Dams and Levees Are Not Enough: The Case for Recognizing a Cause of Action Against Non-Complying NFIP Communities

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INTRODUCTION

The scene sounds like something straight out of New Orleans: people rescued from the roofs of their houses by helicopter as the water rapidly rises below; hundreds of thousands ordered to evacuate rapidly flooding areas; presidential declarations of natural disaster areas; millions of dollars in damages.

While these descriptions would certainly apply to New Orleans and the aftermath of Hurricane Katrina, they actually describe the recent effects of flooding along the banks of the Susquehanna and Delaware Rivers in New Jersey and Pennsylvania. After fifty years of no significant flooding, the Delaware flooded and caused significant damage to the surrounding areas three times in a two-year period between September 2004 and September 2006.

Although heavy rains and the remnants of tropical storms and hurricanes precipitated the floods of 2004-2006, the storms were certainly...
nothing extraordinary like Katrina. The rapid increase in the frequency of flooding, absent an extraordinary storm like Katrina, has caused environmentalists, and even some public officials, to recognize that there is an additional significant underlying cause to the recent flooding: overdevelopment in and around existing floodplains. As overdevelopment increases, there are simply fewer places where flood water can go. This lack of runoff space threatens areas already significantly prone to flood damage.

Of course, with the assistance of federal disaster relief, many victims of flooding attempt to rebuild. Unfortunately, the federal aid received is often insufficient to fully rebuild, and is certainly less than what would be received from an insurance policy. Also, federal disaster relief cannot prevent future flooding. Furthermore, as Hurricane Katrina so aptly illustrated, federal money thrown into building projects—such as reservoirs, dams or levees—is often insufficient.

The federal government has recognized that human construction is not the only means to prevent future flooding. In 1968, Congress passed the National Flood Insurance Act ("NFIA"). There are two major ways in

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8 Steve Chambers & Jeff Whelan, New Rules Good for Rivers, Not So Great for Builders, STAR-LEDGER, Aug. 23, 2006, at 13 (citing comments by environmentalists and New Jersey Governor Jon Corzine recognizing that overdevelopment has contributed to an increase in flooding). See also Hal Marcovitz, Bucks Hearing Seeks to Ease Floods, ALLENTOWN MORNING CALL, July 18, 2006, at B1 (quoting (now former) Congressman Mike Fitzpatrick, who stated that "development in the floodplain puts homes in harm's way.").

9 Brian Scheid, What’s Causing Frequent Floods?, THE INTELLIGENCER, June 29, 2006, at B3 ("As more wetlands, farmlands and river and stream banks are paved over, the amount of rainfall absorbed is slashed, forcing more storm runoff into rivers, creeks and streams.") (quoting David Masur, director of PennEnvironment).

10 Chambers & Whelan, supra note 8, at 13.

11 Reilly & Tyrell, supra note 3, at 39. Even though some property owners receive federal aid, there are many that go without, as statewide damage totals must meet a specified FEMA threshold. Id.


13 Marcovitz, supra note 8, at B1 (five reservoirs with a total capacity of sixty-nine billion gallons overflowed during the June 2006 flooding).

which the NFIA seeks to prevent future flood damage: 1) as the title implies, it provides federally subsidized flood insurance for those in known flood-prone areas; and 2) in exchange for this federal assistance, participating communities enact zoning ordinances meant to prevent future flooding.\textsuperscript{15} Aside from preventing the loss of life and property, one of Congress's primary concerns was a more pragmatic one: reducing federal expenditures on flood disaster relief.\textsuperscript{16}

The focus of this paper is on the second means by which the NFIA seeks to prevent future federal expenditures caused by flooding: the requirement that local communities "adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses."\textsuperscript{17} Although federally-subsidized insurance can help persons recover from flooding after the fact, only by preventing future construction in flood-prone areas can future flood-related damages be prevented, or at the very least, lessened.\textsuperscript{18}

