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## Lessons Learned From The Flood Insurance Re-Mapping Controversy In Portland, Maine

Wesley Davis

*University of Maine School of Law*

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# LESSONS LEARNED FROM THE FLOOD INSURANCE RE-MAPPING CONTROVERSY IN PORTLAND, MAINE

*Wesley Davis*\*

## I. INTRODUCTION

Releasing its first updated floodplain map for a major New England harbor,<sup>1</sup> the Federal Emergency Management Agency (FEMA) imposed severe building restrictions on Portland, Maine, the largest foreign inbound transit tonnage port in the U.S.,<sup>2</sup> threatening to leave this sheltered waterfront with only fishing shacks.<sup>3</sup> Portland is naturally protected by islands<sup>4</sup> and has been used for centuries as a safe haven for ocean-going vessels, including oil tankers, cruise ships, and Coast Guard frigates.<sup>5</sup> Minute storm damage has been reported over this time.<sup>6</sup> Over

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\* J.D. Candidate, 2011, University of Maine School of Law.

1. Tom Bell, *New Flood Map – and a New Model*, PORTLAND PRESS HERALD, June 5, 2010, at A1.

2. Welcome to Portland's Downtown District, <http://www.portlandmaine.com/index.php?sec=2> (last visited Jan. 21, 2010) [hereinafter Portland's Downtown District].

3. Tom Porter, *Portland Officials Optimistic After Talks on FEMA Flood Map*, MAINE PUBLIC BROADCASTING, Oct. 27, 2009, <http://www.mpbn.net/News/MaineNews/tabid/181/ctl/ViewItem/mid/3475/ItemId/9544/Default.aspx>.

4. See Christopher Kessler, *Sebago Technics Working with FEMA on Flood Map*, THE SOUTH PORTLANDER, [http://fwix.com/portlandme/share/a2bb34d170/sebago\\_technics\\_working\\_with\\_fema\\_on\\_flood\\_map](http://fwix.com/portlandme/share/a2bb34d170/sebago_technics_working_with_fema_on_flood_map) (last visited Jan. 12, 2010).

5. See Porter, *supra* note 3; Tom Bell, *FEMA Threatens Harbor Construction; Portland Officials Say a Revised Flood Insurance Map Would Devastate the City's Working Waterfront*, PORTLAND PRESS HERALD, Aug. 10, 2009, at A1.

6. See Evan Lehmann, *Port City Pushes Back Against Washington's Tightening Flood Insurance Definitions*, N.Y. TIMES, Sept. 29, 2009, <http://www.nytimes.com/cwire/2009/09/29/climatewire-port-city-pushes-back-against-washingtons-ti-24450.html>; Bell, *supra* note 5.

the past thirty years, only three insurance claims, totaling \$36,000, have been paid out.<sup>7</sup>

FEMA has an incentive to designate as many properties as possible as “high risk.” Such a classification arrests development and increases the local share of the cost of flooding. These results further the flood program’s goal of keeping property and people out of harm’s way and reducing the public’s share of the flooding cost.<sup>8</sup>

In Portland, where benign waters do not even lap against piers, the agency declared that waves were capable of surging three feet in the air and crashing down on waterfront property.<sup>9</sup> The federal government may have zealously cast too wide a net. The result is that the National Flood Insurance Program (NFIP), a scheme created for financial reasons, is unnecessarily working against its own purpose by halting development and threatening to wreak economic havoc.

To rectify this, economic factors should be considered when determining building restrictions. Until this is done, cities like Portland should not comply with the restrictions. They can protect their economic development interest and are likely to escape any serious repercussions for not complying. FEMA has been unable to adequately enforce its building restrictions and its sanctions are light. Courts also favor noncompliant municipalities.

This Comment will explore these issues. In Part II, we will gain an understanding of the policy reasons behind building restrictions. We will then learn why these policies are fatally flawed. In Part III, we will survey the purpose and limitations of FEMA’s national re-mapping effort and how it is being received across the country. Then, we will hear Portland’s story, including the local officials’ arguments against the new restrictions on development. In Part IV, the Author argues that Congress and FEMA should incorporate economic factors into the agency’s

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7. Tom Bell, *FEMA Delays New Flood Map for Portland*, PORTLAND PRESS HERALD, Sept. 21, 2009, at A1.

8. *Id.* See generally DISASTERS AND THE LAW: KATRINA AND BEYOND 201, (Daniel A. Farber and Jim Chen eds., Aspen Publishers 2006) [hereinafter Farber] (discussing the role of mitigation); Martha Thompson & Izaskun Gaviria, WEATHERING THE STORM: LESSONS IN RISK REDUCTION FROM CUBA (Oxfam America 2004) (studying Cuba’s ability to prevent development in disaster-prone areas); Government Accounting Office, FEDERAL EMERGENCY MANAGEMENT AGENCY: OVERSIGHT AND MANAGEMENT OF THE NATIONAL FLOOD INSURANCE PROGRAM 12-14 (Oct. 20, 2005) [hereinafter GAO], available at <http://www.gao.gov/new.items/do6183t.pdf> (describing a pilot program that requires “repetitive-loss” property owners to sell their property to FEMA or face higher insurance rates).

9. Lehmann, *supra* note 6.

determination of building restrictions. In Part V, we will get an update on Portland. Then, we will walk through the options available to similar port cities stuck with severe building restrictions. The most palatable one is non-compliance. We will discuss why it enjoys a favorable legal position, including courts' unwillingness to burden municipalities with massive liability. We will also look at the risks involved.

## II. FEDERAL FLOOD POLICY

Flooding is a matter of public policy because market economies do not have the capacity to handle the problem. Involved in nearly 90 percent of all disasters, flooding is the most common natural disaster and the most destructive to property.<sup>10</sup> The risk of exposure is so great that it is actuarially unsound for insurance companies to insure against it.<sup>11</sup> Property owners will not find flood coverage in their homeowner's insurance.<sup>12</sup> A catastrophic flooding event exceeds the capacity of the insurance industry.<sup>13</sup> All fifty U.S. states are subject to the risk of a catastrophic flooding event.<sup>14</sup>

In the early years of American life, flooding was a problem for local government. Natural disasters, isolated instances in localized areas, were not within the purview of the national government. Federalism was in its purest form. The central government confined itself chiefly to matters of international and national concerns. States dominated their local jurisdictions and the federal government had neither the political will nor the power to wield control over local matters. Accordingly, federal aid did not flow in to relieve victims of natural disasters.<sup>15</sup> Instead, local officials and private entities responded.<sup>16</sup> As one commentator pointed out, victims "were pretty much on their own."<sup>17</sup>

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10. RAWLE O. KING, FEDERAL FLOOD INSURANCE: THE REPETITIVE-LOSS PROBLEM ii, 1 (Congressional Research Service, June 30, 2005).

11. RAWLE O. KING, MIDWEST FLOODING DISASTER: RETHINKING FEDERAL FLOOD INSURANCE? 4 (Congressional Research Service, Aug. 11, 2008).

12. RAWLE O. KING, HURRICANE KATRINA: INSURANCE LOSSES AND NATIONAL CAPACITIES FOR FINANCING DISASTER RISK 7 (Congressional Research Service, Sept. 15, 2005).

13. *Id.*

14. *Id.*

15. Stephen Griffin, *Did the Constitution Fail New Orleans?*, BALKANIZATION, (Oct. 12, 2005, 10:31 P.M.), <http://balkin.blogspot.com/2005/10/did-constitution-fail-new-orleans-part.html>.

