

We Can Roll Back the Biggert-Waters Flood Insurance Reform Act of 2012— But We Can’t Roll Back Mother Nature

A Paper Prepared For the RMLUI Workshop
“The Right Things in the Wrong Places”
March 14, 2014

Orlando E. Delogu
Emeritus Professor of Law
University of Maine School of Law

Background Information:

The National Flood Insurance Program (NFIP) was begun in 1968;¹ the purchase of flood insurance by property owners in designated Flood Hazard Areas was mandated in 1973. The program was intended to be self-supporting in the long run—reasonably priced insurance covering flood damage losses was to be coupled with ongoing regulatory programs that steered new and rebuilt structures to less hazardous areas.

We got the reasonably priced federal flood insurance—indeed for many new and existing low and middle income home owners subsidies were available lowering flood insurance costs well below private risk based flood insurance. However, no level of government—not the Feds, not states, not local governments has been willing to put needed regulatory programs in place—programs that had teeth, that would consistently be enforced, that would steer storm/flood/fire damage rebuilding, and new construction out of hazardous areas.

The results of these actions and inaction were predictable: 1.) Flood damage payouts often exceeded insurance premium revenues—these deficits were simply absorbed by the Federal government. In short, flood damage costs were shifted from those who choose to live/build in hazardous areas to the taxpaying public. 2.) The absence of regulatory mechanisms (steering development out of hazardous areas) allowed existing property owners to rebuild over and over again in the same hazardous location. 3.) At the same time, cheap insurance and the absence

¹ Currently there are 5.6 million policies in force with a face value of \$1.3 trillion dollars.

of regulation attracted new construction to these aesthetically pleasant but high risk areas.

4.) NFIP deficits ballooned further.

Today, NFIP standing debt approximates \$25 billion. This figure does not include the costs of federal emergency disaster relief which for hurricane Katrina alone approximated \$60 billion; hurricane Sandy emergency relief costs are estimated to be \$50 billion. As staggering as these costs are, they do not include Federal, state, and local governmental costs to repair, rebuild and/or expand infrastructure needed to serve populations living in these storm prone areas.

Nor do they include private costs to repair, rebuild homes, businesses, etc. which these two storms gave rise to. Rough estimates suggest private outlays will match (or exceed) all of the governmental outlays noted above. And, of course, the loss of life from these two storms is inestimable, but a factor we should keep in mind when assessing the true costs of our failure to put regulatory measures in place that steer people, businesses, and infrastructure out of hazardous storm, flood, or fire prone areas.

The Biggert-Waters Flood Insurance Reform Act of 2012:

Faced with these daunting cost realities and the growing awareness that sea level rise along the Atlantic and Gulf Coasts poses the threat of far greater damage, larger governmental and private storm damage costs in the future than we have experienced over the last 40 years, a bipartisan Congress in 2012 passed the Biggert-Waters² NFIP Reform Act. Beyond extending the NFIP for five years, a key provision of the legislation will require the NFIP to raise flood insurance rates (over the next four years) to reflect true flood risk; this will make the program in an actuarial sense more financially stable. It removes (at least in part) the incentive to rebuild (or build new housing) in high risk flood hazard areas.

As important, Biggert-Waters required a new generation of FEMA flood maps reflecting current sea level rise data. This will inevitably (but realistically) expand areas deemed hazardous

² Republican Congresswoman, Judith Borg Biggert, Democratic Congresswoman, Maxine Waters

and thus require that property owners in this expanded area carry flood insurance (at true risk cost) and comply with increasingly stringent building codes for new construction/rebuilding in flood hazard areas. These are all useful steps in the right direction.

Do they go far enough? Most scientists, scholars, environmentalists, and land use planners looking at sea level rise data, storm frequency/intensity/surge data, as well as ongoing market pressures to build/rebuild in close proximity to coastal waters and river systems would say, NO. The weak link identified at the outset remains—governments at every level seem unwilling to put in place meaningful regulations/programs that steer development away from hazardous areas.

Biggert-Waters did little to change this reality. The Reform Act did not press the Feds to use the carrot of storm/flood damage relief to force relocation. The Act did little to force the use of state and local planning, zoning, and subdivision control powers to steer (most, but not necessarily all) development away from high hazardous areas. The Act did not require that governmental spending powers be used to limit infrastructure repair in hazardous areas and/or to position new infrastructure in safer (often close at hand) alternative locations.

Biggert-Waters aside, experience in the wake of hurricane Sandy is disheartening. No level of government seized the initiative to significantly alter the paradigm. The mitigation tools suggested above remain largely unused. A handful of barrier beaches have been repaired and expanded in New Jersey; a number of homeowners in a small hazardous neighborhood on Staten Island (which experienced almost total destruction and significant loss of life) have been relocated. But by and large in the wake of Sandy we have **rebuilt in place**, and we've done so with a bravado that seems both unseemly and unjustified. Common sense tells us—there will be another Sandy.

