, “We go right back to the insolvent, unsustainable program we had before.”¹³⁴ Many of the parties who opposed the bill pointed to a recent CBO analysis that suggested that a delay would cost the NFIP \$2.1 billion in losses over ten years.¹³⁵ The program is already \$24 billion in debt.¹³⁶

However, the bill succeeded largely because it garnered significant support from both parties in the Senate. Both prominent

128. Andrew G. Simpson, *Senate Passes Flood Insurance Delay, Agent Licensing Bill*, INS. J. (Jan. 30, 2014), <http://www.insurancejournal.com/news/national/2014/01/30/318963.html>.

129. Davenport, *supra* note 114, at A19.

130. Simpson, *supra* note 128.

131. *Id.*

132. Davenport, *supra* note 114.

133. *Id.*

134. Davenport, *supra* note 114.

135. King, *supra* note 3.

136. Davenport, *supra* note 114.

liberals and conservatives alike supported the bill, such as Senator Elizabeth Warren, Democrat of Massachusetts, and Senator Marco Rubio, Republican of Florida.¹³⁷ Senator Rubio, who said, "I'll vote for this bill and I'll support it because it's important to prevent these rate increases from going forward, but I would like to find some long-term certainty to this," joined fellow Florida Senator Bill Nelson, Democrat.¹³⁸ Senator Nelson's main focus was on freezing the rates before they caused irreversible damage, saying, "It's not fair that people are suddenly having to pay 10 times what they were just paying."¹³⁹ Although Senator Nelson found that the bill's delaying provision was a good start, he expressed concern for those people trying to buy or sell homes in the areas in Florida determined by FEMA to be flood risks.¹⁴⁰ A bipartisan agreement similar to that of Florida's senators was presented in Louisiana. Senator Mary Landrieu, Democrat, was joined in her support of the delay bill by Representative Bill Cassidy, Republican of Baton Rouge, her former opponent in the race for Senate.¹⁴¹

With general success in the Senate, the next step for the proposed delay of BW-12 was a vote from the House of Representatives. Originally, House Speaker John Boehner stated explicitly that the House was "not going to do that."¹⁴² Although Speaker Boehner did not support a repeal of BW-12, he was open to alternative ideas to modify the law.¹⁴³ The issue of the House vote initially seemed far from settled. Democratic Senator Charles E. Schumer, of New York, stated, "When this bill passes the House, millions of homeowners across America will breathe a sigh of relief."¹⁴⁴

In the end, a slightly different version of the same Act was signed by President Obama on March 21, 2014, which was intended to delay the implementation of certain provisions of BW-12.¹⁴⁵ Specifically, the HFIAA focuses on lowering certain rate increases

137. Davenport, *supra* note 114.

138. King, *supra* note 135.

139. *Id.*

140. Bruce Alpert, *House Speaker Boehner says House won't take up bill on 4-year delay in flood insurance increases, but more modest change possible*, TIMES-PICAYUNE, Jan. 16, 2014, 3:54 PM, http://www.nola.com/politics/index.ssf/2014/01/speaker_boehner_says_house_won.html.

141. *Id.*

142. *Id.*

143. *Id.*

144. Davenport, *supra* note 114.

145. Homeowner Flood Insurance Affordability Act of 2014, Pub. L. No. 113-89, 128 Stat. 1020 (2014).

and repealing others, refunding excess premiums to some in the latter category.¹⁴⁶ With limited exceptions, the law guarantees that rates will not increase more than 18% annually.¹⁴⁷ The new law also repeals the portion of BW-12 that eliminated grandfathered rates for coverage in certain cases.¹⁴⁸ Additionally, HFIAA requires that FEMA prepare a draft affordability framework, to be completed after the affordability study required by BW-12.¹⁴⁹ HFIAA also requires that mapping be certified as based on “technically credible” data and approaches.¹⁵⁰ One controversial feature of the new law requires a surcharge from all policyholders to offset the continuing existence of subsidies.¹⁵¹ FEMA announced on April 15, 2014, that “effective May 1, people who purchased new homes after Biggert-Waters became law on July 6, 2012, or who didn't have insurance before that date, or whose insurance lapsed, will revert back to premium schedules in effect Oct. 1, 2013.”¹⁵² With that, the months of debate over insurance reform and the possibility of solving the NFIP's problems were tossed aside to return to the status quo.