16. *Id.*

17. *Id.*

Eventually, this early federalism eroded and the national government adopted a “levee-only” structural approach. The federal government was spurred on by major flooding events.<sup>18</sup> The crush of extensive property damage and the expense of public disaster relief following three decades of Mississippi River flooding compelled Congress to take its first major crack at flood policy.<sup>19</sup> It created the Mississippi River Commission in 1879,<sup>20</sup> and charged it with oversight of levee development for the next fifty years.<sup>21</sup> The federal government was operating in the era when man believed he could overcome any problem with engineering. Redirecting the natural flow of water was a prime example. In 1917, the U.S. Army Corps of Engineers got heavily involved.<sup>22</sup> The 1930s and 1940s saw \$11 billion of federal levee spending.<sup>23</sup>

Enthusiasm for the structural approach began to wane in the 1950s and 1960s. The sheer cost and vastness of the levee-only approach proved unwieldy and the growing environmental conscience of the U.S. was repulsed by the resulting environmental destruction.<sup>24</sup> Later it would be proved that the levees would sometimes fail to keep the water out. In these instances, levees actually increased the amount of property damage because the public rapidly developed property behind levees under the false assumption that they would be flood-proof.<sup>25</sup>

These structural disappointments got policymakers thinking about non-structural approaches, especially insurance and mitigation. It was another slew of disasters that urged policymakers to consider fabricating an insurance system. Hurricane Betsey and other storms in the 1960s ravaged the South and flooded the upper Mississippi River.<sup>26</sup> A huge part of the cost of disaster aid was put on the federal government. The taxpayer picked up the ultimate tab. Policymakers thought a manufactured insurance system could relieve the burden. The hope was that it would re-allocate the cost of the risk of flooding back to those who took the risk by living in floodplains. The government would act just

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18. *Id.*

19. King, *supra* note 11, at 4.

20. *Id.*

21. *Id.*

22. *Id.*

23. DAVID GODSCHALK ET AL, NATURAL HAZARD MITIGATION: RECASTING DISASTER POLICY AND PLANNING 31 (Island Press 1999).

24. *Id.*; King, *supra* note 11, at 4.

25. Charles S. Clark, *Disaster Response: Does the Country Need a New National Strategy?*, 3 CQ RESEARCHER 889 (1993), available at [http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1993101500#NOTE\[6\]](http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1993101500#NOTE[6]).

26. King, *supra* note 10, at 3.

like an insurance company, spreading the risk across its policyholders through premiums.

But, it could not allocate all of the cost of the risk back to those taking the risk. The premiums would be prohibitively expensive. Unaffordable premiums prevented a market-based insurance system from developing in the first place. A government system would have to allow for affordable insurance premiums.

But by doing so, it would not be spreading the great financial risk of flooding in an actuarially-sound manner, leaving it and the taxpayer exposed to that risk. To try to deal with this, policymakers recommended mitigation. The federal government would mitigate damage by discouraging construction in floodplains. In theory, these requirements would reduce the amount of property in harm's way and bring down the cost of claims.

#### *A. Mitigation*

Mitigation has been widely lauded as the most effective flooding response. Commentators Daniel A. Farber and Jim Chen call it “crucial.”<sup>27</sup> Another commentator, David Godschalk, argues that it is the most critical of the four stages of disaster response: mitigation, preparation, response, and recovery.<sup>28</sup> Of these stages, mitigation is the only one that takes place well before the event. Advance action is much more cost-effective than post-disaster reconstruction, particularly for recurrent damage.<sup>29</sup> Effective mitigation reduces the magnitude of future disasters and results in a substantially reduced cost for both response and recovery.<sup>30</sup> Many observers feel the only “sensible” policy is “strategic retreat.”<sup>31</sup> Farber and Chen echo this sentiment, wondering if the most effective way to deal with disaster is to “stay out of the danger zone.”<sup>32</sup>

Congress adopted this insurance-mitigation approach in the form of a carrot-and-stick program. In 1968, Congress created the NFIP, currently administered by FEMA, with passage of the National Flood Insurance Act (NFIA). Through the program, Congress offers subsidized insurance. But the subsidies come at a price. Property owners can only receive it if their municipality takes certain steps to mitigate future

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27. Farber, *supra* note 8, at 201.

28. GODSCHALK, *supra* note 23, at 17.

29. *Id.* at 5, 17.

30. *Id.* at 17.

31. *Id.* at 34.

32. Farber, *supra* note 8, at 213. Oddly enough, “strategic retreat” is little more than a concession of defeat and an inability to effectively deal with flooding and its threat.

damage. The municipality must implement land use controls specifically prescribed by FEMA that restrict the development of floodplain property. Land use control is the NFIP's leading mitigation device, but it also reduces flood damage by acquiring high-risk properties and relocating their owners.

In practice, however, the mitigation scheme, like federal policies before it, has been a disappointment. A policy of acquisition can bring some isolated successes, but it is not a practical large-scale solution. Policymakers began exploring eminent domain in the 1970s and 1980s.<sup>33</sup> Tulsa, Oklahoma, was an early pioneer when it began clearing development out of its floodplain in the 1970s.<sup>34</sup> By the 1990s it had acquired 875 buildings.<sup>35</sup> When the Army Corps of Engineers offered to build a \$3.5 million levee for Soldier's Grove, Wisconsin, it chose instead to relocate the entire town outside the floodplain.<sup>36</sup> In 1983, a cost-benefit analysis by the Flooded Properties Purchase Program (FPPP), the NFIP's acquisition arm, resulted in the purchase and demolition of a 300-home neighborhood in Baytown, Texas, that had been the repeated victim of flooding and was in the process of being rebuilt.<sup>37</sup> After the 1993 Midwest floods, the federal government implemented an aggressive relocation plan, orchestrating 156 buyout projects in nine states, acquiring more than 9,000 properties.<sup>38</sup>

These were all successful relocation projects but they comprise only a negligible slice of the number and value of properties that stand in harm's way. Lack of funding or political or psychological will prevent any meaningful progress. Both the cost and the idea of a comprehensive buyout strategy are unpalatable. The FPPP has been historically underfunded. Only a small number of properties, about 100 per year, can be purchased.<sup>39</sup>

Unlike acquisitions, land use controls are affordable but their corresponding lack of financial incentives has been their downfall. This lack conspires with the value of floodplain property and the result is major increases in floodplain development. In spite of the cost of a 1993 flood, the St. Louis region and several other localities reloaded their

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33. Godschalk, *supra* note 23, at 32.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

floodplains with new urban and suburban development.<sup>40</sup> When these vulnerable areas were hit again by another flood, the cost of disaster assistance vastly increased. Increased costs like these wipe out any potential savings gained by successful mitigation efforts elsewhere.<sup>41</sup>

This shortcoming is traceable to human nature and property rights. Land use controls involve the unnatural human trade-off of economic sacrifices today for unknown benefits at some unknown future time. While advance action is the reason mitigation can be so effective, it is also the reason why mitigation is so difficult to implement. The authoritarian state of Cuba has been able to enforce an effective mitigation regime,<sup>42</sup> but governments blessed with (or hampered by) market economies have not been so fortunate.<sup>43</sup> Proponents of land use control surmise that the public just does not understand the potential benefits.<sup>44</sup>

A bigger roadblock may be the cultural belief that owners have a fundamental right to dispense with their property as they see fit. Owners believe they have some kind of natural right to their property and this belief is reinforced by our political and judicial systems.<sup>45</sup> It is written into the Constitution.<sup>46</sup> Courts have been willing to extend the Fifth Amendment limitation on taking property to the mere minimization of property rights<sup>47</sup> or to regulations that go “too far.”<sup>48</sup> The protection afforded by these cases is readily transferable to flood-related land use controls. Such an application would in turn make these controls prohibitively expensive.

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40. Nicholas Pinter, *One Step Forward, Two Steps Back on U.S. Floodplains*, 308 SCIENCE 207, 207-08 (2005).

41. *Id.*

42. *See generally* Thompson, *supra* note 8.

43. Farber, *supra* note 8, at 213.

44. *See* Godschalk, *supra* note 23, at 17.

45. Farber, *supra* note 8, at 220.

46. U.S. CONST. amends. V, XIV § 1.

47. *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that the installation of a cable line was a *per se* taking).

