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# Thicker Than Water: America's Addiction to Cheap Flood Insurance

By Jeffrey Valacer\*

## I. Introduction

On the evening of October 29, 2012, Hurricane Sandy made landfall in southern New Jersey, with impacts felt across more than a dozen states.<sup>1</sup> During Sandy's immediate aftermath, more than 23,000 people sought refuge in temporary shelters, and more than 8.5 million utility customers lost power.<sup>2</sup> The storm flooded numerous roads and tunnels, blocked transportation corridors, and deposited extensive debris along the coastline.<sup>3</sup> A year later, more than \$7.9 billion in National Flood Insurance Program ("NFIP") payments had been made to policy holders.<sup>4</sup> In January 2013, Congress passed legislation to temporarily increase NFIP's borrowing authority by \$9.7 billion, from \$20.7 billion to \$30.4 billion to address these claims.<sup>5</sup> The NFIP is in dire financial straits. Hurricane Katrina-related claims alone had put the NFIP at an \$18 billion deficit. As of July 2013, following payments to policy holders for Hurricane Sandy-related claims, the NFIP was \$24 billion in debt to the United States Treasury.<sup>6</sup>

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\*Pace University, J.D.; Fordham University, B.A/M.A. I would like to thank Professor Andrew Lund for his thoughtful feedback and advice on this piece, and my mother for her continued support in all I do.

1. *Hurricane Sandy: One Year Later*, FEMA (Oct. 15, 2013), [http://www.fema.gov/media-library-data/1382967173777-7411aa1b6d729a8a97e84dbba62083d8/FEMA%20Sandy%20One%20Year%20Fact%20Sheet\\_508.pdf](http://www.fema.gov/media-library-data/1382967173777-7411aa1b6d729a8a97e84dbba62083d8/FEMA%20Sandy%20One%20Year%20Fact%20Sheet_508.pdf).

2. *Id.*

3. *Id.*

4. *Id.*

5. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-283, HIGH-RISK SERIES: AN UPDATE (2013), available at <http://www.gao.gov/assets/660/652133.pdf>.

6. *National Flood Insurance Program: Continued Attention Needed to*

As will be seen, an analysis of the history of the NFIP and recent litigation surrounding short-lived reforms which sought to correct massive deficits in the program shows the political volatility of flood insurance in America. Without actuarial principles guiding the program, the program is all but guaranteed a bleak fiscal outlook given budgetary and environmental concerns.

This paper is broken down into three parts. Part I traces the history and evolution of flood insurance in the United States, including the establishment of federal flood insurance and key reforms over the 20<sup>th</sup> and 21<sup>st</sup> centuries. Part II discusses the 2012 flood insurance reform package, subsequent legal challenges to the reforms, and the government's response to political pressure over the reform. Part III concludes discussing the continued need for flood insurance reform, especially in a world of rising sea levels and more frequent, stronger weather events.

## II. A Brief History of the National Flood Insurance Program

### A. *The National Flood Insurance Act of 1968*

The NFIP was established when Congress passed the National Flood Insurance Act ("NFIA") in 1968.<sup>7</sup> The NFIP is a federally-subsidized program, part of an effort to create affordable flood insurance for those living in flood-prone areas.<sup>8</sup> Congress created this program to remedy the fact that flood insurance was not readily available from private insurance companies.<sup>9</sup> It was the result of decades of failed attempts by the United States to physically restrain floodwaters with levees, floodways, reservoirs and other physical structures, all at great

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*Address Challenges Hearing Before the Subcommittee on Economic Policy of the Committee On Banking, Housing and Urban Affairs*, 113th Cong. 4 (2013) (statement of Alicia Puente Cackley, Director, Financial Markets and Community Investment Team, U.S. Gov't Accountability Office), available at <http://www.gao.gov/assets/660/657939.pdf>.

7. National Flood Insurance, Pub. L. No. 90-448, Title XIII, § 1302, 82 Stat. 572 (1968).

8. *Id.*

9. Quyhn T. Pham, *The Future of the National Flood Insurance Program in the Aftermath of Hurricane Katrina*, 12 CONN. INS. L.J. 629, 630 (2006).

expense.<sup>10</sup> The impetus to pass the NFIP came in reaction to the escalating costs of ad hoc post-disaster relief legislation, triggered initially by the Alaska earthquake of 1964, and followed by severe flooding and damage from Hurricane Betsy in 1965, America's first billion dollar hurricane.<sup>11</sup> Additionally, the NFIP was implemented in the midst of a remarkable population shift to hurricane-vulnerable states and coastal counties.<sup>12</sup> For example, since 1950, Florida's astounding 579% growth rate was the highest in the nation, raising it from 20th to 4th in population.<sup>13</sup> The NFIP was a congressional response that specifically sought to manage development in floodplains and encourage state and local governments to "constrict the development of land which is exposed to flood damage."<sup>14</sup> The NFIP enables property owners in participating communities to purchase insurance as a protection against flood losses in exchange for state and community floodplain management regulations that reduce future flood damages.<sup>15</sup> Participation in the NFIP is based on an agreement between communities and the federal government.<sup>16</sup> Flood insurance is made available within a community when it adopts and enforces a floodplain management ordinance to reduce future flood risk to new construction in floodplains.<sup>17</sup> Given the NFIP's origin and mission there was practically a guarantee that politics would play a large role in its administration. Indeed, in the years immediately following the creation of the NFIP there was pressure to expand coverage directly from real estate and construction interests—as well as municipalities looking to

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10. Oliver A. Houck, *Rising Water: The National Flood Insurance Program and Louisiana*, 60 TUL. L. REV. 61, 64-65 (1985).

11. Scott Gabriel Knowles & Howard C. Kunreuther, *Troubled Waters: The National Flood Insurance Program in Historical Perspective*, 26 J. POL'Y HIST. 327, 327 (2014).

12. *Id.*

13. *Id.*

14. 42 U.S.C. § 4001(e)(1)-(2) (2012).

15. THOMAS L. HAYES & SHAMA S. SABADE, FEMA, NATIONAL FLOOD INSURANCE PROGRAM: ACTUARIAL RATE REVIEW 2 (2004), available at [http://www.fema.gov/media-library-data/20130726-1554-20490-7222/rate\\_rev04.pdf](http://www.fema.gov/media-library-data/20130726-1554-20490-7222/rate_rev04.pdf).

16. *Id.*

17. *Id.*

sustain tax revenues through development.<sup>18</sup>

It was a matter of legislative finding that floods lead to personal hardships and economic distress which in turn require sharing the risk of flood losses through a national program of flood insurance.<sup>19</sup> Congress also found that “it is in the public interest for persons already living in flood-prone areas to have both an opportunity to purchase flood insurance and access to more adequate limits of coverage, so that they will be indemnified, for their losses in the event of future flood disasters.”<sup>20</sup> The Act originally provided subsidized insurance only to properties already existing at the time the area within which they were located was identified as a Special Flood Hazard Area (“SFHA”).<sup>21</sup>

As the Army Corps of Engineers went about its work of assessing and mapping hazards in the early days, it might find a community to have a greater than 1% chance in any given year of a serious flood.<sup>22</sup> Communities in these zones were deemed to be SFHAs, and this designation placed the community under pressure to pass ordinances restricting floodplain development or lose NFIP eligibility.<sup>23</sup> Faced with restricting development or taking chances on a hurricane and hoping for disaster relief payments, many communities in the early years of the NFIP chose to take their chances.<sup>24</sup>

When category five Hurricane Camille hit the Gulf Coast in August 1969 (259 killed, \$1.4 billion in losses) only two communities (Fairbanks, Alaska and Metairie, Louisiana) were participating in the NFIP.<sup>25</sup> Only two more communities would be deemed eligible by the end of 1969.<sup>26</sup> This dismal state led Congress to amend the program and allow communities that had not yet been mapped for flood hazard or had actuarial rates

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18. Knowles & Kunreuther, *supra* note 11, at 336-37.