IV. THE FUTURE OF FLOOD POLICY: WHERE DO WE GO FROM HERE?

The NFIP's problems are not likely to solve themselves, so it is essential that changes are made to the program. However, this opens the door for many conflicts about which direction reform should lead the program, as residents and lawmakers in nearly all coastal states, especially Florida, have a stake in the conversation. Several factors are relevant in determining what the next step should be for this controversial area of law and policy. Section A of Part IV of this paper focuses on recent scientific conclusions about climate change and recommends that lawmakers rely on these conclusions for wise flood insurance decision-making. Section B argues that the HFIAA's stalling of reform is not the proper technique for strengthening the flawed flood insurance program because it ignores

146. FEMA, HOMEOWNER FLOOD INSURANCE AFFORDABILITY ACT OF 2014 OVERVIEW 1 (Mar. 4, 2014), available at http://www.fema.gov/media-library-data/1396551935597-4048b68f6d695a6eb6e6e7118d3ce464/HFIAA_Overview_FINAL_03282014.pdf.

147. *Id.* at 2.

148. *Id.* at 3.

149. *Id.* at 4.

150. *Id.*

151. *Id.* at 3. “A policy for a primary residence will include a \$25 surcharge. All other policies will include a \$250 surcharge.” *Id.*

152. Bruce Alpert, *First premium relief from new flood insurance law implemented by FEMA*, THE TIMES-PICAYUNE, Apr. 15, 2014, 12:01 PM, http://www.nola.com/politics/index.ssf/2014/04/first_premium_relief_from_new.html.

its continually escalating financial and actuarial problems. Section C explores the possibility of abandoning the existing federal framework to instead impose a privatized market for flood insurance that requires participation by homeowners to relieve the overall burden on the risk pool. Lastly, Section D proposes a repurposing of the NFIP to focus less on flood insurance and more on coastal regulation and retreat, generally avoiding debt from numerous massive flood claims altogether. These varied possibilities, if properly implemented, could mean more successful preparation for extreme storm events.

A. Reform Must Reflect Current Climate Change Science

While the focus of the debate over Biggert-Waters seems to revolve primarily around cost, one issue that has been generally overlooked is the impact of climate change on the future of flood insurance. Several reports and papers have reached many important conclusions about the future of climate change, and lawmakers should not ignore its effects on tropical cyclones and flooding. The primary source of climate change information for the global community comes from the Intergovernmental Panel on Climate Change (IPCC), which is comprised of several hundred scientists who have released five reports since 1998.¹⁵³ The Panel's most recent 2014 report, preceded by a draft report released in 2013, makes clear that there is substantial evidence that climate change has affected all continents and oceans.¹⁵⁴ 2013's draft report linked these effects to human activity, naming it the dominant cause.¹⁵⁵ The 2014 report takes on these climate change impacts as a series of risks and points out as gravest the risks to people in low-lying coastal areas exposed to storm surges, coastal flooding, and sea-level rise, as well as those risks to people living in large urban areas who must worry about inland flooding that could wipe out homes and

153. Justin Gillis, *Climate Panel Cites Near Certainty on Warming*, N.Y. TIMES, Aug. 20, 2013, at A1, available at <http://www.nytimes.com/2013/08/20/science/earth/extremely-likely-that-human-activity-is-driving-climate-change-panel-finds.html?pagewanted=all>.

154. Suzanne Goldenberg, *IPCC report: climate change felt 'on all continents and across the oceans'*, THE GUARDIAN, Mar. 28, 2014, 8:48 AM, <http://www.theguardian.com/environment/2014/mar/28/ipcc-report-climate-change-report-human-natural-systems>.