48. *E.g.*, Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922) (holding that a regulation can go “too far” and constitute a taking); *see generally* Pa. Cent. Transp. Co. v. N.Y., 438 U.S. 104 (1978) (establishing that a regulatory taking can occur when a regulation unreasonably interferes with “investment-backed expectations”); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (holding that beachfront land use controls barring permanent structures is a taking).

## III. RE-MAPPING AND PORTLAND HARBOR

The futility of mitigation policies, especially land use controls, has become evident, but they are still law. FEMA must try to maintain accurate floodplain maps so it can determine the specific land use controls required, as well as the amount of insurance premiums. In 1997, the agency began updating its cartographic mapping system with more accurate and accessible digital maps.<sup>49</sup> In 2003, it formalized this effort with the Flood Map Modernization Program, which is part of a broader mapping, assessment, and planning regime that is funded through 2014.<sup>50</sup> Its goal is to re-map the land on which 93 percent of the nation's population resides.<sup>51</sup> Many maps had not been updated in thirty to forty years.<sup>52</sup> Some were based on ninety-year-old data.<sup>53</sup> Cumbersome and full of "gross errors," the old maps prevented effective determination and enforcement of land use controls.<sup>54</sup> The new maps increase FEMA's ability to identify the severest areas, which is resulting in a broader floodplain determination and higher risk assessments for more properties.<sup>55</sup>

Despite advances, the re-mapping effort is still seriously handicapped. It only has an \$800 million budget.<sup>56</sup> This is a nominal amount for a project that must cover nearly the entire American population. This constraint only allows FEMA to proceed in a "piecemeal fashion"<sup>57</sup> and is limiting the project's effectiveness. Many flaws in the older maps are not being corrected.<sup>58</sup> The new program's data-collection scheme is generic. It fails to account for local variations

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49. John Caulfield, *New Flood Maps Raise New Land-Use Concerns*, BUILDER, (Aug. 14, 2009), available at <http://www.builderonline.com/land/new-flood-maps-raise-new-land-use-concerns.aspx>.

50. *Id.*

51. *Id.*

52. *Id.*; Catherine Saillant, *New Flood Maps Swamp Homeowners*, L.A. TIMES, Jan. 4, 2010, at A1.

53. Me. State Planning Office, *Floodplain Mapping Modernization*, <http://www.maine.gov/spo/flood/maps/mapmodernization.htm> (last visited Jan. 13, 2010) [hereinafter Maine SPO].

54. Caulfield, *supra* note 49.

55. *Id.*; Lehmann, *supra* note 6.

56. Caulfield, *supra* note 49.

57. *Portland Officials Push Back on New FEMA Flood Map*, COASTAL CONTRACTOR ONLINE, <http://www.coastalcontractor.net/article/288.html> (last visited Jan. 12, 2010); see also FEDERAL EMERGENCY MANAGEMENT AGENCY, ESTIMATING THE VALUE OF PARTNER CONTRIBUTIONS TO FLOOD MAPPING PROJECTS, at 2 (Jan. 2009) [hereinafter FEMA].

58. Maine SPO, *supra* note 53.

and this can significantly skew the results. FEMA concedes the maps have accuracy problems.<sup>59</sup>

The maps are also difficult to understand. They are confusing and owners are having a hard time determining if their properties are in designated flood zones or not.<sup>60</sup> As a matter of policy, the agency strongly encourages property owners to question the new maps. It also acknowledges that it should be doing more outreach to help the public understand both the maps and their purpose.<sup>61</sup>

FEMA has sought out an inexpensive solution to all these problems but it has been met with limited success. The agency knows that local involvement in the development and maintenance of the maps would result in better determinations.<sup>62</sup> In 1999, it created the Cooperating Technical Partners (CTP) program,<sup>63</sup> which makes local groups official partners.<sup>64</sup> As of 2009, over 236 groups have been made “partners.”<sup>65</sup> Through these partnerships, FEMA gains local knowledge without paying for it.<sup>66</sup> The agency also welcomes input from local groups during the formal comment period, which occurs after a preliminary map is presented.<sup>67</sup> However, many local groups have no interest in bearing the cost for a program that is resulting in greater building restrictions without any corresponding benefits.<sup>68</sup>

As FEMA has introduced the new maps, property owners have been dismayed by surprisingly higher risk determinations accompanied by new premiums and building restrictions. In Long Island, 4,700 homes previously determined to be in a floodplain were removed from that designation, but 25,000 residents found themselves in newly designated floodplains.<sup>69</sup> The number of affected homes in Sioux Falls, South Dakota, more than tripled from 800 to 2,600.<sup>70</sup> The change in expected

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59. Porter, *supra* note 3.

60. *Id.*

61. Laura Dolce and Steve Bodnar, *Kennebunk, Kennebunkport to Question New Floodplain Maps*, SEACOASTONLINE, (Dec. 10, 2009), <http://www.seacoastonline.com/articles/20091210-NEWS-912100375>.

62. FEMA, *supra* note 57, at 2.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. 42 U.S.C. § 4104(b) (2006).

68. See Porter, *supra* note 3.

69. Caulfield, *supra* note 49.

70. *Id.*

flooding was also dramatic. In Mecklenburg County, North Carolina, the new determinations raised the expected flood elevations by eight feet.<sup>71</sup>

The agency's lack of outreach has left many homeowners unaware of their right to question and challenge the new maps.<sup>72</sup> One homeowner from South Los Angeles said the first she heard of the new designation was when she received a letter from her lender saying she had thirty days to get a flood insurance policy.<sup>73</sup>

Many other property owners and local governments have rebuffed the higher premiums and greater restrictions, with mixed results. One Los Angeles resident won her dispute after paying \$1,400 for a surveyor.<sup>74</sup> A neighborhood group from Southern California met with limited success. After generating data of its own, it accused FEMA of rushing the process, producing contradictory maps, and yielding dubious results.<sup>75</sup> It got the agency to postpone adopting the maps for three years to allow for more study,<sup>76</sup> but whether any meaningful change will come is uncertain. The Moorpark (California) City Council faced a worst-case scenario. It threw \$100,000 into a study that resulted in no meaningful change.<sup>77</sup>

#### *A. Portland Harbor*

In July 2009, FEMA released its preliminary maps for Portland Harbor in Maine.<sup>78</sup> Portland Harbor is the largest foreign inbound transit tonnage port in the U.S.<sup>79</sup> It is one of the few working waterfronts in the U.S.<sup>80</sup> It is the second largest oil port on the East Coast.<sup>81</sup> It is also the largest tonnage seaport in New England and its second largest fishing port.<sup>82</sup> Representatives from other major ports in the region, including Boston, closely watched Portland's re-mapping process.<sup>83</sup>

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71. *Id.*

72. 42 U.S.C. § 4104(b) (1983).

73. Saillant, *supra* note 52.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See* Bell, *supra* note 7.

79. Portland's Downtown District, *supra* note 2.

80. *Id.*

81. *Id.*

82. *Id.*

83. *See* Bell, *supra* note 7.

Portland Harbor's new maps showed a drastically higher flood risk. Its piers and wharves used to be in an "A-zone."<sup>84</sup> This means it was expected that one foot of flooding would occur once every 100 years.<sup>85</sup> This is the lowest floodplain designation. In the new maps, however, the piers and wharves were placed in a "V-zone."<sup>86</sup> This is one of the highest risk designations.<sup>87</sup> "V" is short for velocity.<sup>88</sup> High velocity wind and waves were expected to impact the areas so designated.<sup>89</sup> Specifically, high velocity winds were expected to whip up three foot waves once every one hundred years.<sup>90</sup> Catastrophic consequences are expected. Large waves would crash into land and tear down buildings or cause substantial structural damage.<sup>91</sup> FEMA's flood risk assessment had drastically swung from quite mild to extremely dangerous.