19. 42 U.S.C. § 4001(a)(1)-(4).

20. *Id.* § 4002(a)(6).

21. Saul Jay Singer, *Flooding the Fifth Amendment: The National Flood Insurance Program and the “Takings” Clause*, 17 B.C. ENVTL. AFF. L. REV. 323, 336 (1990).

22. Knowles & Kunreuther, *supra* note 11, at 336-37.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

computed to join on an “emergency” basis as long they accepted floodplain development controls on new construction.<sup>27</sup> This so-called “St. Germain Amendment” lowered the time from application to certification from 9-12 months to 3 weeks, and brought in 154 new communities (5,500 policies) by mid-1970.<sup>28</sup>

B. *The Flood Disaster Protection Act of 1973*

As just shown, a major defect of the original NFIP was its failure to associate federal assistance with the purchase of flood insurance.<sup>29</sup> At the time, the lack of participation by eligible homeowners was primarily fueled by their reliance upon federal disaster assistance “to finance their recovery.”<sup>30</sup> While Congress could not force homeowners to purchase flood insurance<sup>31</sup> they were able to force participation by using spending powers to establish federally-backed mortgages.<sup>32</sup> The Flood Disaster Protection Act of 1973 required federal financial regulatory agencies to adopt regulations prohibiting their regulated lending institutions from making, increasing, extending or renewing a loan secured by improved real estate or a mobile home located or to be located in a SFHA in a community participating in the NFIP unless property securing the loan was covered by flood insurance.<sup>33</sup> Flood insurance became mandatory for anyone wanting to obtain federally-backed mortgages in high risk flood zones. The Act also made federal financial assistance for construction in flood hazard areas contingent upon the purchase of flood insurance.<sup>34</sup> The Act had the intended effect of increasing enrollment in the NFIP and within seven years nearly every community with flood hazards agreed to join the program.<sup>35</sup>

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27. *Id.*

28. *Id.*

29. Singer, *supra* note 21, at 336.

30. Rachel Lisotta, *In Over Our Heads: The Inefficiencies of the National Flood Insurance Program and the Institution of Federal Tax Incentives*, 10 LOY. MAR. L.J. 511, 517 (2012).

31. *Id.* at 517.

32. *Id.*

33. *Id.* at 515.

34. Singer, *supra* note 21, at 337.

35. Pham, *supra* note 9, at 632.

C. *Creation of the “Write Your Own” Program*

Language in the original 1968 statute provided that the national flood insurance program was “to the maximum extent practicable,” intended to encourage and arrange for financial participation and risk sharing program by insurance companies and others. Specifically, the 1968 Act stated:

In administering the flood insurance program under this subchapter, the Administrator is authorized to enter into any contracts, agreements, or other appropriate arrangements which may, from time to time, be necessary for the purpose of utilizing, on such terms and conditions as may be agreed upon, the facilities and services of any insurance companies or other insurers, insurance agents and brokers, or insurance adjustment organizations; and such contracts, agreements, or arrangements may include provision for payment of applicable operating costs and allowances for such facilities and services as set forth in the schedules prescribed under section 4018 of this title.<sup>36</sup>

In 1983 Congress took the necessary steps to carry out this statutory authority by implementing the “Write Your Own” (“WYO”) program through FEMA<sup>37</sup> regulations.<sup>38</sup> Under WYO, private sector insurers market flood insurance with the federal government acting as guarantor and reinsurer.<sup>39</sup> The WYO program is a cooperative undertaking of the insurance industry and FEMA.<sup>40</sup> It allows participating property and casualty

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36. 42 U.S.C. § 4018 (2012).

37. From 1968 until 1979, the NFIP was administered by the Department of Housing and Urban Development. Beginning in 1979, FEMA assumed control. See AM. INST. FOR RESEARCH ET AL., A CHRONOLOGY OF MAJOR EVENTS AFFECTING THE NATIONAL FLOOD INSURANCE PROGRAM 28 (2002).

38. See 44 C.F.R. §§ 62.23-.24 (2009).

39. Singer, *supra* note 21, at 337.

40. *What Is the Write Your Own Program?*, FEMA, <http://www.fema.gov/national-flood-insurance-program/what-write-your-own-program> (last visited Apr. 8, 2015).

insurance companies to write and service the Standard Flood Insurance Policies (“SFIPs”) of the NFIP in their own names.<sup>41</sup> The companies receive an expense allowance for policies written and claims processed while the Federal Government retains responsibility for underwriting losses.<sup>42</sup> The WYO program operates as part of the NFIP, and is subject to its rules and regulations.<sup>43</sup> Insurance agents serve as the agent of record between the insured and the NFIP, thus the NFIP does not employ agents to broker or to service the flood insurance policies.<sup>44</sup> Implementation of WYO resulted in a drastic increase in the number of NFIP policies.<sup>45</sup> From 1985 to 2004, the number of NFIP policies rose from 2 million to 4.7 million in about 20,000 communities.<sup>46</sup>

D. *The National Flood Insurance Act of 1994*

The National Flood Insurance Act of 1994 imposed the requirement that an institution, or servicer acting on its behalf, upon discovering that security property is not covered by an adequate amount of flood insurance, must, after providing notice and an opportunity for the borrower to obtain the necessary amount of flood insurance, purchase flood insurance in the appropriate amount on the borrower’s behalf.<sup>47</sup> Therefore, even those individuals who do not voluntarily purchase flood insurance through the NFIP are effectively in the NFIP marketplace since their lenders will “force place” the insurance and factor the cost of this insurance into the borrower’s monthly payments.<sup>48</sup> This means that there is no effective “opt out” for

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41. *Id.*

42. *Id.*

43. *Id.*

44. Lisotta, *supra* note 30, at 515.

45. Pham, *supra* note 9, at 633.

46. *Id.*

47. FDIC, COMPLIANCE MANUAL: FAIR CREDIT REPORTING ACT V-6.5 (2014), available at <http://www.fdic.gov/regulations/compliance/manual/pdf/V-6.1.pdf>.

48. There has been recent controversy with banks inflating premiums for force-placed insurance. See David McAfee, *Citibank to Pay \$110M in Force-Placed Insurance Settlement*, LAW360 (Feb. 5, 2014 8:54 PM), <http://www.law360.com/articles/507490>; Allissa Wickham, *Wells Fargo Settles Force-Placed Insurance Class Action*, LAW360 (Mar. 5, 2014 7:41 PM), <http://www.law360.com/articles/515666/wells-fargo-settles-force-placed->



those who do not fully own their flood-prone properties. Indeed, the NFIP expressly prohibits federally-regulated lending institutions from making real estate loans in special flood hazard areas if the property is not covered by a flood insurance policy.<sup>49</sup> Congress also amended the NFIA to provide that new contracts for flood insurance coverage and any modifications to coverage under existing contracts would become effective on expiration of a 30-day period.<sup>50</sup>

Additionally, the 1994 reforms introduced the identifying term “repetitive loss structure” and defined it to mean “a structure covered by a contract for flood insurance under this title that has incurred flood-related damage on two occasions during a 10-year period ending on the date of the event for which a second claim is made, in which the cost of repair, on the average, equaled or exceeded 25% of the value of the structure at the time of each such flood event.”<sup>51</sup>

#### E. *The Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004*

Still, after various forms of financial incentivizing, quasi-privatization, and outright penalization, many residences in floodplains remained uninsured.<sup>52</sup> The most important aspect of the 2004 Reform Act was the identification of “repetitive-loss

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insurance-class-action.