155. *Id.*

businesses.¹⁵⁶ The report also expresses that some of the effects of climate change may be irreversible.¹⁵⁷

Nearly coinciding with the release of the 2013 ICPP draft report was FEMA's release of a report concerning the impact of climate change on the NFIP. Replete with findings and recommendations, the report addressed the expected changes in climate that will affect flood insurance policies through the year 2100.¹⁵⁸ In reference to coastal environments, the report determined that special flood hazard areas are projected to increase by about 55% by the year 2100 if shorelines remain fixed, or by 40% if the shorelines recede.¹⁵⁹ Looking specifically at the Atlantic and Gulf Coasts, the average growth of flood hazard areas, with fixed shorelines, could be nearer to 100% by 2100.¹⁶⁰ The National Oceanic and Atmospheric Administration (NOAA) has determined that approximately eight million people in the U.S. already live in coastal areas at risk of flooding.¹⁶¹ Thus, should the projections of the FEMA report be accurate, an immense number of people will likely find themselves in flood hazard areas. Additionally, coastal areas are home to many of the nation's military, energy, and commercial assets.¹⁶² These critical areas also will become more susceptible to flooding if the FEMA projections are correct.

Much of the effect that climate change could have on coastal flood zones in the future involves precipitation and storm events rather than rising sea levels. The frequency of heavy precipitation events in the U.S. is projected to increase.¹⁶³ Such events are expected to occur about every four to fifteen years by 2100, whereas currently they occur closer to once every twenty years.¹⁶⁴ The warming of tropical sea surface temperature will likely lead to an

156. IPCC WORKING GROUP II, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY – CHAPTER 19: EMERGENT RISKS AND KEY VULNERABILITIES 3 (2013), available at http://ipcc-wg2.gov/AR5/images/uploads/WGIIAR5-Chap19_FGDall.pdf.

157. Goldenberg, *supra* note 154.

158. AECOM, THE IMPACT OF CLIMATE CHANGE AND POPULATION GROWTH ON THE NATIONAL FLOOD INSURANCE PROGRAM THROUGH 2100 (Margaret Davidson et. al. eds. 2013).

159. *Id.* at 144.

160. *Id.*

161. Wendy Koch, *NOAA sees sea level rise of up to 6.6 feet by 2100*, USA TODAY, Dec. 6, 2012, 7:09 PM, <http://www.usatoday.com/story/news/nation/2012/12/06/noaa-sea-level-rise/1750945/>.

162. *Id.*

163. *Future Precipitation Storm Events*, EPA: FUTURE CLIMATE CHANGE, <http://www.epa.gov/climatechange/science/future.html> (last updated Mar. 4, 2014).

164. *Id.*

increase in the intensity of Atlantic hurricanes, specifically by an increase in hurricane rainfall rates and wind speeds of the strongest hurricanes.¹⁶⁵ The level of confidence in these various projections means that many dramatic changes driven by climate change will have severe impacts for coastal areas in states like Florida. What is less certain is how much these startling projections will be taken into account when reevaluating coastal development regulation and flood insurance.

B. Delaying True Reform: Is HFIAA the Right Move?

It is important to determine what the practical effects of delays in updating rates and flood maps and making meaningful changes might mean for the NFIP. In light of the conclusions presented by the IPCC report, it seems clear that storm-related flood events may worsen in the future. Yet, the government has chosen to take a course that fails to account for any changing circumstances and keeps the regulatory framework for flood insurance coverage essentially the same as it has been since 1968. The proposed four-year delay for rate increases and two-year affordability study that would be required would extend beyond 2017, the year in which the restructuring mandated by BW-12 would have ended. In this amount of time, any number of severe tropical cyclones can pummel our coastlines and lead the NFIP into greater debt. While the HFIAA does not entirely repeal all of BW-12, it essentially removes its teeth and fails to give the NFIP a fighting chance to recover. This lack of recovery period could be significant for the program that, even six years later, is still reeling from the awe-inspiring effects of Hurricane Katrina and her cyclonic siblings.

An affordability study seems as though it may provide a proper reform and address the program's needs; it should require an analysis of private and federal interests to determine what the appropriate costs for effectively managing the NFIP would be. John Young, President of Jefferson Parish in Louisiana, argued for delay by stating that "Congress must consider long-term solutions that balance fiscal responsibility with insurance premium affordability."¹⁶⁶ Therefore, at a glance, the HFIAA's proposed delay and affordability study could be the correct choice for the

165. *Id.*

166. John Young, *Guest commentary: Biggert-Waters an assault on the American Dream*, THE ADVOCATE (Nov. 21, 2013), <http://theadvocate.com/news/opinion/7583497-123/guest-commentary-biggert-waters-an-assault>.