This new determination brings with it severe building restrictions.<sup>92</sup> In the previous "A-zone" classification, harbor structures were only required to maintain a slightly raised ground floor: one foot above normal.<sup>93</sup> But with a "V-zone" designation there is a complete ban on new construction.<sup>94</sup> In addition, current buildings cannot be fully rebuilt if they need repair.<sup>95</sup> They can only be rebuilt to half their value.<sup>96</sup> Currently over the harbor piers and wharves sit condominiums, offices, restaurants, and lobstermen.<sup>97</sup> The new designation would likely halt all development and leave lobstermen and other fishermen as the only remaining tenants.<sup>98</sup>

Before the new maps were released, a study was done that showed immeasurable property development potential for the waterfront.<sup>99</sup> The

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84. Lehmann, *supra* note 6.

85. Institute for Business and Home Safety, HURRICANE IKE: NATURE'S FORCE VS. STRUCTURAL STRENGTH 7 (Sept. 2009), *available at* [http://www.disastersafety.org/resource/resmgr/pdfs/hurricane\\_ike.pdf](http://www.disastersafety.org/resource/resmgr/pdfs/hurricane_ike.pdf) [hereinafter IBHS].

86. Lehmann, *supra* note 6.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Lehmann, *supra* note 6.

93. *Id.*

94. Bell, *supra* note 7.

95. *Id.*

96. Bell, *supra* note 5.

97. Lehmann, *supra* note 6.

98. Porter, *supra* note 3.

99. Rebecca Goldfine, *Waterfront a development goldmine*, MAINEBIZ, Dec. 8, 2009, *available at* <http://www.mainebiz.biz/news45565.html> (last visited Jan. 13, 2010).

study found more than 20 acres of development property.<sup>100</sup> A centerpiece of the development opportunity was the seven-acre Maine State Pier.<sup>101</sup> The study also emphasized attractive features such as the port's expanding cruise ship commerce and a ready market for a hotel on the waterfront.<sup>102</sup> This is in a city that already sports a vibrant waterfront shopping and dining culture.<sup>103</sup>

The study was done by a real estate consulting firm that specialized in lesser known New England markets, including Providence, Rhode Island, and was presented to the leading investment groups in the area, including private equity fund managers and bankers.<sup>104</sup> Portland is Northern New England's banking capital,<sup>105</sup> in addition to Maine's economic and commercial hub. Finalized after the release of FEMA's maps, the study warned about the negative economic consequences of the new restrictions.<sup>106</sup>

### *B. Portland's Response*

Local officials feared the potential economic impact of the restrictions. Besides losing development due to the complete restriction on new construction, they worried that the new disincentive to build would lead to properties falling into disrepair, causing a blight on the community in general, a condition that Portland once experienced and does not want to see return. Officials had 30 days to respond to the new maps and did so vigorously. City and state leaders, including most of Maine's congressional delegation, urged FEMA officials to reconsider.<sup>107</sup>

They used political pressure, called for the creation of a regulatory niche for harbors, and made an economic argument. U.S. Senator Susan Collins used the occasion of the August confirmation hearing of the second highest FEMA official, Deputy Administrator Richard Serino, to bring attention to the Portland problem. The ranking Republican on the Senate Homeland Security Committee (which oversees FEMA), Collins called for the agency to work with local officials to produce a more accurate risk assessment.<sup>108</sup>

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100. *Id.*

101. *Id.*

102. *Id.*

103. Portland's Downtown District, *supra* note 2.

104. Goldfine, *supra* note 99.

105. Portland's Downtown District, *supra* note 2.

106. *Id.*

107. Porter, *supra* note 3.

108. Bell, *supra* note 7.

The following day, the agency decided to delay the remapping of the harbor. It suspended the 90-day appeal period, which had been scheduled to commence immediately following the comment period. FEMA cited technical errors in the community notification process as the reason for the delay. Perhaps the agency feared litigation, a possibility which Collins referenced in her testimony.<sup>109</sup> In 2005, the U.S. District Court of South Carolina invalidated FEMA's map determinations for Richland County, S.C., because it failed to give proper notice of the start of the comment period.<sup>110</sup>

Although FEMA may have yielded to political pressure to postpone the finalization of its maps, it is loath to change any maps on political pressure alone without any scientific data to validate such a change.<sup>111</sup> The agency would face severe criticism for shifting its position based on political pressure.<sup>112</sup> Moreover, Congress has charged FEMA to alter a flood map only if it is scientifically or technically incorrect.<sup>113</sup>

Local leaders began pointing at specific weaknesses in the agency's findings. Much of it was based on information not specific to the harbor area. This is a well-established flaw of the mapping program. FEMA analyzed the less calm eastern section of the shore and failed to take into account the calmer western region.<sup>114</sup> FEMA also mistakenly found that a seventy-one mile per hour wind could persist for an hour over the harbor.<sup>115</sup> Sustained winds have never exceeded fifty miles per hour.<sup>116</sup> City officials recommended the agency place a tidal gauge in the harbor for a year to get a more realistic impression.<sup>117</sup>

To have a chance at being persuasive, local officials knew they needed compelling data. "We follow the science," said one FEMA

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109. Bell, *supra* note 7.

110. Columbia Venture, LLC, et al v. S.C. Wildlife Fed. et al, 2008 WL 2307394 \*3 (Appellate Brief) (4th Cir. May 15, 2008) (Response Brief of Columbia Venture, LLC et al). FEMA appealed the decision, and the Fourth Circuit reversed it, holding that the notice failure was harmless error. Columbia Venture, LLC v. S.C. Wildlife Fed., 562 F.3d 290, 295 (4th Cir. 2009). The mistake in Portland was that the agency's notification letter was addressed to former Mayor Ed Suslovic, when it should have been addressed to the city's chief executive, Joe Gray. Bell, *supra* note 7. Presumably, this is also harmless error considering the fact that Gray had little trouble learning of the news.

111. Lehmann, *supra* note 6.

112. *Id.*

113. 42 U.S.C. § 4104(b).

114. Bell, *supra* note 5.

115. Porter, *supra* note 3.

116. Goldfine, *supra* note 99.

117. Lehmann *supra* note 6.

official.<sup>118</sup> Portland engaged an engineering firm, which collected significantly more measurement points than FEMA. It statistically established the wave-calming influence of the harbor islands and more accurately depicted potential wave action.<sup>119</sup> The city hoped the new data would lead to a redrawn map.<sup>120</sup>

Portland's scientific input was welcomed by FEMA. The agency encourages local participation. "Now if someone like the city of Portland comes and says, 'Well, you were gathering your scientific information from this point in the area, and we have other validated scientific information from another point,' then of course we look at that," said agency spokesman Dennis Pinkham.<sup>121</sup> FEMA's Regional Administrator Paul Ford agreed to review Portland's entire study.<sup>122</sup>

The agency took steps to improve its findings. It reran some specific modeling.<sup>123</sup> FEMA had analyzed how a one hundred year storm would affect the Portland Fish Pier, which is located toward the eastern section of the harbor. Originally, it showed that five foot waves would occur.<sup>124</sup> The second time, the modeling resulted in a much lower wave height: only three feet, three inches.<sup>125</sup> This is just barely high enough to qualify for the V-zone designation. The cut-off is three feet. FEMA acknowledged that it might do some other reanalysis as well.<sup>126</sup> One spokesman admitted that, "there is certainly additional modeling and more detailed modeling that could be done."<sup>127</sup>

He warned, however, "That [it] may or not make a difference in terms of what the maps look like."<sup>128</sup> If Portland's efforts are unsuccessful, there will be no reimbursement from the agency<sup>129</sup> for the cost of the city's studies, which is at least \$10,000.<sup>130</sup> The city officials urged the federal government to stop shifting the re-mapping cost onto

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118. Lehmann, *supra* note 6.