However, communities by and large have failed to enact such ordinances to prevent future flood-related damages.\textsuperscript{19} Although some government officials in the areas affected by the Delaware flooding are now speaking about adopting preventive legislation,\textsuperscript{20} history has shown that such zeal is likely to fade as time passes.\textsuperscript{21} Regardless, the damage has already been done in New Jersey; future ordinances will not make the victims of past flooding whole. Because of this, public officials will generally focus on securing federal aid to help those affected by floods rebuild.\textsuperscript{22}

\begin{flushleft}
\textsuperscript{15} Id.
\textsuperscript{17} 42 U.S.C. § 4002 (2000).
\textsuperscript{18} In addition to overdevelopment, many environmentalists also cite global warming as a reason for increased flooding. Therefore, even if the overdevelopment problem is remedied, it is possible that flood-related damages will still increase. Still, correcting part of the problem is likely to at least slow the rise of flood-related damages. See Scheid, \textit{supra} note 9, at B3 ("the frequency of major flooding could be signs of the impact of global warming.").
\textsuperscript{19} See Oliver Houck, \textit{Rising Water: The National Flood Insurance Program and Louisiana}, 60 TUL. L. REV. 61, 114 (1985) ("the closer one comes to a flooding problem, the harder it is to make the NFIP work.").
\textsuperscript{20} Chambers & Whelan, \textit{supra} note 8, at 13 (describing Governor Corzine's proposal to double or triple existing no-development zones on New Jersey's waterways).
\textsuperscript{21} See generally Houck, \textit{supra} note 19. Despite repeated flood damage having occurred in New Orleans and surrounding parishes, overdevelopment and failure to abide by FEMA regulations has continued. Id.
\end{flushleft}
The problem is exacerbated by the influential development lobby. Immediately after New Jersey Governor Jon Corzine proposed modest building restrictions in flood-prone areas, the development lobby began criticizing the suggestion. Whereas garnering federal emergency assistance is viewed positively by all in the community as evidence that their government officials are taking immediate action, restrictive ordinances take time to show results and are subject to criticism.  

I. SOLUTION OVERVIEW

Clearly, the NFIA intends for communities to develop sound building ordinances to minimize the risk of future flood damage. However, communities often fail to do so. The damage caused as a result is high, both at the federal level in the form of increased expenditures on disaster assistance, and at the personal level in the form of extensive property damage. What, then, is to be done about these two types of damages? Because communities are required by the NFIA to adopt sound land use ordinances to protect against future flooding, the courts appear to be a logical place to seek compliance. There are two potential ways in which the courts can be used. First, the federal government can use the courts to bring lawsuits against communities that participate in the National Flood Insurance Program (“NFIP”) but fail to comply with their responsibilities as stated in the NFIA. Second, individual property owners can use the courts to bring lawsuits against their local governments based on a tort theory predicated on breach of duty.

23 See Chambers & Whelan, supra note 8, at 13 (suggesting that the New Jersey development community will oppose Governor Corzine’s proposed building restrictions; the New Jersey Builders Association and Builders League of South Jersey refused comment until the official proposal was published).
24 See Houck, supra note 19, at 134.
26 See generally Houck, supra note 19 (offering a description of four Louisiana communities and their implementation of the NFIA; includes descriptions of failures to implement proper ordinances, such as structures being built before the issuance of a permit, as well as allowing builders to self-certify that they are conforming to floodplain regulations).
28 Houck, supra note 19, at 135-36.
29 Id.
Of course, both the federal government and property owners have attempted to use the courts in this manner. To date, they have not been very successful. Ironically, the Fifth Circuit and Louisiana state courts have made the sound ordinance provision of the NFIA virtually unenforceable. In United States v. Parish of St. Bernard, the Fifth Circuit rejected the federal government's claim for damages based on a breach of contract theory. In Gabler v. Regent Development Corp., a Louisiana state court rejected a private cause of action on the grounds that the damage caused was by "an act of God." However, other circuits, such as the Third Circuit that governs New Jersey and Pennsylvania, are obviously not bound by the Fifth Circuit's decisions. This paper will discuss avenues of distinguishing the Fifth Circuit's decisions, or, more drastically, arguments that can be made as to why the Fifth Circuit's decisions are erroneous and thus should be ignored. If the other circuits should ultimately choose to align themselves with the Fifth, the burden would then lie with Congress to amend the NFIA to make it more enforceable through the judicial system. Of course, any discussion of amending the NFIA will have to evaluate the political reality of doing so. Included in this discussion is a debate as to whether it is more advantageous to take federal action by amending the NFIA, or whether it is best to leave the matter to state and local governments in the hope that they can formulate effective policies at the local level.