49. 42 U.S.C. § 4012a(b) (2012).

50. National Flood Insurance Act, Pub. L. No. 103-325, Tit. V, § 579, 108 Stat. 2160 (1993). Prior to this, the NFIP required only a five-day waiting period between the purchase of coverage and its effective date. See Christine A. Klein & Sandra B. Zellmer, *Mississippi River Stories: Lessons from a Century of Unnatural Disasters*, 60 SMU L. REV. 1471, 1493-94 (2007). This allowed property owners to “track” approaching floodwaters and purchase insurance at the last minute. *Id.* In 1993, in Chesterfield, Missouri, owners of corporations behind a levee rushed to buy flood insurance just in time to beat the five-day waiting period required before being eligible for insurance benefits. *Id.* When the levee collapsed, sixty-seven claims were filed in the area behind the levee, totaling \$13.2 million. Chesterfield residents received a financial windfall in the form of federal insurance payouts. *Id.*

51. § 512(a), 108 Stat. 2160.

52. Lisotta, *supra* note 30, at 518 (“[A] study in 2005 indicated [eighty-four percent] of residents in flood-prone areas had not purchased flood insurance—although nearly half were supposed to have purchased it by law.”) (internal quotation marks omitted).

properties,” which were defined as “a property that had experienced two or more flood losses within a 10-year period where each loss exceeded \$1,000.”<sup>53</sup> These properties were wreaking havoc on the NFIP. Indeed, they comprised only approximately 1% of insured properties but were expected to account for 25 to 30% of claims losses.<sup>54</sup> Therefore, the 2004 reforms addressed mitigation efforts for homeowners and eligible communities in an attempt to stop reoccurring claims for the same properties.<sup>55</sup> These efforts included buyouts, elevations, relocations, or flood-proofing in hopes of producing savings for policyholders and taxpayers through reduced losses and disaster assistance.<sup>56</sup>

Concerns over repetitive-loss properties were answered by including a new section to the NFIA entitled “Pilot Program for Mitigation of Severe Repetitive Loss Properties.”<sup>57</sup> For purposes of the new section the concept of a “severe repetitive loss property” was defined in the example of “a property consisting of one to four residences to mean a property covered under an NFIP contract for flood insurance that had incurred flood-related damage for which four or more separate claims payments had been made with the amount of each exceeding \$5,000 and the cumulative amount of those claims payments exceeding \$20,000 or for which at least two separate claims payments had been made with the cumulative amount exceeding the value of the property.”<sup>58</sup>

#### F. *NFIP Legal Construction*

States have traditionally retained many controls over the insurance industries operating within their jurisdictions. State legislatures set broad policy for the regulation of insurance.<sup>59</sup>

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53. National Flood Insurance Act, Pub. L. No. 108-264, § 2(3), 118 Stat. 712 (2004).

54. *See id.* § 2(6); Lisotta, *supra* note 30, at 519.

55. Lisotta, *supra* note 30, at 519.

56. § 2(9), 118 Stat. 712.

57. 42 U.S.C. § 4102a (2012).

58. § 102(a), 118 Stat. 712.

59. NAT'L ASS'N OF INS. COMM'R, STATE INSURANCE REGULATION HISTORY, PURPOSE AND STRUCTURE (2011), *available at* [http://www.naic.org/documents/topics\\_white\\_paper\\_hist\\_ins\\_reg.pdf](http://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf).

They establish and oversee state insurance departments, regularly review and revise state insurance laws, and approve regulatory budgets.<sup>60</sup> States' tax premiums of commercial insurers oversee the financial solvency of insurers, require the filing of policy forms with a state insurance regulatory agency, and regulate insurance marketing and claims practices.<sup>61</sup> Each state has a department of insurance and an insurance commissioner who is usually a cabinet-level officer responsible for overseeing that state's insurance regulatory operation.<sup>62</sup>

Under the NFIA, however, state insurance law is preempted by federal law and FEMA regulations due to the federal nature of flood insurance. As the NFIA makes clear:

In the event the program is carried out as provided in section 4071 of this title, the Administrator shall be authorized to adjust and make payment of any claims for proved and approved losses covered by flood insurance, and upon the disallowance by the Administrator of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Administrator, may institute an action against the Administrator on such claim in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and original exclusive jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy.<sup>63</sup>

As the above text shows, Congress conferred exclusive federal court jurisdiction over all disputes arising out of the NFIP. The courts have widely acknowledged that the NFIA

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60. *Id.*

61. *See id.* at 2-5.

62. *See Map of NAIC States & Jurisdictions*, NAT'L ASS'N OF INS. COMM'RS, [http://www.naic.org/state\\_web\\_map.htm](http://www.naic.org/state_web_map.htm) (last visited Apr. 8, 2015).

63. 42 U.S.C. § 4072 (2012).

authorized FEMA to promulgate regulations to preempt state law claims made against issues related to the NFIP.<sup>64</sup> Additionally, courts have interpreted this preemption broadly, placing limited ability on a party to sue FEMA for disputes arising out of NFIP claims handling.<sup>65</sup> Courts have also held that the NFIA creates no private cause of action.<sup>66</sup> Courts have interpreted 42 U.S.C. § 4072 as a limited waiver of sovereign immunity to be construed narrowly.<sup>67</sup>

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64. See *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 390 (5th Cir. 2005) (“[S]tate law tort claims arising from claims handling by a WYO are preempted by federal law.”); *Davis v. Nationwide Mut. Fire Ins. Co.*, 811 F. Supp. 2d 1240, 1248 (E.D. Va. 2011) (holding that that federal law preempts state law, not only with respect to policy interpretation and claims handling under the NFIP, but also with respect to policy issuance and administration, including the rating, renewal, transfer, non-renewal, cancellation, or reformation of any SFIP contract issued by a WYO Company on behalf of the NFIP); *TAF, LLC v. Hartford Fire Ins. Co.*, 549 F. Supp. 2d 1282, 1289 (D. Colo. 2008) (holding that bad faith breach claims are state law tort claims based on the handling of the claim, and therefore preempted by NFIA); *Scratchfield v. Mut. of Omaha Ins. Co.*, 341 F. Supp. 2d 675, 680 (E.D. Tex. 2004) (determining that FEMA effectively preempted all state law claims by revising the language of the SFIP); *Pecarovich v. Allstate Ins. Co.*, 272 F. Supp. 2d 981, 987 (C.D. Cal. 2003) (stating that “an express preemption provision” has been added to policies under the NFIP), *rev'd on other grounds*, 135 Fed. Appx. 23, 26 (9th Cir. 2005); *Friedman v. S.C. Ins. Co.*, 855 F. Supp. 348, 350 (M.D. Fla. 1995) (holding that Federal common and statutory law preempts state contract law for purpose of interpretation of insurance policies issued pursuant to National Flood Insurance Act).