119. Kessler, *supra* note 4.

120. *Id.*

121. Porter, *supra* note 3.

122. Bell, *supra* note 7.

123. Tom Bell, Local Cities Join to Fight FEMA Over Flood Zoning, PORTLAND PRESS HERALD, Sept. 5, 2009, at A1.

124. *Id.*

125. *Id.*

126. Kessler, *supra* note 4.

127. Bell, *supra* note 123.

128. *Id.*

129. 42 U.S.C. § 4104(f) (2006).

130. Bell, *supra* note 123. Portland's neighbor South Portland chipped in at least \$5,000. *Id.*

local communities.<sup>131</sup> U.S. Congresswoman Pingree said this is an unfair burden that “should have [been borne by] FEMA in the first place.”<sup>132</sup> U.S. Senator Susan Collins also found it “troubling” that Portland must “shoulder the financial burdens of correcting FEMA’s mistakes.”<sup>133</sup>

At the same time that they was challenging FEMA’s data, local officials were calling on Congress and FEMA to draw up laws and regulations that better suit urban waterfronts. Portland Harbor and others like it have a different natural environment. The FEMA’s program is best applicable to environmentally sensitive areas like coastal plains, not to fishing ports in sheltered harbors.<sup>134</sup> These harbors are chosen specifically because they are better protected naturally. They do not have the same vulnerability. They should not receive the same treatment nor bear the same mitigation costs. FEMA will continue to run into resistance from port cities. It should carve out an exception for working waterfronts, which do not fit FEMA’s homogeneous method.

Local officials supported this contention with anecdotal and technical evidence. Portland Harbor is densely-built, has been developed over several hundred years, and has proven itself in the worst weather.<sup>135</sup> The harbor’s piers and wharves calm waves.<sup>136</sup> Government frigates and major passenger and commercial vessels use Portland as a safe harbor. No catastrophic storm has hit Portland Harbor in the last one hundred years (the period of time used to establish flooding risk).<sup>137</sup> For any flooding to occur, the harbor tide gauge must exceed 12 feet.<sup>138</sup> The highest tide ever recorded was only 2 feet higher at 14.17 feet when the infamous Blizzard of 1978 damaged one of the wharves.<sup>139</sup> An April 2007 storm, locally remembered as the Patriot’s Day storm, which brought down several moored boats, caused no damage to the wharves and only crested the 12 foot mark by 1 foot, reaching 13.28.<sup>140</sup> The owner of a two hundred year old concrete pier could find no documented

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131. Porter, *supra* note 3.

132. Lehmann, *supra* note 6.

133. *Id.*

134. *Id.*

135. Bell, *supra* note 5.

136. *Id.*

137. Lehmann, *supra* note 6.

138. Bell, *supra* note 5.

139. *Id.*

140. *Id.*

evidence of 3 foot wave damage in its storied history.<sup>141</sup> Pier owners have made no significant insurance claims.<sup>142</sup>

Local officials also felt that economic factors should be considered when determining building restrictions. Collins said FEMA's maps should not "unduly burden[] the city and its residents."<sup>143</sup> U.S. Congresswoman Pingree called the restrictions on development a "huge economic burden" that would be "devastating" given the current economic climate "in particular."<sup>144</sup> A city official said "what you are in effect doing is putting these waterfronts out of business."<sup>145</sup> City officials acknowledged that protecting lives and property is paramount but felt that economic considerations should not be wholly ignored.<sup>146</sup>

#### IV. NEED FOR ECONOMIC ANALYSIS

Science and safety are essential, but economic factors are also important. They should be considered whenever practical. To support this proposition one need look no further than the NFIP itself. It was created to address economic concerns, primarily the growing financial burden of flooding on the federal government. The program's insurance component was designed to shift this burden off the general taxpayer and onto those taking the risk. The program's mitigation component was also intended to reduce financial exposure.

There should be economic safeguards in place so that FEMA's mitigation determinations, such as building restrictions, do not create a worse economic situation than before. Ironically, mitigation efforts may actually be increasing the overall economic cost of flooding. This is due to the cost of lost opportunity. Building restrictions may be warranted where development potential is slight. Severe restrictions may even be desirable where development potential is high because the risk of flooding and the cost of rebuilding are also high. But in places like Portland, where the economic opportunity is high and the risk of flooding low, building restrictions may be ill-advised. Here, the natural human aversion to mitigation may be well-placed: potential future benefits will not exceed the initial economic sacrifice.

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141. Lehmann, *supra* note 6.

142. See Bell, *supra* note 7.

143. Bell, *supra* note 7.

144. Porter, *supra* note 3.

145. Bell, *supra* note 7.

146. *Id.*

Sheltered harbors that drive major economic activity litter the coast. In places like Portland, there is little evidence that mitigation will prevent much property damage. In Portland there has been minute damage to the waterfront over centuries because of natural defenses. Where little damage is likely, are economically destructive restrictions on development appropriate? This is an especially apropos question in the present economic climate.

The economic importance of coastal development is indisputable. The property that runs along the Gulf and Atlantic coasts alone is valued at \$9 trillion.<sup>147</sup> Much of this is attributable to giant commercial centers, derived from their mercantile past where they served as conduit points between the shipping lanes of the open ocean and the inland networks of road and rail.

Not only financial health but psychological well-being is also at stake. The high economic value of coastal land is not merely about dollars and cents.<sup>148</sup> The purely recreational and personal value of the coast cannot be denied. People love the coast. This fact is evident from the massive wealth on display in mansions and resorts from Bar Harbor, Maine to Sarasota, Florida and in places like Newport, Rhode Island. People love to be near the water, especially the coast where they can watch the sublime movements of the currents go on until they meet the vast, open sky. People enjoy watching boats float atop the ocean's bosom. They like to interact where the land and ocean meet in work and in play in ways they have done for millennia.

Governments also recognize this value. Their respect for the personal and public pursuit of waterfront living can be seen from Oregon to the Great Lakes to Maine. They support public access, right-of-ways, and the public trust doctrine. The federal government should not discourage this natural pursuit of waterfront living by pushing people away through questionable mitigation policies. Either FEMA through regulation, or Congress through statute, should incorporate economic factors into the agency's mitigation determinations.

FEMA's limited ability to collect accurate data is another reason for incorporating economic factors. For its part, FEMA is an agency with a mindset for technical data. A spokesman involved in the Portland mapping project said that "[o]ur job is to map risk and identify that risk and put it on the map as best we can. That is our job and what we are

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147. IBHS, *supra* note 85, at 4.

148. When the Author refers to the economic value of coastal development, he is including in that term its psychological value which plays a role in determining coastal property's monetary value.

charged by Congress to do.”<sup>149</sup> As a result, FEMA rightfully puts a lot of focus on accuracy, but because of its limited resources, its data-collection is limited and homogeneous, and often a poor predictor. The agency could compensate for this weakness by considering other, nonphysical factors.

The mechanism for incorporating economic factors could be as follows. First, as it does now, FEMA would ascertain as accurately as possible the flood predictors, but this would not be the final determinant. Second, it would derive from the flood maps the building restrictions necessary to prevent property damage. Third, it would determine the financial savings that would result. Fourth, it would discount the projected savings by the projected loss of economic development. Where the savings exceed the loss, the requirements should be implemented. Where the loss exceeds the savings, lesser restrictions should be applied as safety permits. This would produce a much more economically efficient mitigation plan. Even if FEMA’s current analysis accounts for lost opportunity to some degree, this needs to be more robust, as evidenced by Portland, where the restrictions were overly damaging economically.

With the likelihood that FEMA lacks authority or political will to incorporate economic factors into its determinations, Congress should mandate it. It has started down this road. On July 15, 2010, the U.S. House of Representatives passed legislation that would require FEMA to study “the impact of working waterfronts on storm and flood risk.”<sup>150</sup> Portland’s U.S. Representative, Chellie Pingree, introduced the amendment as a direct result of the city’s experience.<sup>151</sup> The requirement is part of a larger bill to reform the NFIP but it will have difficulty clearing the Senate. Even if it becomes law, the changes will not take effect until the next re-mapping program,<sup>152</sup> which could be decades away. That will be too late to help port cities stuck with restrictions on development as a result of this current re-mapping effort.