NFIP and FEMA. In the short term, homeowners gain some relief and peace of mind in knowing that flood insurance premiums will not skyrocket for at least four years. In the long term, policyholders, as well as policymakers, can rest assured that a proper balance will be struck, as informed by the mandatory affordability study. In that this plan considers both short-term and long-term benefits, it is reasonable to believe it will be successful. However, it is the period of time that bridges the short term to the long term that will prove problematic.

To understand the problem, one need only examine the circumstances that led to reform in 2012 in the first place. The monumental debt that FEMA and the NFIP acquired was the driving force for reform, and to delay that much needed reform would do nothing to alleviate that debt. Homeowners will be temporarily appeased, but at what cost? The result may very well be a total collapse of the NFIP, or simply a later increase of premiums, which by then will only be more necessary and more drastic.

To argue on behalf of the pocketbooks of the homeowners as the important reason for stalling reform of the NFIP is not only one-sided, but nearsighted. Michael Hecht, president and CEO of Greater New Orleans Inc. and the Coalition for Sustainable Flood Insurance, appeals to this sentiment by emphasizing that 55% of Americans live within fifty miles of the coast, and that, “if the Administration wants to address income inequality, it can begin by ensuring that millions of Americans do not lose their homes.”¹⁶⁷ This argument is valid, if narrow. Its foundational fault is the fact that the NFIP was not created with only homeowners in mind. In enacting the NFIA, Congress considered various interests, including private homeowners, private insurers, local governments, and the national economy. The mandatory affordability study will also take into account all of these interests. To let the NFIP’s debt continue to escalate while an affordability study determines the inevitable conclusion that the necessary reform will, in fact, be costly would be to ignore the reasons why the NFIP exists in the first place. Unfortunately, the HFIAA is not a solution to the NFIP’s problems; it is merely an avoidance of the problems the program is facing.

167. Michael Hecht, *Why Obama Should Support Delaying Biggert-Waters Flood Insurance Hikes: Opinion*, INS. JOURNAL (Jan. 28, 2014), <http://www.insurancejournal.com/news/national/2014/01/28/318660.htm>.

C. Repeal BW-12 and HFIAA; Make Room for Private Insurance

Though Congress's main focus in passing the HFIAA was on delaying the effects of BW-12, the idea of more meaningfully repealing the act altogether was expressed. Representative Tom Marino of Pennsylvania introduced one such bill.¹⁶⁸ His proposal would fully strike all policy aspects of BW-12, especially essential language that leads to rate increases.¹⁶⁹ This option gained little traction in comparison to other bills proposing to delay BW-12 (including several which Representative Marino himself has supported).¹⁷⁰ However, this route leaves room for an interesting possibility: if BW-12 were repealed, the next step would be to repeal HFIAA right along with it. In this scenario, it may become necessary for the NFIP, in its current iteration, to be abandoned or restructured from the bottom up due to extreme debt. Thus, new legislation would need to be created to solve the problem of flooding in the United States.

The next step in this scenario may be to return to private insurance, just as was standard when the NFIP was first created and which was later outlined as a goal for BW-12.¹⁷¹ The purpose of such a strategy would be to relieve the U.S. treasury from having to pay out massive losses when major storm events occur. While the current framework of the NFIP does give some control to private insurers through the issuance of WYOs, both the policies and the program are still actually governed by FEMA.¹⁷² Of course, the problem that arises from such a decision is the one that led to FEMA's control of the program in the first place: inability of private insurers to sustain the overwhelming cost of the risk of flood insurance.¹⁷³ The NFIP's significant financial woes are evidence enough of the fact that the cost of insuring coastal, flood-prone property is a daunting task.¹⁷⁴

The U.S. Government Accountability Office (GAO) recently prepared a report to congressional committees entitled "Flood Insurance: Strategies for Increasing Private Sector Involvement" in

168. Press Release, U.S. Rep. Tom Marino, Marino Introduces Legislation to Repeal Biggert-Waters (Jan. 7, 2014), available at <http://marino.house.gov/press-release/marino-introduces-legislation-repeal-biggert-waters>.