65. See *Gunter v. Farmers Ins. Co.*, 736 F.3d 768, 772-73 (8th Cir. 2013) (holding that the reference to federal common law in insureds’ SFIP only required courts to look to standard principles of interpreting insurance contracts when resolving questions about coverage, not to expand available remedies or causes of action); *Wright v. Allstate Ins. Co.*, 500 F.3d 390, 398 (5th Cir. 2007) (*Wright II*) (holding that plaintiff’s “extra-contractual claims for fraud and negligent misrepresentation are neither explicitly nor implicitly authorized by the NFIA” and therefore dismissing federal common law claims); *In re Katrina Canal Breaches Consol. Litig.*, 572 F. Supp. 2d 664, 668 (E.D. La. 2008) (concluding that the insureds’ extra-contractual claim alleging breach of fiduciary duty against the WYO insurer based on the calculation of SFIP rates was preempted by NFIA and therefore dismissed).

66. *Segall v. Rapkin*, 875 F. Supp. 240, 241 (S.D.N.Y. 1995).

67. *State Bank of Coloma v. Nat’l Flood Ins. Program*, 851 F.2d 817, 820 (6th Cir. 1988) (“Congress, in creating the National Flood Insurance Program, provided that claimants under the program could sue the government in District Court. As we noted, such waivers of sovereign immunity must be strictly construed.”).

III. The Biggert-Waters Flood Insurance Reform and Modernization Act of 2012

A. *The Bigger-Waters Flood Insurance Reform Act of 2012*

On July 6, 2012, President Obama signed the Biggert-Waters Flood Insurance Reform Act of 2012 (“BW-12”) extending the National Flood Insurance Program through September 30, 2017.<sup>68</sup> BW-12 also made significant reforms including phasing out subsidies for many properties, raising the cap on annual premium increases from 10% to 20%, allowing multifamily properties to purchase NFIP policies, imposing minimum deductibles for flood claims, requiring the NFIP administrator to develop a plan for repaying the debt incurred from Hurricane Katrina, and establishing a technical mapping advisory council to deal with map modernization issues.<sup>69</sup>

BW-12 began the elimination of five categories of property to be excluded from receiving subsidized premium rates: (1) residential property that is not the primary residence of an individual; (2) any “severe repetitive loss” property; (3) property that has incurred flood-related damage in which the cumulative amounts of payments equaled or exceeded the fair market value of that property; (4) business property; and, (5) any property that on or after July 6, 2012, the date of enactment, has experienced or sustained substantial damage exceeding 50% of its fair market value or substantial improvement exceeding 30% of the fair market value.<sup>70</sup> Subsidies would be immediately phased out for all new and lapsed policies and upon sale of the property.<sup>71</sup> Additionally, new rules were established to make it easier to apply for the FEMA buyout program.<sup>72</sup> BW-12 also capped

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68. Lori Widmer, *What to Know About the New Flood Insurance Program*, INS. J. (July, 31, 2012), <http://www.insurancejournal.com/news/national/2012/07/31/257675.htm>.

69. Andrew G. Simpson, *President Obama Signs Flood Insurance Reform Bill*, INS. J. (July 9, 2012), <http://www.insurancejournal.com/news/national/2012/07/09/254797.htm>.

70. 42 U.S.C. § 4014(a)(2) (2012).

71. See FEMA, QUESTIONS ABOUT THE BIGGERT-WATERS FLOOD INSURANCE REFORM ACT OF 2012 2 (2013), available at [http://www.fema.gov/media-library-data/20130726-1912-25045-9380/bw12\\_qa\\_04\\_2013.pdf](http://www.fema.gov/media-library-data/20130726-1912-25045-9380/bw12_qa_04_2013.pdf).

72. Widmer, *supra* note 68.

annual premium increases at 20%, a 10% raise over the previous year's cap.<sup>73</sup>

Changes were also made to WYO. Under BW-12, underwriters would receive an expense allowance equal to 30% of premium.<sup>74</sup> Agents would receive 15% commission, and the NFIP picks up 13% of company expenses and 2% of state premium tax.<sup>75</sup> However, despite the desire of NFIP to transfer some of the business to the private market, private insurers are beginning to leave the NFIP's WYO program.<sup>76</sup> Some insurers began jumping ship after 2008, when those 17 extensions of the law and lack of any real change discouraged them.<sup>77</sup> Most notably, State Farm dropped its participation in the program, at which time it was administering 829,273 policies.<sup>78</sup> At the time, the company cited extensions and expirations, as well as procedural changes that forced too much of its resources to the program as reasons for ending their participation in WYO.<sup>79</sup>

As noted above, BW-12 also reestablished the Technical Mapping Advisory Council to make recommendations to FEMA about how to update and improve Flood Insurance Rate Maps ("FIRMs").<sup>80</sup> Additionally, BW-12 required FEMA, in coordination with the Technical Mapping Advisory Council, to create a program to constantly review, update, and maintain NFIP rate maps.<sup>81</sup> BW-12 ordered that when the flood maps change, any property located in an area that is participating in the NFIP will have the risk premium rate adjusted to accurately reflect the current risk of flood to that property.<sup>82</sup>

BW-12 also required that the NFIP devise a schedule for

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73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* Recently, Traveler's Insurance announced they would also be ending their involvement in WYO. See *Travelers to Exit NFIP's Write-Your-Own Program*, *INS. J.* (Aug. 23, 2013), <http://www.insurancejournal.com/news/national/2013/08/23/302727.htm>.

80. 42 U.S.C. § 4101a (2012).

81. *Id.* § 4101b(a).

82. *Id.* § 4015(h).

repayment of the program's debts<sup>83</sup> and establishment of a reserve fund.<sup>84</sup> The reforms set forth in the new plan had the Congressional Budget Office estimate a \$2.7 billion increase in net income over the next ten years.<sup>85</sup> Still, Congress expected a more aggressive plan for paying off the \$18 billion still owed.<sup>86</sup> The National Flood Insurance Reserve Fund was to be separated from other accounts or funds and be available to meet future obligations of the program including payment of claims, claims adjustment expenses, and repayment of debt.<sup>87</sup> A balance that is equal to at least 1% of the total potential loss exposure of all outstanding policies in force in the prior fiscal year is required to be maintained by the reserve fund.<sup>88</sup>

### B. *Mississippi's Lawsuit*

Almost immediately the reforms were met with popular disapproval. On October 1, 2013, FEMA began implementing rate changes on policyholders whereby some individuals saw flood insurance premiums increases more than ten-fold.<sup>89</sup> States and their elected officials began scrambling to stave off full rate increases prior to their October 1, 2013 implementation. On September 26, 2013, the Mississippi Department of Insurance filed a lawsuit against the federal government to try to block rates from increasing on October 1 in the NFIP.<sup>90</sup>

What drove Mississippi's Department of Insurance to sue before any other state was that BW-12 implemented a strategy for remapping the country's flood zones, and that remapping

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83. *Id.* § 4016(c).

84. *Id.* § 4017a.

85. Widmer, *supra* note 68.

86. *Id.*

87. 42 U.S.C. § 4017a(a).

88. *Id.* § 4017a(b)(1).