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149. Bell, *supra* note 5.

150. Flood Ins. Reform Priorities Act of 2010, H.R. 5114, 111th Cong. H. AMDT. 718(9) (2010).

151. Steve Mistler, *Problems with FEMA Maps for Maine Help Spur Change in Flood Insurance Bill*, THE FORECASTER, July 21, 2010 (available at <http://www.theforecaster.net/content/pnms-femamaps-3> (last visited Aug. 20, 2010)).

152. *Id.*

## V. AVOIDING ECONOMIC LOSS

Portland will not be one of those port cities. In June 2010, FEMA released revised maps.<sup>153</sup> With the exception of the Maine State Pier, the entire harbor was put back into an “A-zone,” where there are no significant building restrictions.<sup>154</sup> The agency had been persuaded by local efforts and essentially reversed its position. The harbor’s private property owners will be free to develop. In October 2010, FEMA went a step further. It again withdrew its maps, this time in favor of an entirely new program which calls for total collaboration with local authorities.<sup>155</sup> Local groups may be spared much of the cost of their studies, so long as they are made “incident to any appeal.”<sup>156</sup> Congress requires FEMA to reimburse parties that win their appeals, though only for expenses directly related to the agency’s changed position.<sup>157</sup> Expenses incurred during the comment period may not be considered “incident to any appeal” and may not be reimbursable. Whether or not political or economic influences had a strong effect on these outcomes, FEMA and local officials credited the new, locally supplied data for the change.<sup>158</sup>

Not all results will be as cheery as Portland’s. Several major coastal cities still stand in the eye of the re-mapping storm, including Boston, Providence, Portsmouth (New Hampshire), and New Haven (Connecticut). If these cities are stuck with restrictions on development, they should first appeal FEMA’s final decision to a U.S. District Court. However, a favorable outcome is not promising. For organizations with vast financial resources, an appeal could be advantageous. It could provide leverage over an agency eager to avoid expensive litigation.<sup>159</sup> But most municipalities, even large cities, cannot afford expensive litigation, especially in this tight economic climate.

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153. Bell, *supra* note 1.

154. *Id.*

155. Tom Bell, *FEMA Pulls Flood Maps for Two Counties*, Portland Press Herald, Oct. 2, 2010, at A1.

156. 42 U.S.C. § 4104(f) (2006).

157. *Id.*

158. Bell, *supra* note 1.

159. See Dan McCue, *Columbia Venture Sues Richland County Over Land Dispute*, Free Times, Nov. 11, 2009, [http://www.free-times.com/index.php?cat=121304064644348&z\\_Issue\\_ID=11010311090903415&ShowArchiveArticle\\_ID=11010411093056358&Year=2009](http://www.free-times.com/index.php?cat=121304064644348&z_Issue_ID=11010311090903415&ShowArchiveArticle_ID=11010411093056358&Year=2009) (last visited Mar. 31, 2010) (Columbia Venture, a land developer in South Carolina, is still fighting a 2001 flood map determination).

Even if a port city could afford to mount an appeal, courts are unlikely to reverse FEMA's determinations because of highly deferential standards of review. Judicial review is governed by the Administrative Procedures Act.<sup>160</sup> As such, a *de novo* review would only be available if the agency determination was adjudicatory in nature.<sup>161</sup> Courts have repeatedly held that flood map determinations are not adjudicatory, but quasi-legislative.<sup>162</sup> As a result, the court will only look to see if the determination was arbitrary or capricious.<sup>163</sup> The cards are stacked even further against appellants by courts' deferral to FEMA's technical expertise.<sup>164</sup>

A port city could not even use pending litigation to temporarily enjoin the implementation of the determinations. Congress specifically provided that maps go into effect despite pending litigation.<sup>165</sup> There is an exception if good cause is shown, but this would be little help. A port city could argue that FEMA's determinations were inaccurate or insufficient but a court would likely see FEMA's technical data as authoritative. A port city could also make a public policy argument on economic grounds, but this would also fail because there is no support for it in the governing statutory and regulatory laws.

#### A. *A Port City's Spectrum of Options*

With dim prospects in an appeal, a port city can look to three other options which run along a spectrum. Sitting to one side of the spectrum is the option to completely submit to FEMA's building restrictions. This option is politically feasible. Port city officials would keep their jobs because they would preserve subsidized flood insurance for their citizens. A catastrophic event is unforeseeable in cities like Portland, but voters know that some isolated flooding, inland or otherwise, is liable to occur. Wary of their own potential loss, these voters would be happy that they still have their affordable insurance and would not be so

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160. 42 U.S.C. § 4104(g) (2006) (This subsection references chapter 7 of title 5, which is the Administrative Procedures Act).

161. *Camp v. Pitts*, 411 U.S. 138, 141-42 (1973); *Falls Chase Special Taxing Distr. v. Dir. Fed. Emerg. Mgmt. Agency*, 580 F. Supp. 967, 970 (N.D. Fla. 1983).

162. *Falls Chase Special Taxing Distr.*, 580 F. Supp., at 970; *City of Wenatchee v. U.S.*, 526 F. Supp. 439, 441 (D. Wash., 1981); *Tex. Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025, 1032 (D.D.C. 1978).

163. 5 U.S.C. § 706(2)(A) (2006); 42 U.S.C. § 4104(g) (2006); *Falls Chase Special Taxing Distr.*, 580 F. Supp., at 970.

164. *Falls Chase Special Taxing Distr.*, 580 F. Supp. at 970.

165. 42 U.S.C. § 4104(g) (2006).

concerned about losing economic development on the waterfront. They would directly feel the effect of losing flood insurance (even if just on their psyche) but would not feel any direct or immediate loss from a bar against development. However, the long-term economic consequences of such a move could be devastating.

Officials could look to the opposite end of the spectrum and choose to completely withdraw from the NFIP. This would be economically beneficial overall. Breaking ties with the program would set a port city free to exploit waterfront development. It would also spell the end of subsidized insurance, but cities like Portland, with natural physical barriers, do not suffer the serious coastal and inland flooding seen in the Midwest, Gulf region, and Northern California. Subsidized flood insurance is not as economically significant in places like Portland. Some property owners would suffer flood damage, but the city could use funds derived from waterfront development to aid them.

Although withdrawal is economically favorable, the loss of subsidized insurance would be politically untenable. There would be some voters in favor of withdrawal because it would end the unpopular requirement that owners of high risk properties purchase insurance.<sup>166</sup> However, the political support for subsidized insurance would be much more powerful.

### *B. Non-Compliance and Its Favorable Legal Landscape*

While submission at one end of the spectrum is economically dangerous, and withdrawal at the other end is politically untenable, in the center lies a more palatable option. A port city could remain in the NFIP, but not comply with the building restrictions. With this option, the city could try to maintain the best of both worlds. It could have economically vital waterfront development and politically valuable subsidized insurance. Based on history, a port city could be successful taking this approach.

FEMA has limited oversight ability. The drive to develop has been too powerful for the agency's limited resources. According to Professor Oliver Houck, where the flooding risk is low and the building restrictions are modest, compliance is generally good because "no one's shoe is pinched."<sup>167</sup> But, where the risk is high and the restrictions on

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166. GAO, *supra* note 8, at 14.

167. Oliver A. Houck, *Rising Water: The National Flood Insurance Program and Louisiana*, 60 TUL. L. REV. 61, 164 (1985).

development are severe, development overrides compliance.<sup>168</sup> Even “an army of inspectors”<sup>169</sup> could not oversee all twenty-thousand participating communities. A non-complying port city could easily fly under the radar.