II. Establishing Local Governments' Duties Under the NFIA

A. Congressional Intent

At its most basic level, the National Flood Insurance Program, established by the NFIA, provides subsidized flood insurance for property owners located within a Special Flood Hazard Area ("SFHA"), colloquially known as a "flood-zone." These flood zones are determined by the Federal Emergency Management Agency ("FEMA") and are published in map form

30 See United States v. Parish of St. Bernard, 756 F.2d 1116 (5th Cir. 1985) (lawsuit by the federal government against local governments in Louisiana for failing to comply with terms of the NFIA); Gabler v. Regent Dev. Corp., 470 So. 2d 149 (La. Ct. App. 1985) (lawsuit by individuals seeking damages from Louisiana local government for failing to comply with terms of the NFIA).
31 St. Bernard, 756 F.2d at 1116.
32 Gabler, 470 So. 2d at 162.
as a Flood Insurance Rate Map ("FIRM"). Before any mortgage or refinancing of a mortgage can occur from a federally-insured lending institution, a flood determination must be done on the property. If the main structure is located within a flood zone, the property owner is required to purchase flood insurance. This part of the NFIA focuses on property that is already at risk of flooding.

Other parts of the NFIA also focus on requiring local governments participating in the NFIP to establish land use ordinances to prevent future flooding. The text of the NFIA appears to be sufficiently clear in this regard. The original NFIA states that Congress believed that the NFIP could provide protection against flood losses through the insurance program and by "encouraging sound land use by minimizing exposure of property to flood losses." The statute also "encourages" local governments to adjust land use as necessary "to constrict the development of land which is exposed to flood damage and minimize damages caused by flood losses," and to "guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards."

Although the word "encouraged" is somewhat ambiguous, the subsequent Flood Disaster Protection Act of 1973 clearly states that the purpose of the Act is to "require States or local communities" participating in the

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35 44 C.F.R. § 59.2 (2006). Generally, the lending institution will hire a flood zone determination company, as the NFIA allows the lender to hire a third party to make the determination. See 42 U.S.C. § 4104b(d) (2000). For a list of some existing flood determination companies, see Flood Zone Determination Companies, http://www.fema.gov/business/nfip/fzone1.shtml (last visited Nov. 26, 2007). It should also be noted that the federal courts have refused to acknowledge a cause of action against lending institutions that fail to notify borrowers that their property is located in a flood zone and thus leave the property uninsured against flood damage. Mid-Am. Nat'l Bank of Chicago v. First Sav. & Loan Ass'n of S. Holland, 737 F.2d 638, 638-39 (7th Cir. 1984).
36 See 44 C.F.R. § 59.2. (2006) Areas determined to within a hundred year flood plain are denoted as "Zone A" on Flood Insurance Rate Maps (FIRM) maps. See id. § 59.1 (defining special flood hazard areas). For areas where the Base Flood Elevation ("BFE") is known, the BFE is listed on the map and all new residential structures must be elevated above the BFE. Id. § 60.3(c).
38 Id. § 4001(c).
39 Id. § 4001(e). Note that this subsection (e) is entitled in part "Land use adjustments by State and local governments; development of proposed future construction . . . " Id. The choice of title indicates that Congress intended for the Act to not only provide insurance, but also that local governments regulate future construction to prevent the necessity of flood insurance in the first place.
NFIP to “adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards” in an attempt to prevent future flood damage.\textsuperscript{40} The 1973 Act was passed in response to 1972’s Hurricane Agnes, evidencing what Congress determined was a lack of enforcement capabilities under the original 1968 Act.\textsuperscript{41} Currently there are federal regulations that specifically delineate some of the requirements of participating communities.\textsuperscript{42} Furthermore, the fact that part of the NFIP’s purpose is to prevent future flood loss has been recognized by the Third Circuit.\textsuperscript{43}