89. See Lizette Alvarez & Campbell Robertson, *Cost of Flood Insurance Rises, Along with Worries*, N.Y. TIMES, Oct. 13, 2013, at A14 ("Wendy Lockhart and her husband, who live in St. Pete Beach [Florida], a barrier island, said they recently closed on a house not too far away. Just after they put their old house on the market, they found out that for a buyer, the flood insurance rates on that home would jump immediately to \$8,500 a year from \$800.").

90. Emily Wagster Pettus, *Mississippi Insurance Chief Sues to Halt Flood Insurance Rate Hikes*, INS. J. (Sept. 29, 2013), <http://www.insurancejournal.com/news/southeast/2013/09/29/306567.htm>.

appeared to have started with Mississippi.<sup>91</sup> According to FEMA, Mississippi and Louisiana were the first states to include the post-Hurricane Katrina statistics in their rating methodology.<sup>92</sup> This meant that Mississippi's citizens would pay higher rates for many years before citizens of other states would have been required to do likewise.<sup>93</sup> However, Florida<sup>94</sup>, Alabama<sup>95</sup>, Louisiana<sup>96</sup>, South Carolina<sup>97</sup>, and Massachusetts<sup>98</sup> all filed amicus curiae briefs supporting Mississippi's lawsuit.

Mississippi claimed that FEMA's implementation of the scheduled rate increases would be arbitrary and capricious because FEMA had failed to conduct and complete various studies as statutorily mandated by Congress in BW-12 prior to making decisions determining flood insurance premium rate changes.<sup>99</sup> Among the most important studies for the purposes of Mississippi's argument was an "Affordability Study" which read:

(a) FEMA Study.—The Administrator shall conduct a study of—

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91. First Amended Complaint, at 8, *Miss. Ins. Dep't v. U.S. Dep't of Homeland Sec.*, No. 1:13CV379 LG-JMR (S.D. Miss. Closed Apr. 14, 2014).

92. *Id.*

93. *Id.* at 9.

94. *Florida, Alabama Officials Back Mississippi's Suit Over Flood Insurance*, *INS. J.* (Nov. 15, 2013), <http://www.insurancejournal.com/news/southeast/2013/11/15/311397.htm>.

95. *Id.*

96. Chevel Johnson, *Louisiana Joins Lawsuit to Block Flood Insurance Hike*, *INS. J.* (Dec. 2, 2013), <http://www.insurancejournal.com/news/southcentral/2013/12/02/312712.htm>.

97. Tyrone Richardson, *South Carolina Supports Mississippi's Lawsuit Against Flood Insurance Rate Increases*, *POST & COURIER* (Nov. 8, 2013), <http://www.postandcourier.com/article/20131108/PC05/131109423>.

98. *Mass. AG Files Federal Brief Urging Court Action on Flood Insurance*, *INS. J.* (Nov. 18, 2013), <http://www.insurancejournal.com/news/east/2013/11/18/311563.htm>.

99. First Amended Complaint, *supra* note 91, at 10-15, 20-23. Studies to be conducted included: (1) Report on Improving the NFIP; (2) Report of the Administrator on Activities Under the NFIP; (3) GAO Study on Pre-FIRM Structures; (4) GAO Review of FEMA Contractors; (5) Study and Report on Graduated Risk; (6) Interagency Coordination Study; (7) GAO Study on Business Interruption and Additional Living Expenses Coverages; and (8) Report on Inclusion of Building Codes in Floodplain Management Criteria. *Id.*



(3) methods for establishing an affordability framework for the National Flood Insurance Program, including methods to aid individuals to afford risk-based premiums under the National Flood Insurance Program through targeted assistance rather than generally subsidized rates, including means-tested vouchers; (emphasis added) and

(4) the implications for the National Flood Insurance Program and the Federal budget of using each such method.

...

(c) Report.—Not later than 270 days after the date of enactment of this Act, the Administrator shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report that contains the results of the study and analysis under this section.

(d) Funding.—Notwithstanding section 1310 of the National Flood Insurance Act of 1968 (42 U.S.C. 4017), there shall be available to the Administrator from the National Flood Insurance Fund, of amounts not otherwise obligated, not more than \$ 750,000 to carry out this section.<sup>100</sup>

Mississippi argued that since the over-arching purpose of the NFIP is to provide affordable flood insurance in high-risk areas,<sup>101</sup> FEMA's actions were arbitrary and capricious because FEMA was proceeding without considering much of the relevant necessary evidence which Congress had expressly identified and directed FEMA and the Comptroller of the Currency and others to furnish to Congress sufficiently in advance of October 1, 2013 to make necessary changes and corrections to BW-12.<sup>102</sup>

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100. Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, § 100236, 126 Stat. 405, 957 (2012).

101. First Amended Complaint, *supra* note 91, at 9-10.

102. *Id.* at 24.

Mississippi sought declaratory judgment stating that FEMA did not yet have the information that was required in order to make rating decisions and would not have such information until the mandated studies (including those addressing the key issue of “affordability”) are obtained and meaningfully reviewed by FEMA, that the rate changes are not on “reasonable terms” and therefore, contrary to the congressionally-stated intent behind the NFIP, and that FEMA could not move forward until the mandated studies were completed.<sup>103</sup> Mississippi also sought injunctive relief under the Administrative Procedures Act (“APA”) on the basis that FEMA’s failure to complete the mandatory obligations imposed during the first year after the passage of BW-12 were multiple, discrete agency inactions or failures to act which mandate a judicial decree under the APA requiring FEMA to deliver the required reports to Congress and enter into the various contracts and consulting relationships with third parties all before any rate increases are implemented.<sup>104</sup> Mississippi’s entire argument for the studies being mandatory hinged upon the use of the word “shall” in the statutory language of BW-12.<sup>105</sup>

### C. *Analysis and FEMA’s Response*

FEMA filed a motion to dismiss responding that Congress never intended the studies to be completed before implementation of rate changes.<sup>106</sup> The Supreme Court has ruled that agencies are given broad discretion in determining whether or not to act in certain instances. In *Heckler v. Chaney*, prison inmates in California brought suit to compel the FDA to

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103. *Id.* at 26.

104. *Id.* at 31.

105. *Id.* at 34 (“The other provisions of BW-12 cited and discussed previously all contain ‘shall’ as *mandatory* language which FEMA has not complied with.”) (emphasis added).

106. Brief for Defendant, at 11, *Miss. Ins. Dep’t v. U.S. Dep’t of Homeland Sec.*, No. 1:13CV379 LG-JMR (S.D. Miss. Closed Apr. 14, 2014) (“[T]o complete the affordability study required by Section 236 will do nothing to redress the injuries Plaintiff alleges Mississippi residents are suffering. . . . This is because the plain language of subsections 205(e), 205(a)(1)(B) (42 U.S.C. § 4014(g)(1)-(2)), and 205(a)(2) explicitly mandate when the premiums must be phased out or eliminated, without regard to any other action that BW-12 directs FEMA to undertake.”) (citations omitted).

take enforcement action under a law with respect to drugs used for lethal injections to carry out capital punishment.<sup>107</sup> The Supreme Court in *Heckler* held that the presumption of unreviewability of decisions of an agency not to undertake enforcement action was not overcome by the prison inmates.<sup>108</sup> In *Heckler*, the Supreme Court noted that there is a presumption that an agency's refusal to investigate or enforce is within the agency's discretion, unless Congress has indicated otherwise.<sup>109</sup> This presumption of agency discretion can be overcome if Congress indicates that a decision or act is not discretionary.<sup>110</sup> Importantly, the Supreme Court's decision in *Heckler* applies to both agency matters of enforcement and investigation.<sup>111</sup> When discussing why agency determinations should not normally be reviewed the Supreme Court said:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of

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107. *Heckler v. Chaney*, 470 U.S. 821 (1985).