A port city has every reason to try non-compliance because even if it gets caught, FEMA’s sanctions are light. The agency penalizes a non-complying community by removing it from the NFIP, but it is allowed to return to the program in full as soon as it implements a mechanism to enforce FEMA’s building restrictions. This is a reform which could be accomplished in a relatively short time. A port city would only see a brief hiatus from the program. No other sanctions or penalties are imposed. As Professor Houck laments, “a sanction which merely removes a non-complying community from the program until it cleans house would, in effect, be license to get away with the maximum infractions before the inspectors arrived.”<sup>170</sup>

Sparse monitoring coupled with a light penalty means that a non-complying port city could enjoy years of unmonitored waterfront development with little risk of reprisal. At worst, it would suffer a brief time-out from the NFIP before returning to the program in full. Perhaps, it could lapse back into non-compliance again a short time later. This cycle could go on indefinitely.

### 1. Courts’ Unwillingness to Burden Municipalities with Liability

Pursuing a remedy in the court system would seem like a good idea for FEMA, but the courts have been reluctant to assign liability to non-complying municipalities. A successful court decision or two would be a relatively inexpensive tool for FEMA in compelling compliance nationwide, but the courts have been historically unwilling to burden municipalities with “massive” contractual or tort liability.

The seminal case on contract liability is *U.S. v. Parish of St. Bernard*, decided by the U.S. Court of Appeals for the Fifth Circuit in 1985.<sup>171</sup> The Parish of St. Bernard was a poor Louisiana municipality that disregarded NFIP requirements to mitigate future flood damage. The community was regularly barraged by storms and flooding. In 1978,

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168. *Id.*

169. *Id.*

170. *Id.*

171. 756 F.2d 1116 (5th Cir. 1985), *cert. denied.*

1980, and 1982, storms caused at least \$93 million in flood claims.<sup>172</sup> These claims could have been avoided if St. Bernard had fulfilled its obligations to mitigate flooding.<sup>173</sup> FEMA<sup>174</sup> argued that St. Bernard's obligation was contractual and that it was liable for all damages stemming from its breach. The Fifth Circuit disagreed, refusing to recognize a contract and subject municipalities to "unlimited liability." It rested its decision on its finding that there was no statement in either the NFIA or FEMA's regulations literally declaring that participation creates a contract.<sup>175</sup> Nothing short of that would establish a contract.

Courts are also reluctant to find municipalities liable in tort. In *St. Bernard*, the Fifth Circuit set down a precedent that essentially bars FEMA from bringing a negligence claim against non-compliant communities. St. Bernard could not hide behind sovereign immunity (abandoned in Louisiana), nor could it readily shield itself from tort liability under the public duty doctrine; but nevertheless, the court denied most tort claims. To do this, it extended its contract holding.<sup>176</sup> Because the court held that Congress did not intend to heap unlimited contractual liability upon municipalities, it must not have intended to assign massive tort liability either.<sup>177</sup> According to the court, "[i]t is unreasonable to argue . . . that the NFIP, a program designed to lessen the massive public outlay for federal disaster assistance, could be foisted in its entire cost onto the very people Congress was trying to protect from the prohibitive cost of flooding."<sup>178</sup>

However, in some instances courts will allow FEMA to bring a tort claim. In *St. Bernard*, the Fifth Circuit established the precedent that the agency can pursue subrogation claims. The court recognized that insurance law, including the principle of subrogation, applied to the NFIP. Although the court found that FEMA lacks standing to pursue its own negligence claims, its private insureds can subrogate their claims to the agency. This could be a viable avenue for FEMA because it could stand in the shoes of a large number of claimants and seek substantial damages.

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172. Petition for a Writ of Certiorari, *The Parish of St. Bernard v. U.S.*, No. 85-332, 1985 WL 694981 (U.S.). [hereinafter *St. Bernard Petition*].

173. *U.S. v. Parish of St. Bernard*, 756 F.2d 1116, 1119 (5th Cir. 1985), *cert. denied*.

174. This action was also brought on behalf of the Federal Insurance Administration (FIA), which was responsible for administering the NFIP before FEMA. *Id.*

175. *Id.* at 1121.

176. *Id.* at 1126-28.

177. *Id.* at 1127-28.

178. *Id.*

However, once in court, FEMA has historically been unable to show causation. Courts have been reluctant to find that municipality negligence is the proximate cause of flooding damage. Flooding arises amidst major weather events, and courts usually find that they are proximately caused by an “act of God.”<sup>179</sup> Showing that damage is not caused by a severe natural disaster is a high evidentiary hurdle. Proving this for enough properties to make a suit monetarily worthwhile is even tougher. The combination of these two factors significantly deters FEMA from making subrogation claims.<sup>180</sup>

The Fifth Circuit prevented FEMA from asserting other causes of action as well. It ruled that the NFIA did not imply a private right of action.<sup>181</sup> It also denied FEMA the right to sue a municipality over damage to its own public property.<sup>182</sup> The court recognized the insurance law principle that an insurer cannot sue its insured.<sup>183</sup> FEMA, therefore, cannot sue a municipality with respect to its own property. Insurance law makes an exception when the insured acts fraudulently, but this exception is of little use to FEMA. Intentional non-compliance may amount to fraud, but evidentiary problems combined with monetary concerns render such a claim impractical.<sup>184</sup> The amount of damages would not be “litigation-worthy.”<sup>185</sup> Only a fraction of all insured properties are public.

## 2. Potential and Existing Risks

A non-complying port city sees a very favorable legal landscape, but risks do exist. The court’s position could erode significantly in the areas of both contract and tort. Courts could begin to see non-compliance as bad faith. A court wishing to punish this behavior has a readily accessible option. It need look no further than the shaky principles underpinning the Fifth Circuit’s contract holding in *St. Bernard*. That court briskly passed by FEMA’s logical argument that a contract existed. The agency plainly asserted that a municipality’s agreement to comply

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179. See *Gabler v. Regent Dev. Corp.*, 470 So. 2d 149, 162 (La. Ct. App. 5th Cir. 1985).

180. See *Houck*, *supra* note 167, at 156.

181. *St. Bernard*, 756 F.2d at 1122-23.

182. *Id.* at 1128.

183. *Id.* at 1127.

184. *Houck*, *supra* note 167, at 156.

185. *Id.*

with federally imposed conditions in return for subsidized insurance is in the nature of a contract.<sup>186</sup>

A more in-depth analysis than the court gave inevitably leads to the conclusion that FEMA was right. In holding that no contract existed, the Fifth Circuit relied upon *Pennhurst State Schools & Hospital v. Halderman*,<sup>187</sup> but misinterpreted its holding. *Pennhurst* established that a contract exists when Congress imposes an obligation as a condition of federal funding.<sup>188</sup> The key is that an *obligation is imposed*. Mere precatory language, such as an expression of a simple desire or the encouragement of certain behavior, will not create a contract.<sup>189</sup> In fact, *Pennhurst* recognized the “well-settled” distinction between “encouragement” and the “imposition of binding obligations.”<sup>190</sup> It also confirmed that Congress understood this difference and its significance.<sup>191</sup>

To better understand the distinction between a contractual obligation and mere precatory language, *Pennhurst* provided several working definitions, including the following three. First, *King v. Smith* provided an example of a contract.<sup>192</sup> In *King*, Alabama received federal funds under the Social Security Act, but breached its obligation to aid needy families with children.<sup>193</sup> The U.S. Supreme Court found that 42 U.S.C. §§ 603, 602(a)(9) (1964) created a contractual obligation.<sup>194</sup> Section 603(a) established the main part of the obligation. It read, in pertinent part, that “the Secretary of the Treasury shall pay to each State which has an approved plan for aid and services to needy families with children . . . .”<sup>195</sup> This subsection established a state’s obligations to have an approved plan as a condition of receiving federal funding. This is a simple and clear quid pro quo.

Section 602(a)(9) provided the specific part of the plan that Alabama violated. It read: “A State plan for aid and services to needy families with children must . . . provide . . . that aid to dependent children shall be furnished with reasonable promptness . . . .”<sup>196</sup> This subsection

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186. *St. Bernard*, 756 F.2d at 1121.