B. Failure to Comply

1. Types of Failure, Generally

In his examination of four NFIP-participating communities located around New Orleans in the 1980s, Oliver Houck describes typical types of noncompliance.\textsuperscript{44} Generally, development is weakly regulated; existing ordinance violations, as well as federally-mandated elevation and flood-proofing violations, are ignored.\textsuperscript{45} Although the NFIP allows participating communities to issue variances for the construction of new buildings within a floodplain,\textsuperscript{46} certain NFIP regulations and procedures must be followed for the variance to be granted.\textsuperscript{47} Generally, noncompliance is blatant. In one community, instead of issuing an elevation certificate when a building plan was submitted, as required by the NFIP, the certificate was issued after the building was already constructed.\textsuperscript{48} In another community, vague

\textsuperscript{40} Flood Disaster Prevention Act of 1973, Pub. L. No. 93-234. § 2, 87 Stat. 975, 976 (emphasis added).
\textsuperscript{41} See Houck, supra note 19, at 70.
\textsuperscript{42} See generally 44 C.F.R. § 60.3(b) (2006) (requiring a participating community to use any available information to determine the BFE of a flood zone). For a less clear requirement, see id. §60.3(a)(3) (requiring that new construction be “reasonably safe” from flooding).
\textsuperscript{43} See Pennsylvania v. Nat’l Ass’n of Flood Insurers, 520 F.2d 11, 17 n.7 (3d Cir. 1975) (recognizing that “[a] second objective of the Act . . . was to encourage the restriction of development of land exposed to flood hazards” but “[p]rocedures designed to implement this purpose are not . . . at issue in this appeal.”) (overruled on other grounds).
\textsuperscript{44} Houck, supra note 19.
\textsuperscript{45} Id. at 93.
\textsuperscript{46} 44. C.F.R. § 60.6 (2006).
\textsuperscript{47} Id.
\textsuperscript{48} Houck, supra note 19, at 99. Note that the NFIP does not prohibit construction in a flood zone. However, when construction in a flood zone does occur, the construction must conform with the base flood elevation level (BFE) to assure that the structure rises above
regulation language was cited as justification for allowing mobile homes below the designated elevation.\textsuperscript{49} A third community simply authorized the construction of a shopping center in a known floodway.\textsuperscript{50}

2. Allegations of Failure Along the Delaware

Twenty-plus years after Houck's study, it appears that similar failures occurred in the communities affected by the Delaware River flooding.\textsuperscript{51} In response to the Delaware floods, the Delaware River Basin Flood Mitigation Task Force\textsuperscript{52} recently published a study acknowledging that communities failed to abide by FEMA regulations.\textsuperscript{53} Much like the approval of the shopping center in Louisiana that was constructed in a floodway, the Task Force, without citing specific examples, found that “new construction is sometimes improperly permitted.”\textsuperscript{54}

The Task Force also found problems with the enforcement of floodplain regulations at the local level.\textsuperscript{55} Disturbingly, the Task Force found that “[f]loodplain managers come from a variety of curricula and backgrounds” not necessarily related to floodplain management; that many floodplain managers are only part-time employees; and that the Certified Floodplain Managers designation issued by the Association of State Floodplain Managers are not required to become a floodplain manager.\textsuperscript{56} The same under-qualification was found in Louisiana twenty years ago.\textsuperscript{57} Even

\textsuperscript{49} Houck, \textit{supra} note 19, at 98.
\textsuperscript{50} \textit{Id.} at 101. A floodway is part of the flood zone where generally no building can occur.
\textsuperscript{51} \textit{Id.} at 101. A floodway is part of the flood zone where generally no building can occur. \textit{See Delaware River Basin Interstate Flood Mitigation Task Force, Action Agenda 63} (July 2007) [hereinafter \textit{TASK FORCE}], available at http://www.state.nj.us/drbc/Flood _Website/taskforce/Action-agenda_0707/index.htm (“New construction is generally prohibited in floodways because it is unsafe and obstructs the passage of floodwaters.” The floodway is often “the most dangerous area that carries deeper flows and higher velocities.”). \textsuperscript{52} \textit{See generally id.} (in proposing a number of measures to lessen flooding along the Delaware, the Task Force also analyzed what failures regarding floodplain management may have occurred and subsequently contributed to the recent flooding). \textsuperscript{53} The members of the Task Force are Delaware, Pennsylvania, New Jersey, and New York. \textit{Id.} at 7.
\textsuperscript{54} \textit{Id.} at 63.
\textsuperscript{55} \textit{Id.} at 69.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} Houck, \textit{supra} note 19, at 109 (discovering that the St. Tammany Parish flood program was overseen by its Engineering Department, which was comprised of three individuals
though there has been an increase in flood-related damages, the qualifications for local government officials in charge of floodplain management have not improved.