108. *Id.* at 838.

109. *Id.*

110. *Id.* ("The general exception to reviewability provided by § 701(a)(2) for action 'committed to agency discretion' remains a narrow one, . . . but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise.") (citations omitted).

111. *Id.*

administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.<sup>112</sup>

The courts have also had occasion to discuss whether the use of the word "shall" creates an affirmative duty on behalf of agencies to carry out statutorily prescribed actions. In *Sierra Club v. Whitman*, the EPA was sued by citizens and the Sierra Club alleging that EPA failed to take action upon alleged Clean Water Act ("CWA") violations by operators of a wastewater treatment plant.<sup>113</sup> The CWA provides that, whenever "the Administrator finds that any person is in violation" of permit conditions, the Administrator "shall issue an order requiring such person to comply . . . or . . . shall bring a civil action" against the violator.<sup>114</sup> Much the same as Mississippi's argument against FEMA, the Sierra Club relied heavily on the use of the word "shall" in the CWA as forming the basis for mandatory agency action.<sup>115</sup>

However, the Ninth Circuit rejected the Sierra Club's contention that the presence of "shall" in the CWA created a mandatory duty for EPA to investigate or take enforcement action.<sup>116</sup> The Court began by recognizing that "shall" in a statute generally denotes a mandatory duty.<sup>117</sup> However, the use of "shall" is not conclusive.<sup>118</sup> Particularly when used in a statute that prospectively affects government action, "shall" is sometimes the equivalent of "may."<sup>119</sup> The question whether "shall" commands or merely authorizes is determined by the objectives of the statute.<sup>120</sup>

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112. *Id.* at 831-32.

113. *Sierra Club v. Whitman*, 268 F.3d 898, 900 (9th Cir. 2001).

114. *Id.* (quoting 33 U.S.C. § 1319(a)(3) (2012)).

115. *Id.* at 904 ("It is this language, and especially the word 'shall,' upon which the Sierra Club principally relies.").

116. *Id.* at 903-04.

117. *Id.* (citing *Alabama v. Bozeman*, 533 U.S. 146 (2001)).

118. *Id.* at 904 (citing *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)).

119. *Id.* (citing *Richbourg Motor Co. v. United States*, 281 U.S. 528, 534 (1930)).

120. *Id.* (citing *Escoe*, 95 U.S. at 493).

The objective of BW-12 was to bring the NFIP back to financial solvency by employing actuarial principles in determining flood insurance rates. This is evident through the removal of subsidies as outlined above. While Congress put certain, varying deadlines in place for FEMA to complete a wide array of studies, it could not be said that Congress required FEMA to base any rate changes upon the findings of those studies. Specifically, the text of BW-12 related to the Affordability Study (reproduced above) says nothing that requires FEMA to tie any findings from the study to any new flood insurance rates that are meant to reflect actuarial risk. BW-12 merely says:

Not later than 270 days after the date of enactment of this Act, the Administrator shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report that contains the results of the study and analysis under this section.<sup>121</sup>

Clearly absent from this section was any indication that Congress intended to require FEMA to incorporate into its analysis the results of this study (or any other study) in determining new flood insurance premium rates which were primarily meant to show actuarial risk of flooding. All the statute said regarding the study was that it was to be delivered to certain congressional and Senate committees. Viewing Mississippi's claim under the *Chaney* framework and the Ninth Circuit's analysis in *Sierra Club v. Whitman* it is obvious that FEMA would be accorded deference in determining the rate changes before the studies were completed.

In *Guerrero v. Clinton* the Governments of the Territory of Guam, the Commonwealth of Northern Mariana Islands, and State of Hawaii brought suit challenging the failure of the Director of Office of Insular Affairs to issue a report to Congress annually as required by the Compact of Free Association Act of

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121. Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, § 100236, 126 Stat. 405, 957 (2012).

1985.<sup>122</sup> In ruling that the report did not need to be completed and transmitted to Congress, the Ninth Circuit in *Guerrero* said:

Submitting a § 1904(e)(2) report does not cause Congress to “act sympathetically,” nor is it in any way the *sine quo non* to receiving Compact aid. Instead, it is purely informational. Although a more detailed report or a report that highlights impact more emphatically might have a better chance of getting some member of Congress’s attention, it carries no greater clout than that. . . . In sum, no legal consequences flow from a § 1904(e)(2) report and it has no “determinative or coercive effect upon the action of someone else”<sup>123</sup>

In the Mississippi lawsuit, FEMA argued that the reports were meant to be only informational in nature. In requiring FEMA to only *deliver* the studies to Congress it could not be logically concluded that Congress intended FEMA to base any rate changes off the conclusions of those studies.<sup>124</sup>

An additional argument that FEMA advanced in its brief in support of its motion to dismiss was that the Mississippi Department of Insurance lacked standing to sue FEMA for the rate changes. FEMA argued that Supreme Court precedent

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122. *Guerrero v. Clinton*, 157 F.3d 1190, 1191 (9th Cir. 1998).

123. *Id.* at 1194-95 (quoting *Bennett v. Spear*, 520 U.S. 154 (1997)).

124. It should be noted that FEMA attempted to complete the study in the timeframe laid out in BW-12. As FEMA noted in their brief:

In February 2013, FEMA began discussions with NAS [National Academy of Science] and others regarding the requirements for the affordability study. . . . All parties concluded that additional time and funding were needed to complete the full scope of work contemplated in Section 236. . . . On April 18, 2013, FEMA received a letter from NAS explaining that NAS could not complete its analysis under the time and funding constraints provided for in BW-12. . . . After receiving the letter from NAS in April of 2013, FEMA formally notified Congress of the delays, as well as funding constraints, in completing the affordability study.

Brief for Defendant, *supra* note 106, at 8-9 (citations omitted).

forecloses a State agency from suing the federal government on behalf of the State's citizens to protect those citizens from the operation of federal law.<sup>125</sup> Therefore, argued FEMA, any attempt to rely on the injuries of Mississippi citizens and thereby characterize this action as one in *parens patriae*<sup>126</sup> had to be rejected.<sup>127</sup>

FEMA argued that the Supreme Court had made clear that a State cannot bring a *parens patriae* action against federal defendants to protect a state's citizens from the operation of federal statutes.<sup>128</sup> In *Massachusetts v. Mellon*, the Supreme Court stressed that "it is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government;" "it is the United States, and not the state, which represents [its citizens] as *parens patriae*."<sup>129</sup>

However, the Supreme Court has also established the right of a State to sue as *parens patriae* to prevent or repair harm to its "quasi-sovereign" interests.<sup>130</sup> These interests deal primarily with original suits brought directly in the Supreme Court pursuant to Section 2 of Article III of the Constitution under common-law rights of action.<sup>131</sup> The key characteristic in these suits are that they are lawsuits between states or between states and private entities.<sup>132</sup> In order to properly invoke this

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125. *Id.* at 15

126. The doctrine of *parens patriae* (literally meaning "parent of his country") says a government has standing to prosecute a lawsuit on behalf of a citizen, especially on behalf of someone who is under a legal disability to prosecute the suit. BLACK'S LAW DICTIONARY (9th ed. 2009).