The Fate of Biggert-Waters:

One might have thought that good science, sound planning principles, and fiscal

responsibility, coupled with damaging floods in the Midwest, unprecedented fire damage in the western states, and the huge damages which hurricanes Irene and Sandy gave rise to (all in 2011-2012) would have prompted a doubling down on the useful steps taken in the Biggert-Waters Reform Act. The weak links noted above—the failure to connect all levels of government in a concerted (federal, state, local) effort to steer existing development and new development away from hazardous land areas cried out for remediation—for a **Phase II** set of Biggert-Waters reforms.

But that hasn't happened. On the contrary, what we are facing in 2014 is a bipartisan effort to roll back the sensible, but relatively modest, reforms Biggert-Waters put in place. This effort is on the cusp of succeeding.³ It is led by property owners in hazardous areas who for the first time in decades are faced with bearing the true costs of risk-based flood insurance. They are not mollified by the fact that these increases are fair, long overdue, and will be phased in over a four year period.

Joining these property owners are builders and contractors who would profit from the **rebuild in place** strategy that has characterized our approach to disaster recovery for a long time—far too long. This strategy is not sustainable today.⁴ The Katrina, Irene, Sandy damage curves speak for themselves. Rebuilding in place costs will increase dramatically in the future with even modest sea level rise.

The Biggert-Waters roll back is also being pushed by banking, real estate, and developer groups that have long profited from our propensity to build at the water's edge without regard to the hazardous characteristics of many of these coastal and riverfront land areas. NFIP pricing, and the failure to put in place regulatory programs/policies that steer people out of harm's way

³ The Senate has already passed bipartisan legislation that undercuts many Biggert-Waters Reform Act provisions; see "Homeowner Flood Insurance Affordability Act of 2014," sponsored by Sens. Bob Menendez (D-N.J.) and Johnny Isakson (R-Ga.).

⁴ Some have called it "...a fiscal time bomb for the government." See www.forbes.com, Doug Bandow, *Budget Reform in Reverse: Congress Prepares to Hike Flood Insurance Subsidies*, (2014).

has allowed (indeed it has subsidized) continuous rounds of risk taking—the building of countless new homes and commercial facilities on land areas known to be hazardous. These interests groups want to continue this taxpayer funded profit making.

Finally, a Biggert-Waters rollback in this election year has found wide, politically motivated, bipartisan support in Congress, particularly in many close election districts in east and gulf coast states. Science, sound planning, harm avoidance, fiscal responsibility (even loss of life) seemingly go out the window as individual members of Congress count November's vote. We should be better than this—but apparently we're not.

The final shape of House roll back provisions (which apparently differ significantly from the Senate's already completed action, see f.n. 3) are not yet on the table, but are scheduled to be dealt with shortly in an expedited procedure that requires a clearly bipartisan 2/3 house vote.⁵ If a House bill passes, what emerges from a Senate/House conference on these differing roll-back enactments remains to be seen. Also unknown at this point is whether the President will veto any roll-back legislation that reaches his desk. He has expressed opposition to a Biggert-Waters roll back in the past, but the tide of events is moving against him.

Conclusion:

Even if a roll back of the Biggert-Waters Reform Act is somehow avoided, it is unlikely that any of the unmet needs, the issues that neither the NFIP nor Biggert-Waters reforms have addressed, will be dealt with anytime soon. Without strong federal direction state and local governments will continue to take the path of least resistance in recovering from storm, flood, fire induced damages—they will **rebuild in place**, particularly when this path is facilitated by ever more generous federal insurance subsidies, repeated payouts, disaster relief, etc.

In the same vein, without strong federal direction, state and local governments who find

⁵ See rollcall.com/218 Emma Dumain, “*Fate Uncertain for House Flood Insurance Bill*” (Feb. 25, 2014); Google generally, Biggert-Waters Reform Act.

themselves in intrastate and interstate competition to attract jobs, capital investment, an increased tax base will almost certainly continue to allow new developments (commercial activities, housing, etc.) in highly attractive, but often risk prone coastal, riverfront, and high mountain areas. The federal government, by its inaction, has incentivized these misguided behavioral patterns.

None of this augers well for the safety of our citizens, for the protection of existing (public and private) capital investments, for the long-run fiscal stability of our society. Moreover, it shows a lack of common sense that is mind boggling.

If, in the political hurrah of the moment, we in fact roll back existing Biggert-Waters reforms, we will have created an even worse situation for ourselves. Barring some catastrophic wake-up call, the time frame for remediation of NFIP and Biggert-Waters weaknesses will almost certainly be extended well into the future. In the interim we will experience ever higher storm, flood, fire damages, more federal deficits, greater loss of life. In short, we can roll back Biggert-Waters reforms (or not)— but we can't roll back Mother Nature.

fini