III. **Enforcing Local Governments' NFIP Responsibilities Through the Courts**

Because the NFIA was intended to prevent future flood losses through sound local building ordinances, an effective enforcement mechanism might be assumed. However, the NFIA only provides one explicit means of enforcement: suspending noncomplying participating communities for failure to adopt or enforce adequate regulations. This method of enforcement is insufficient, as FEMA oversight of the program has been deficient, mostly due to the sheer volume of communities participating.

Some might argue that providing a judicial remedy against noncomplying communities would be pointless because the NFIP is a voluntary program from which a community can withdraw at any time. However, allowing either a governmental or private cause of action would still compensate the injured party, whether the federal government or an individual property owner, who has suffered due either to a community's breach of its promise to abide by the NFIP or due to a community's negligent implementation of its duties under the NFIP. Also, it is by no means certain that municipalities would automatically withdraw if they were exposed to liability. The federal government offers incentives for participation in the program which a municipality might decide is worth the risk of liability.

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59 Houck, supra note 19, at 92. FEMA's main source of checking compliance is a one-page form that each participating community is required to fill out. However, up to twenty percent of communities in a given year do not fill out the report, and FEMA makes little effort to collect them. Id. Only about fifteen percent of communities are inspected for compliance annually by FEMA. Id. at 91-92. See also Griffith, supra note 27, at 748 (noting the logistical problems of checking in on the 18,000 participating communities, let alone ensuring that individual building permits conform with NFIP standards).
60 FEMA, ANSWERS TO QUESTIONS ABOUT THE NFIP, http://www.fema.gov/business/nfip/intnfip.shtm#11 (last visited Nov. 26, 2007). Although community participation is voluntary, the state government may require all communities within it to participate. Id.
61 See generally 42 U.S.C. §§ 4001-4129 (2000) (the main benefit provided is obviously the ability of a community's residents to receive federally subsidized flood insurance). In fact, part of the reason the program is criticized is because communities receive "all of the carrot, and little of the stick." Houck, supra note 19, at 88.
Additionally, the democratic process might cause a municipality to remain in the program. As members of the public become more aware of a major flooding problem, they might insist on protection, and thus vote against any candidate wishing to withdraw from the program. Finally, property values might come into play. One can imagine a situation where a nonparticipating community might see its property values decline relative to a nearby participating municipality.

Undoubtedly, the threat of liability would make a locality more likely to fulfill its obligations. The goal of providing a cause of action is not to bankrupt participating communities. Rather, the goal is to prevent the need for litigation in the first place by preventing flood damage. Furthermore, enacting strict land use ordinances regulating building in floodplains entails little legal risk for communities. Courts have uniformly held that no unconstitutional taking occurs in this situation. Thus, local governments do not have to be concerned about compensating property owners under the doctrine of eminent domain.

IV. POTENTIAL CAUSES OF ACTION

A. Contract Cause of Action

"Federal grants authorized by Congress create binding contracts between the United States and the recipient, and the United States has the authority to fix the terms and conditions." When Congress acts pursuant to its spending power, it generates legislation 'much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.' These statements by the United States

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62 Even if a community is held liable, the cost could be paid by its liability insurer. However, the St. Bernard court in dicta seemed to be concerned about the potential for excessive liability, especially since the federal government was seeking $95 million from the local communities. United States v. Parish of St. Bernard, 756 F.2d 1116, 1121 (5th Cir. 1985).
63 Tex. Landowners Rights Ass’n v. Harris, 453 F. Supp. 1025, 1031-32 (D.D.C. 1978) ("When the government acts to protect the safety and welfare of the community, generally no taking or appropriation is found. Only unreasonable measures will usually be held to constitute a taking.") (citations omitted). Unless a plaintiff can prove that the NFIA operates to make his land worth close to nothing, the NFIA's land use restrictions are not unreasonable. See id.
Supreme Court imply that if a participating community does not comply with the NFIP, they may be liable on a breach of contract theory if the federal government were to bring suit. In fact, early litigation related to the NFIP suggested that such a theory might be judicially plausible.