127. Brief for Defendant, *supra* note 106, at 15.

128. *Id.* at 11 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)).

129. *Id.*

130. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 258 (1972).

131. *Id.* at 258-59.

132. The Court in *Standard Oil* noted:

This Court's acceptance of the notion of *parens patriae* suits in *Louisiana v. Texas* was followed in a series of cases: *Missouri v. Illinois*, 180 U.S. 208 (1901) (holding that Missouri was permitted to sue Illinois and a Chicago sanitation district on behalf of Missouri citizens to enjoin the discharge of sewage into the Mississippi River); *Kansas v. Colorado*, 206 U.S. 46 (1907) (holding that Kansas was permitted to sue as *parens patriae* to enjoin the diversion of

jurisdiction, the State must bring an action on its own behalf and not on behalf of particular citizens.<sup>133</sup>

The Supreme Court in *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez* also explained that there are no “definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior” in order to support a *parens patriae* action; rather such a determination turns on whether a “sufficiently substantial segment of [the State’s] population” is affected by the direct and indirect effects of the alleged injury.<sup>134</sup> Additionally, after admitting that this term “quasi-sovereign” is vague, the Supreme Court in *Snapp* wrote that “a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.”<sup>135</sup>

The question in the FEMA lawsuit was if those citizens of Mississippi, and *only* those citizens, who were to be negatively impacted by changes in NFIP flood insurance rates rose to the level of a “sufficiently substantial segment of [the State’s] population” as identified in *Snapp*. After all, in Mississippi, 14% of flood insurance policies are subsidized, according to the NFIP.<sup>136</sup> Both residents of Mississippi who do not partake in the NFIP and 86% of flood insurance policyholders would go

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water from an interstate stream); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (holding that Georgia was entitled to sue to enjoin fumes from a copper plant across the state border from injuring land in five Georgia counties); *People of State of New York v. New Jersey*, 256 U.S. 296 (1921) (holding that New York could sue to enjoin the discharge of sewage into the New York harbor); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (holding that Pennsylvania might sue to enjoin restraints on the commercial flow of natural gas); and *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (holding that Minnesota could sue to enjoin changes in drainage which increase the flow of water in an interstate stream).

*Id.* at 258.

133. *Id.* at 258 n.12.

134. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

135. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 426 (5th Cir. 2008) (quoting *Snapp*, 458 U.S. at 607).

136. Pettus, *supra* note 90.



unaffected by any rate changes. Therefore, assuming *arguendo*, that Mississippi would be permitted to sue the federal government for its citizens, the question became if Mississippi's lawsuit violated a basic tenant of the *parens patriae* doctrine because the state's legal action was on behalf of a particular, subset of citizens. Namely, the 14% of flood insurance policyholders having subsidized NFIP policies. An additional question that had to be considered was if protecting cheap, subsidized flood insurance for 14% of flood insurance policyholder in Mississippi qualified as a quasi-sovereign interest in the health and well-being of Mississippi's residents in general.

Lastly, as FEMA argued, Mississippi could not demonstrate that it had standing to challenge BW-12 because it has failed to identify an injury it had suffered from the statute.<sup>137</sup> As the Supreme Court noted in *Lujan v. Defenders of Wildlife*:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."<sup>138</sup>

The only allegations of injury found in Mississippi's Amended Complaint were allegations of injury to Mississippi

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137. Brief for Defendant, *supra* note 106, at 10.

138. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (citations omitted).

NFIP policyholders.<sup>139</sup> Taken together, FEMA claimed, it was obvious that Mississippi lacked the standing to bring the lawsuit and even if they had been able to show an injury or bring a legitimate claim under *parens patriae* it is evident that, given the statutory construct of BW-12 and case law, FEMA was not required to complete the affordability study prior to instituting any rate changes.

#### D. *Politics as Usual*

The Court did not have an opportunity to rule in this critically important case. Rather, in a crass display of election-year politicking, Congress passed, and President Obama signed into law, the Homeowner Flood Insurance Affordability Act of 2014 on March 21, 2014.<sup>140</sup> The President's signature culminated a nearly two-year effort to combat large premium increases for some of the 5.5 million flood insurance policyholders.<sup>141</sup> The Homeowner Flood Insurance Affordability Act limits yearly premium increases to an average of 15% per year for each of the nine property categories listed by FEMA, and stipulates that no individual policyholder pay an increase of more than 18% per year.<sup>142</sup> It calls on FEMA to "strive" to reach the goal that most policyholders have a premium of no more than 1% of the value of their coverage—in other words, \$2,000 for a \$200,000 policy.<sup>143</sup>

The legislation offers its greatest relief to owners of properties that were originally built to code but subsequently were found to be at greater flood risk.<sup>144</sup> Such "grandfathered" homeowners currently benefit from below-market rates that are subsidized by other policyholders, and the new legislation

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139. Brief for Defendant, *supra* note 106, at 11.

140. Bruce Alpert, *President Obama Signs Flood Insurance Bill into Law*, TIMES-PICAYUNE (Mar. 21, 2014), [http://www.nola.com/politics/index.ssf/2014/03/do\\_not\\_run\\_president\\_obama\\_sig.html](http://www.nola.com/politics/index.ssf/2014/03/do_not_run_president_obama_sig.html).

141. *Id.*

142. *Id.*

143. *Id.*

144. Nedra Pickler, *President Obama Signs Flood Insurance Relief Bill*, INS. J. (Mar. 24, 2014), <http://www.insurancejournal.com/news/national/2014/03/24/324217.htm>.

preserves that status and caps premium increases at 18% a year.<sup>145</sup> Another provision, eagerly sought by the real estate industry, allows sellers of older homes built before original flood insurance risk maps were drafted to pass taxpayer-subsidized policies on to the people buying their homes instead of requiring purchasers to pay actuarially sound rates immediately, as required by the 2012 law.<sup>146</sup>

As a result of the legislation, the Mississippi Department of Insurance entered a voluntary notice of dismissal without prejudice on April 14, 2014.<sup>147</sup> However, Insurance Commissioner Chaney said he would refile the lawsuit against FEMA if the latest changes in the flood program prove to be unsatisfactory.<sup>148</sup> FEMA will therefore implement the new 2014 legislation knowing that elected officials and policyholders in flood-prone States are watching closely.

It is no wonder the timing of the reform bill, passed just weeks before Congress was set to begin a two-week spring recess and a month-long summer recess later in August.<sup>149</sup> The reform bill passed by wide margins with support coming from both parties. The bill passed the House of Representatives on March 4, 2014 with 306 yeas, 91 nays, and 33 not voting.<sup>150</sup> Of the yeas, 126 were Republicans and 180 were Democrats.<sup>151</sup> On March 13, 2014 the bill passed the United States Senate with 72 yeas, 22 nays, and 6 not voting.<sup>152</sup> On the Senate side, the yeas were

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145. *Id.*

146. *Id.*

147. Michael Adams, *Mississippi Withdrawing Lawsuit Over Flood Insurance Rates*, *INS. J.* (Apr. 17, 2014), <http://www.insurancejournal.com/news/southeast/2014/04/17/326698.htm>.