169. *Id.*

170. *Id.*

171. See Lehrer, *supra* note 5, at 352.

172. C.E.R. 1988 v. Aetna, 386 F.3d 263, 267 (3d Cir. 2004).

173. See Spinelli, *supra* note 2, at 437.

174. See WETLANDS WATCH, *supra* note 95, at 1; see Davenport, *supra* note 114.

response to the debate over flood insurance reform.¹⁷⁵ The report recommended certain strategies that would promote private market involvement in flood insurance.¹⁷⁶ One condition is for the NFIP to charge full-risk rates for flood policies, with only very specific scenarios for granting a subsidy, so that private insurers, who cannot provide subsidies, would be competitive while offering the same full-risk rates.¹⁷⁷ Additionally, continued federal involvement would be necessary, by way of reinsurance to prepare for catastrophic loss or as a residual market for the highest risk properties.¹⁷⁸ One issue that would require additional creativity would be attaining more customers for private market flood insurance, as the lack of participation limits the risk pool and makes management difficult.¹⁷⁹

The solution to this participation problem for private insurance borrows from another area of insurance: health insurance. Taking a page from the Affordable Care Act, a private market of insurers could be established for flood insurance with the stipulation that all homeowners participate in the market to contribute premiums that will allow for the private market to have the ability to handle the risk of flood disasters.¹⁸⁰ Increasing participation in the flood insurance program would enlarge the risk pool and, thus, reduce premiums. Additionally, if private market insurance becomes sustainable and has successful participation, dependence on FEMA would be eliminated, giving the agency an opportunity to refocus towards general disaster preparation and recovery. This distancing from reliance on complete federal funding would allow for an opportunity to recover and begin reducing the massive current debt of the NFIP.¹⁸¹

The private market for flood insurance is already making strides in Florida, where the state Senate unanimously passed a measure

175. GAO, FLOOD INSURANCE: STRATEGIES FOR INCREASING PRIVATE SECTOR INVOLVEMENT 2 (2014), available at <http://www.gao.gov/assets/670/660309.pdf>.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 17.

180. See generally 26 U.S.C. § 5000A(f) (2014); see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

181. Andrew G. Simpson, *How to Encourage Private Flood Insurance; Why Delaying Biggert-Waters Is Not the Answer*, INSURANCE JOURNAL (Jan. 24, 2014), <http://www.insurancejournal.com/news/national/2014/01/24/318297.htm>.

that provides homeowners with private alternatives to the NFIP.¹⁸² Florida's relationship with the NFIP is rather strained, as Florida contains 37% of all the NFIP's policies yet has only received \$3.7 billion of the \$50 billion paid out in the history of the program.¹⁸³ About 268,500 homeowners in Florida had subsidized policies from the NFIP that would have been exposed to significant rate increases due to BW-12.¹⁸⁴

The Florida plan allows for homeowners to purchase less coverage than is required by the NFIP, which has limits of \$250,000 for a home and \$100,000 for personal property.¹⁸⁵ Under the Florida measure, a homeowner could choose to insure only her outstanding mortgage balance, the home's replacement cost, or the home's actual cash value.¹⁸⁶ While these options for homeowners will likely have broad appeal and, thus, increase participation in insurance, they do not protect development in flood-prone areas. These homeowners will receive what they pay for; in the case of a catastrophic flood event, they will only be minimally covered. However, in the end, this strategy may support the larger goal of rescuing at least a portion of the national economy by avoiding a further accumulation of debt due to the NFIP.