In *Pennsylvania v. National Ass’n of Flood Insurers*, the Third Circuit stated in dicta that “a second objective of the Act other than to make flood insurance available to private individuals was to encourage the restriction of the development of land exposed to flood hazards.” However, the court did not reach the ultimate issue of whether there could be local government liability, because “[p]rocedures designed to implement this purpose [were] not . . . at issue in this appeal.” Still, the Third Circuit seemed to suggest that there might be some judicial mechanism to enforce the stated purpose of the NFIP.

Following *National Ass’n of Flood Insurers*, the United States District Court for the District of Columbia in *Texas Landowners v. Harris* decided the issue of whether it was constitutionally permissible for the federal government to impose sanctions on nonparticipating communities. These “sanctions,” the plaintiffs argued, occurred in two forms: 1) declining property values for those living in nonparticipating communities; and 2) withholding of federal aid from nonparticipating communities. The court held that such “sanctions” were constitutionally permissible under the Tenth Amendment, and once again indicated the willingness of the courts to uphold means to achieve the goals of the NFIP. However, the *Texas Landowners* court only ruled on an issue relating to nonparticipating communities. The Fifth Circuit was first to rule on whether courts could provide a remedy against participating but non-complying communities.

1. *United States v. Parish of St. Bernard*

   In *United States v. Parish of St. Bernard*, the federal government brought suit on a breach of implied contract theory against two NFIP-participating communities in Louisiana based on the communities’ alleged

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66 Pennsylvania v. Nat'l Ass'n of Flood Insurers, 520 F.2d 11, 17 n.7 (3d Cir. 1975).
67 Id.
68 See id. at 19 n.17.
70 Id. at 1028.
71 Id. at 1030.
72 Id.
73 See United States v. Parish of St. Bernard, 756 F.2d 1116 (5th Cir. 1985).
non-compliance with the terms of the NFIP. The government argued that as consideration for federal funds, an NFIP-participating community agrees to comply with federally imposed conditions, including a duty to enact proper land use ordinances to prevent future flooding. When a community fails to comply, the federal government argued, there is a breach of contract and the federal government is entitled to recover any damages that result from the breach. In *St. Bernard*, the federal government sought to recoup the money it spent providing disaster relief that was required as a result of the defendants' failure to prevent flooding.

The Fifth Circuit recognized that a statute does not have to explicitly authorize a cause of action for one to exist. However, despite the aforementioned purpose of preventing flooding by requiring communities to adopt sound land use ordinances, the Fifth Circuit, in a 2-1 decision, overruled the district court and held that nothing in the language of the NFIP supported the theory that Congress intended for there to be a cause of action against NFIP-participating communities.

The majority reached its decision by applying a four-prong test used previously by the Fifth Circuit in *Till v. Unifirst Federal Savings & Loan Ass'n* to determine whether there was a cause of action under a statute if one was not explicitly provided for by Congress. The four prongs, initially enunciated by the Supreme Court in *Cort v. Ash*, were: 1) "whether the plaintiff is one for whose special benefit the statute was enacted"; 2) "whether there is an indication of legislative intent to create or deny such remedy"; 3) "whether such a remedy would be inconsistent with the underlying legislative purpose"; and 4) "whether the cause of action is one traditionally relegated to state law."

In his dissent in *St. Bernard*, Judge Williams stated that he would have found a breach of contract because the participating communities failed to implement and enforce specific land ordinance requirements as

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74 Id.
75 See id. at 1121.
76 See id.
77 Id. at 1119.
78 See id. at 1122.
79 See id. at 1122-23.
80 Till v. Unifirst Fed. Sav. & Loan Ass'n, 653 F.2d 152 (5th Cir. 1981).
81 St. Bernard, 756 F.2d 1116 at 1122.
82 422 U.S. 66 (1975).
83 St. Bernard, 756 F.2d at 1122.
mandated by participation in the NFIP. Instead of using the *Till* test, he would have applied the principle that it is an “inherent right” of the federal government to sue for breach of contract when it attaches conditions to a grant of federal assistance.