148. *Id.*

149. Billy House, *For House, 2014 Will Be a Busy Year—Away From Washington*, *NAT'L J.* (Oct. 31, 2013), <http://www.nationaljournal.com/congress/for-house-2014-will-be-a-busy-year-away-from-washington-20131031> (“There’s a nearly two week spring break in April, and then lawmakers will be out of session for the entire month of August and beyond – extending into first full week of September, which includes Labor Day.”).

150. *Final Vote Results for Roll Call on Motion to Suspend Rules and Pass, as Amended, Homeowner Flood Insurance Affordability Act of 2014*, OFFICE OF CLERK OF HOUSE OF REPRESENTATIVES (2014), available at <http://clerk.house.gov/evs/2014/roll091.xml>.

151. *Id.*

152. *U.S. Senate Roll Call Votes 113th Congress – 2nd Session on Passage*

comprised of 51 Democrats and 21 Republicans.<sup>153</sup> The bipartisan support for the bill shows just how volatile an issue flood insurance reform is in the 2014 midterm election cycle. The issue undoubtedly cuts across party lines and ideology.<sup>154</sup>

#### IV. Weaker Than the Shore

The Mississippi lawsuit, which as of this writing has been terminated, was an opportunity snatched away from the courts to come down on the side of the reasoned decision-making of FEMA to allow the NFIP to bring itself back to fiscal sanity. However, even though the reforms of 2014 rolled back significant portions of BW-12, FEMA is still granted authority to raise rates as high as 18% a year. But if the court in the Mississippi lawsuit had been given the opportunity to grant FEMA's motion to dismiss there would have been a clear opportunity for FEMA to put the NFIP on the road to solvency using a broader range of tools to implement rate changes, revise flood maps, and remove subsidies that reflect actuarial risks for properties in floodplains across America. However, election year politics proved too strong a factor.

#### V. Conclusion

While the increased rates were politically unpopular, the NFIP is currently running at a \$25 billion deficit.<sup>155</sup> The next major storm will assuredly put it deeper into debt. The NFIP

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*of the Bill (H.R. 3370)*, SEC'Y OF U.S. SENATE (2014), available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?&ongress=113&session=2&vote=00078](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&ongress=113&session=2&vote=00078).

153. *Id.* The Senators from Mississippi, Louisiana, Florida, South Carolina, New Jersey, New York, and Massachusetts voted Yea. Senator Jeff Sessions of Alabama voted Yea, while Senator Richard Shelby of Alabama voted Nay. *Id.*

154. Indeed, the bill was sponsored by Congressman Michal Grimm (R-NY) and Senator Robert Menendez (D-NJ). See *H.R. 3370 (113th): Homeowner Flood Insurance Affordability Act of 2014*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr3370> (last visited Apr. 10, 2015); *S. 1610 (113th): Homeowner Flood Insurance Affordability Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s1610> (last visited Apr. 10, 2015).

155. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 5.

will never be solvent without serious changes. One scientific organization has noted that rising sea levels have contributed to shoreline erosion and degradation and raises flooding risks from extra-high tides.<sup>156</sup> States with large areas of low-lying land (such as California, Florida, Louisiana, North Carolina, and South Carolina) or states with large populations living on low-lying land (such as California, Florida, Louisiana, and New York) are particularly vulnerable.<sup>157</sup> A rise of approximately two feet above today's sea level by 2100 would put more than \$1 trillion of property and structures in the United States at risk of inundation, with roughly half of that value concentrated in Florida.<sup>158</sup>

Not only will things not get better for the NFIP, they will get substantially worse. The growing pace of coastal development puts more people and property in the path of coastal storms, flooding, inundation, and erosion.<sup>159</sup> Rising property values in many places along ocean coastlines also mean that, in the event of devastating storms, damage costs are growing.<sup>160</sup> More and more people moving into coastal areas and seeking to purchase flood insurance at below-market rates with increasing probabilities of flooding due to rising sea levels and stronger weather events is a recipe for disaster for the NFIP. It almost guarantees the NFIP will forever be a budgetary black hole of the United States. Although FEMA is in the process of updating FIRMs, FIRMs in some communities flood maps are still out of date and have not been updated, in some cases, since the 1980's.<sup>161</sup> Mapping practices also do not account for

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156. UNION OF CONCERNED SCIENTISTS, OVERWHELMING RISK: RETHINKING FLOOD INSURANCE IN A WORLD OF RISING SEAS 3 (2013), *available at* [http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global\\_warming/Overwhelming-Risk-Full-Report.pdf](http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/Overwhelming-Risk-Full-Report.pdf).

157. *Id.*

158. *Id.*

159. *Id.* at 4.

160. *Id.*

161. JESSICA GRANNIS, GEO. CLIMATE CENTER, ANALYSIS OF HOW THE FLOOD INSURANCE REFORM ACT OF 2012 (H.R. 4348) MAY AFFECT STATE AND LOCAL ADAPTATION EFFORTS 5 (2012), *available at* [https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIP/upload/GCC\\_Analysis-of-the-Flood-Insurance-Reform-Act-of-2012\\_8-14-12.pdf](https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIP/upload/GCC_Analysis-of-the-Flood-Insurance-Reform-Act-of-2012_8-14-12.pdf).

increased flood risks as a result climate change, sea-level rise, or even increased impervious coverage due to land use changes.<sup>162</sup> As a result, FIRMs may be inaccurate at predicting both the geographic extent of flooding and flood heights communities will face in the future.<sup>163</sup> Indeed, after Hurricane Katrina, it was discovered that large portion of the Biloxi, Mississippi area was not considered to be, according to 1981 maps, in a special hazard zone.<sup>164</sup> After the maps were updated, several excluded properties were then placed in the special hazard zone.<sup>165</sup>

There have been some changes without the needed reforms to the NFIP, such as President Barack Obama issuing an executive order directing all government agencies handing out federal aid to incorporate stricter building requirements that take sea-level rise into account.<sup>166</sup> Additionally, on the New Jersey Shore, any home in a flood zone that was declared substantially damaged — meaning it would cost 50% or more of the home's pre-damage market value to restore — must be rebuilt to current standards, which may require elevating the property.<sup>167</sup>

However, these directives and regulations are not enough. The ability to increase rates, albeit capped, and the reworking of flood maps is an opportunity for our coastal communities to take real ownership over the problem of increasing effects of flooding and have an honest conversation on this issue. Implementing actuarial principles in the NFIP will incentivize coastal communities to construct more wisely and take larger preventive measures to combat flooding. Presently, artificially low flood insurance rates have created a vicious cycle of risky development near land's end. Implementing actuarial principles meaningfully in the NFIP's determination of flood insurance

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162. *Id.*

163. *Id.*

164. Widmer, *supra* note 68.

165. *Id.*

166. Press Release, White House Office of the Press Sec'y, Executive Order – Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (Jan. 30, 2015), *available at* <http://www.whitehouse.gov/the-press-office/2015/01/30/executive-order-establishing-federal-flood-risk-management-standard-and->

167. Ronda Kaysen, *Back to the Shore*, N.Y. TIMES, Apr. 4, 2014, at RE1.

rates and revising flood maps to reflect current sea-levels and weather conditions will not only bring the NFIP back from fiscal disaster, it will also allow our coastal communities to work together with their local, state, and federal governments in devising real ways to combat rising sea-levels and harsh weather events through mitigation and prevention.