187. *Id.*

188. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17-18 (1981).

189. *Id.*

190. *Id.* at 27.

191. *Id.*

192. *Id.* at 18.

193. *King v. Smith*, 392 U.S. 309, 333 (1968).

194. *King*, 392 U.S. at 316-17, 333.

195. 42 U.S.C. § 603(a) (1964).

196. *Id.* § 602(a)(9) (1964).

established that an approved plan includes the prompt furnishing of aid to dependent children. The two subsections, read together, established that Alabama was contractually obligated to provide prompt aid. Alabama had not done this, and the Court found this to be a breach of contract. Thus, the Court found a contract even though Congress did not literally state that a contract was created.

The *Pennhurst* Court provided another example of a contract by pointing to language in the Developmentally Disabled Assistance and Bill of Rights Act of 1975.<sup>197</sup> One of the Act's funding sections, 42 U.S.C. § 6063, stated: "[a]ny State desiring to take advantage of this subchapter [funding for University Affiliated Programs] must have a State plan submitted to and approved by the Secretary under this section."<sup>198</sup> As in *King*, this language imposed a contractual obligation upon participating states to have an approved plan in return for federal funding. This is another clear quid pro quo. Section 6063 went on to enumerate the specific requirements of the plan. Failure to satisfy those requirements would result in a contractual breach. Here, as in *King*, Congress did not specifically state that a contract is created.

The *Pennhurst* Court also provided an example of language that did not create a contract. The Developmentally Disabled Assistance and Bill of Rights Act of 1975 also set forth certain rights, including the following: "Persons with developmental disabilities have a right to appropriate treatment . . . ."<sup>199</sup> It was argued that this language imposed an obligation upon states to provide "appropriate treatment." However, the Court held that this was a mere Congressional affirmation, akin to a purpose statement, that had no specific bearing on the relationship between the states and the federal government. It did not impose a duty upon states to act. It was not a condition of federal funding.<sup>200</sup> There was no consideration or quid pro quo. The establishment of this right is much more precatory in nature than contractual. Congress would have to speak much more clearly than this to create a contractual obligation.

When compared to these examples, the NFIA clearly reflects a Congressional intent to impose a contractual obligation upon participating municipalities. Notably, § 4022 of the NFIA reads: "no . . . flood insurance coverage shall be provided under this chapter [National Flood Insurance] in any area (or subdivision thereof) unless an appropriate public body shall have adopted adequate land use and control

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197. *Pennhurst State Sch. & Hosp.*, 451 U.S. at 23.

198. 42 U.S.C. § 6063(a) (1982 & Supp. III 1983).

199. *Pennhurst State Sch. & Hosp.*, 451 U.S. at 13.

200. *Id.*

measures (with effective enforcement provisions) which the Director finds are consistent with the comprehensive criteria for land management and use . . . .<sup>201</sup> Here, just as in *King* and in the *Pennhurst* funding section, there is an expectation that the municipality will fulfill an obligation before receiving federal funding. Congress clearly conditioned the receipt of subsidized flood insurance on the adoption and enforcement of building restrictions. This is an obvious quid pro quo.

This is not the only section in the NFIA that shows a Congressional intent to impose a contractual obligation. It can also be seen in § 4012:

The Director shall make flood insurance available in only those States or areas (or subdivisions thereof) which he has determined have . . . given satisfactory assurance that . . . adequate land use and control measures will have been adopted [as specifically required] . . . and that the application and enforcement of such measures will commence as soon as technical information . . . is available.<sup>202</sup>

Here again, there is an expectation that flood insurance will only be given to those municipalities that promise to comply with FEMA's building restrictions. A promise is a clear contractual obligation. This is another obvious quid pro quo.

The language of the NFIA also shows that Congress knew the difference between contractual and precatory language. It used contractual language when laying out municipalities' obligations in the sections just described. It used simple precatory language when laying out general principles that were merely purpose statements. In § 4001(e), the first section of the act, Congress stated: "It is the further purpose of this chapter [National Flood Insurance] to (1) *encourage* State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses . . . ."<sup>203</sup> This was the only time Congress used the word "encourage" in a precatory context.

It used the term "encourage" in a later section of the NFIA, but the purpose of that usage was not to express a Congressional wish. In § 4102(c), Congress stated that

the [FEMA Administrator] shall from time to time develop comprehensive *criteria designed to encourage*, where necessary, the adoption of adequate State and local measures which, to the

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201. 42 U.S.C. § 4022(a)(1) (2006).

202. *Id.* § 4012(c) (2006).

203. *Id.* § 4001(e) (2006) (emphasis added).

maximum extent feasible, will— (1) constrict the development of land which is exposed to flood damage where appropriate, (2) guide the development of proposed construction away from locations which are threatened by flood hazards, (3) assist in reducing damage caused by floods, and (4) otherwise improve the long-range land management and use of flood-prone areas . . .

<sup>204</sup>

Here, “encourage” is not the active verb. It is not the focus of the sentence. The focus of the sentence is the design of adequate criteria. The active verb is “designed.” “Encourage” is used as an infinitive. Its purpose is merely to describe adequate criteria.

While courts could easily find municipalities contractually liable, some are already beginning to find them tortiously liable. Not all courts are willing to allow the ever-present “act of God” defense to immunize municipalities from tort liability. Courts have grown more willing to find that municipality negligence is the proximate cause of flooding. They are especially willing to assign liability when the municipality creates or perpetuates a known hazard.<sup>205</sup> As a result, suits against municipalities have been increasing.<sup>206</sup> For example, in *Saden v. Kirby* (1995), a municipal water and sewer board was held liable for flooding that followed heavy rains in 1983.<sup>207</sup> The Supreme Court of Louisiana found that the proximate cause of some of the flooding was the board’s failure to repair certain known structural problems before the rains came. Some of the flooding was attributable to an “act of God,” but expert witnesses convinced the court that the height of the flood waters would have been several inches lower had the repairs been made beforehand. The board was held liable for that part of the damage that resulted from the higher flood levels.<sup>208</sup>

## VI. CONCLUSION

A port city could end up in front of a court that is willing to find contractual or tort liability. There is ready-made case law that would strongly support a finding of contractual liability, and we are already beginning to see liability for negligence. Nevertheless, the overall

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204. *Id.* § 4102(c) (2006) (emphasis added).

205. Jon A. Kusler, *Liability as a Dilemma for Local Managers*, 45 PUB. AD. REV. 118, 120 (1985).

206. *Id.*

207. *Saden v. Kirby*, 660 So. 2d 423, 430 (La. 1995).

208. *Id.*

present legal landscape is favorable for a non-complying community. Courts are still mostly entrenched in their unwillingness to assign massive liability to municipalities. For twenty-five years, *St. Bernard* has stood as a testament to the fact that courts do not want to make cash-strapped municipalities financially beholden to the federal government.

Port cities have another powerful force on their side: the *force majeure*. The concept of *force majeure* has an imposing presence in negligence cases. The assumption that a *force majeure* is the proximate cause of flooding is a tall obstacle for FEMA to surmount. The expense of making such an evidentiary showing would not warrant a suit. Monetary judgments would not be high enough. Port cities' natural defenses would keep flooding damage relatively low. If FEMA imposes severe restrictions on development that are unwarranted because the flooding risk is low and economic opportunity high, port cities should not comply.

While port cities pursue non-compliance, Congress and FEMA should work to incorporate economic factors into the determination of floodplain building restrictions. A first step in the right direction would be the creation of a statutory and regulatory niche for working waterfronts. This body of law would recognize the natural protection these harbors have from flooding. There is a reason why thriving centers of commerce and economic activity have risen up in these areas, and they should be allowed to continue to thrive. Certainly their economic health should not be threatened by off-base predictions. The NFIP, created to reduce financial exposure, should not be a source of economic harm.