2. Developments Since *St. Bernard*

The federal government has not pursued a contract cause of action to enforce the NFIP since *St. Bernard*; thus, no other circuit has had the opportunity to revisit the Fifth Circuit’s holding. In fact, there has been surprisingly little comment on *St. Bernard* in other court opinions. One court that did comment on *St. Bernard* was the United States District Court for the Southern District of Ohio in *United States v. Miami University.* In a suit brought by the federal government, the court was faced with the issue of whether the Family Educational Rights and Privacy Act (“FERPA”) created a binding contract between the government and grant recipients. The defendants sought to rely on *St. Bernard* for the proposition that any conditions bringing rise to a federal cause of action must be “unambiguously stated.” However, the court quickly distinguished *St. Bernard* on a factual basis, stating that the Fifth Circuit merely found that there was insufficient evidence to hold that a contract existed between the federal government and the participating communities. In the present case, the court held that, although there was no express provision of a contract, the terms of FERPA created “clear and unambiguous obligations and restrictions on fund recipients, and thus a ‘contract’ . . . was created.” Obviously, it was not the district court’s place to expressly reject *St. Bernard’s* holding, as neither the location nor context were the same. However, if the federal government were to try again, another court could reach the same conclusion as the Southern District of Ohio in a NFIP context by stating that the terms of the NFIP create “clear and unambiguous” obligations and restrictions on the participating communities, thus creating a contract.

84 See id. at 1129 (Williams, J., dissenting).
85 Id. at 1128.
87 Id. at 1141-42.
88 Id at 1142 n.7.
89 Id.
90 Id. at 1142.
91 Id.
3. Other Ways to Distinguish *St. Bernard*

a. Strict Construction

A key feature of the *St. Bernard* decision is that the Fifth Circuit majority clearly relied on the Supreme Court's decision in *Cort v. Ash*. In that case, the Supreme Court began its trend of limiting a plaintiff's ability to bring suit on an implied contract theory. The Fifth Circuit's decision is clearly one of strict statutory construction. A differently composed court in another circuit may decide to interpret the NFIA differently. Furthermore, it can be argued that the *St. Bernard* court erred by placing the federal government on the same standing as ordinary plaintiffs. If a court was concerned about opening the door to implied causes of action, it could merely assert that there were policy reasons to allow the government greater leeway in bringing a suit based on an implied cause of action. Of course, as the *St. Bernard* court argued, a community must have notice that it has entered into a contract. Here the obvious counter-argument is that participating communities have constructive notice based on their obligations under the act.

b. The *Cort v. Ash* Test

Another circuit, wanting to keep with the *Cort v. Ash* tradition, could merely interpret the *Cort* test differently and reach a contrary result. The first and third factors, whether the plaintiff is a member of the class for whose benefit the statute was created and whether a private right is consistent with the underlying purpose of the legislative scheme, seem to come out determinatively in favor of the federal government. Additionally, at least one federal circuit has recognized that the Supreme Court has moved towards a more holistic analysis of legislative intent rather than adhering strictly to the four *Cort* factors. As such, the first and third

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92 *St. Bernard*, 756 F.2d at 1122.


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

95 The *St. Bernard* court only analyzed the issue of whether there was a legislative intent to create a private right of action. Again, the court was extraordinarily contextual, and finding nothing specific in the language of the statute or the legislative history, decided there was no legislative intent to provide for a cause of action by the federal government against a participating community. *St. Bernard*, 756 F.2d at 1122-23. However, the court only examined the history of the 1968 Act as support for its conclusion, and did not examine the 1973 Act. See *id.* at 1122-23 n.7.

96 Mid-Am. Nat'l Bank of Chicago v. First Sav. & Loan Ass'n of S. Holland, 737 F.2d 638,
Cort factors could be held to be dispositive, or, at the very least, highly persuasive, in determining the outcome of the second factor. Thus, if the first and third factors are present, it is likely the second factor is present as well; therefore, three of the four Cort v. Ash factors would be met.