D. Redesigning the NFIP with a Focus on Regulating Coastal Development

Enacting the HFIAA essentially erased any significant memory of the reform that was BW-12. The current solution that Congress selected is to delay any true reform of the NFIP for the time being. Meanwhile, the other possibility—breaking down the NFIP by taking an extreme shift toward private market insurance—would be far too complex and problematic. Therefore, the most practical solution may be some middle ground where all interests are considered. SmarterSafer.org, a group representing environmental, taxpayer, insurer, and housing interests, commented on Senate's vote to delay BW-12, stating, "Today's vote further underscores the need to modify, rather than abandon, badly needed reforms to the

182. Mary Ellen Klas, *Florida Senate passes bill to launch private flood insurance option*, TAMPA BAY TIMES, Mar. 26, 2014, 2:43 PM, <http://www.tampabay.com/news/business/banking/florida-senate-passes-bill-to-launch-private-flood-insurance-option/2172052>.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

National Flood Insurance Program.”¹⁸⁷ This statement is accurate. If one thing has become evident, it is that there needs to be a change in the NFIP, or else the outcome may not be agreeable.

Luckily, much of what may be necessary to revitalize the NFIP is already within the program’s parameters. While the program is directly named for its main activity, flood insurance, it also contains distinct control over land use and regulation of coastal development. One of the NFIP’s main purposes has long been “to encourage state and local governments to be more active in regulating the development and use of land that is exposed to potential flood damage, thereby relieving the federal government of the heavy burden of flood disaster relief.”¹⁸⁸ The NFIP contains language that grants it the power to promote proper land use to avoid flood damage.¹⁸⁹ Additionally, the Community Rating System provides incentive for those homeowners who go above and beyond the requirements of FEMA’s regulations.¹⁹⁰ Where the NFIP fails to enforce land use regulations, the Coastal Barrier Resource Act actually steps in to take care of the job, excluding NFIP coverage to protect life and property.¹⁹¹ Although land use and mitigation have not been the hotly contested topic of flood insurance reform, the subjects are certainly relevant. There must be a balanced compromise between insurance and land use regulation to create a sound coastal flood policy.

One solution that would relieve some pressure from of the insurance side of the program would be a restructuring of the current regulatory framework. One new focus could be construction regulation to prevent and correct disaster damage. This solution would not look solely to an adjustment of premiums as a solution to the NFIP’s debts, which in the past has been a reactive approach to managing disaster losses. When a major storm such as Betsy or Katrina comes around, the government scrambles to adjust and lessen the blow to our regulatory structure. Rather than this haphazard remedial approach, proactive implementation of stronger land use measures could be the solution the NFIP needs.

The CBRA serves as a strong example of what the NFIP could do with regard to land use regulation. The act focuses on avoiding

187. Simpson, *supra* note 128.

188. *Beverly v. Macy*, 702 F.2d 931 (11th Cir. 1983).

189. 42 U.S.C. § 4001(c).

190. FEMA, *supra* note 46.

191. *See* Randall, *supra* note 50, at 159.

damage to coastal areas, particularly barriers, and any ecosystem or construction that this protected area entails.¹⁹² With this strict goal in mind, the act makes it necessary to give a firm “no” to certain proposed developments. What the CBRA recognizes is that certain coastal harms are inevitable. With support from the IPCC report, one can only expect that these harms are here to stay.¹⁹³ The CBRA essentially determines that these coastal regions are not to be inhabited due to the loss that will almost surely occur; it would be wasteful to continue to allow the same buildings to be erected in these areas. The overall message of the CBRA: retreat from the coasts.

Meanwhile, the NFIP’s main goal has always been to provide affordable and accessible flood insurance.¹⁹⁴ No matter how extreme the storms or the debt, the focus on affordability remained. When desperately needed reform finally arrived in the form of BW-12, homeowners and lawmakers alike scoffed at the idea of having to pay more for protection against an inevitable and escalating harm. Upon moving to and constructing a home in a flood-prone coastal zone, one can generally rely on the certainty that FEMA and the NFIP will provide the necessary relief after big, bad storms. The overall message is that residents should feel free to move to a flood-prone area. Also, because of the NFIP’s failure to update premiums, the second part of the message is an assurance that residents will be charged far less than needed to sustain the program. Regulating development is an afterthought for the NFIP because the preference is simply to rebuild after a storm, as promised.

Proposing an increase in land use and construction regulation through the power of the NFIP shifts the strategy of the program to one that promotes retreat and thereby avoids and mitigates hurricane flood damage to insured properties. In a coastal state like Florida, this would mean that residents in hazardous flood zones would lose the safety net of flood insurance payouts when a storm hits. It would not be long before many residents made the choice to stop rebuilding their homes along Florida’s many beaches and began to seek landward shelter. This proposition is not without controversy. The debate is often politicized, as exemplified by Democratic Gov. Andrew Cuomo in New York pushing a retreat approach to relocate flood victims, while Republican Gov. Chris Christie in New Jersey

192. 16 U.S.C. § 3501.

193. See generally Goldenberg, *supra* note 154.

194. 42 U.S.C. §4002 (a)(6).

“has jumped aboard the bandwagon against the NFIP and against FEMA, assailing them at town hall meetings as agents of sloth and caution in a moment of urgent citizen need.”¹⁹⁵

The reason that strict land use regulation is a necessary option is because continued funding of flood insurance in high-risk areas is a losing game. The solution to the program’s failings was packaged nicely in BW-12, but it was rejected. So rather than spending time on an affordability study that will only show the obvious conclusion that flood insurance is not affordable, the government must commit time and energy into repurposing the NFIP as a land use and development planning tool for vulnerable coastal areas. The program could use its insurance framework to mitigate the effects of catastrophic losses when they occur on a massive scale, but for the most part the losses should be avoided by proper foresight and regulation.

Even without retreat, the systems already in place are powerful enough to create a solid foundation for sustainable development. Even if the NFIP doesn’t last, some of the coastal construction will, so long as it is built with scientific advancement in mind, as well as the well-known threat of future cyclone events. After many years of extending a helping hand to homeowners, with few expectations in return, the United States must pull the hand away and lay down some strict rules.

Though slightly extreme compared to the United States’ flood policy approach, the strategy of the Netherlands serves as a fascinating case study not of retreat but of preparedness and foresight. In a particular Dutch province twelve feet below sea level, hydrologists ensure that no event like Hurricane Sandy will ever harm their coasts by utilizing an advanced defensive system of flood control to block storm surges.¹⁹⁶ While the method is highly scientific, it is the philosophy towards disaster that is most shocking. Rather than focusing on disaster relief and disaster management, like the U.S., the focus in the Netherlands is on disaster avoidance and anticipating and minimizing the risk of flooding.¹⁹⁷ In the Netherlands, the focus is planning and design that will benefit all

195. Scott Gabriel Knowles, *Flood Zone Foolishness*, SLATE, Mar. 23, 2014, 11:47 PM, http://www.slate.com/articles/health_and_science/science/2014/03/biggest_waters_and_nfip_flood_insurance_should_be_strengthened.html.

196. Andrew Higgins, *Lessons for U.S. from a Flood-Prone Land*, N.Y. TIMES, Nov. 15, 2012, at A6. While there are no hurricanes in the Netherlands, there are ferocious storms which pose a serious threat to the two-thirds of the population who live in flood-prone areas. *Id.*

197. *Id.*

residents, not an endless stream of unsustainable, unaffordable insurance coverage. It is time for U.S. flood insurance and disaster policy to go Dutch.

V. CONCLUSION

The National Flood Insurance Program began with the simple intention to help homeowners. Unfortunately, the program's selflessness has led it down a path of instability and dire financial straits. Now is the time for the program to propel itself into the future as a smarter, more streamlined program that accounts for climate change effects, changes in development in coastal zones, true risk, available science, and its own massive debts. One thing is certain: the NFIP will not last much longer if no action is taken to repair it and save it from debt.

The options that may save the NFIP are drastic, but they could be the catalyst for change in the right direction. Support from a private market of insurers, giving much needed relief to the federal government, would be welcomed with open arms. Alternatively, a repurposing of the program with a focus on land use and development regulation could do more than just alter the program's principles, but could actually alter societal attitudes toward disaster preparedness and climate change. Better yet, the NFIP could combine both recommendations to assure its future strength and prosperity. It will take time and much more debate before another round of drastic reforms occur, but one can only hope that the change arrives before the next big storm does.