The federal government, as plaintiff, clearly intended to benefit from the statute, because one of the main reasons the NFIA was enacted was to lessen federal expenditures spent on flood-related damages. Furthermore, a breach of contract remedy is not inconsistent with this federal purpose. Putting communities on notice that they must comply or face liability would certainly lessen federal expenditures. The second factor, whether there is an indication of a legislative intent to create such a remedy, can be supported by the 1973 Act, where Congress clarified the responsibilities of participating communities.

On the other hand, one could also argue that Congress had the opportunity to provide a private right of action but chose not to do so. The best argument against inferring a cause of action is that the NFIA provides for access to the courts in certain specific instances. For example, Section 4053 allows NFIA insurance policyholders to sue their insurers in federal court, and Section 4104(g) allows those objecting to designation of an area as a flood hazard to bring an action in federal court seeking a redesignation. Still, an argument could be made that perhaps Congress felt a private right of action was already implied under general contract principles. The fourth prong of the test—whether the claim is one traditionally assigned to state law so that it would be inappropriate to infer a claim based on federal law—also appears to be satisfied. A suit by the federal government against a state over a federal matter, in this instance the NFIA, is a matter not generally assigned to state law.

639-40 (7th Cir. 1984) ("[i]n these more recent cases the Supreme Court has focused on a comprehensive analysis of legislative intent instead of explicitly following the point-by-point Cort analysis.").

Id. at 640 ("the first and third Cort factors are intimately related to the question of legislative intent ... [p]ursuant to this development the second Cort factor—legislative intent—is the crucial issue, to be resolved in light of the statutory language, legislative history, and legislative purpose.").

Id.


See U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made,
B. Tort Cause of Action

1. Gabler v. Regent Development Corp.

In Gabler v. Regent Development Corp., twenty-two plaintiffs filed a tort cause of action against the Regent Development Corporation, and, importantly, against the parish of Jefferson, Louisiana and its liability insurer. The plaintiff's theory of the case was that the parish negligently approved the construction of a subdivision despite the fact that the area would be exposed to a significant risk of flooding. The Louisiana state trial court initially ruled for the plaintiffs; the issue on appeal concerned whether the defendants were the proximate cause of the plaintiffs' injuries. Defendants relied solely on an "act of God" defense.

In its opinion, the Louisiana Court of Appeals cited varying definitions of what constitutes an "act of God." Ultimately, the court noted that the most clear definition of an act of God is a definition that defines what is not an act of God: "[a]n act which may be prevented by the exercise of ordinary care is not an act of God." The court then concluded that 13.5 inches of rain falling within a twenty-four hour period did indeed amount to an act of God.

However, the court acknowledged that not every act of God relieves a defendant of liability. The court stated that "[w]hen an 'act of God' combines or concurs with the negligence of a defendant to produce an injury, the defendant is liable if the injury would not have resulted but for his own negligent conduct or omission." Based on the facts of this particular case, the court merely held that the injuries suffered by the plaintiff would have occurred no matter what precautions were taken.

or which shall be made, under their Authority ... to Controversies to which the United States shall be a Party. ...".

106 Id. at 150.
107 Id. at 151. Damages were never announced, as the action was bifurcated as to liability and damages. Id.
108 Id.
109 Id.
110 Id. at 152.
111 Id.
112 Id.
113 See id.
2. **Cases Since Gabler**

   The state court *Gabler* decision has been followed by the United States District Court for the Eastern District of Louisiana. In *Beahm v. Groike*, the plaintiff alleged that the defendant failed to alert him that the property he was purchasing was in a flood plain. Much like in *Gabler*, the defendant argued that the event causing the plaintiff's damages was an "act of God"; thus the plaintiff would have suffered damage regardless of whether he knew that the property he was purchasing was in a flood plain. Citing *Gabler*, the court held that "[e]xcessive rains, floods, and inundations have long been considered acts of God," and that the flood in the present case was also an act of God. Because most damages alleged to stem from NFIP violations will likely involve heavier-than-normal rainfall, reliance on *Gabler* creates a significant hurdle. Plaintiffs must somehow prove that an extraordinary weather event was not an act of God. Perhaps one course of action for plaintiffs would be to cite the recent frequency of "extraordinary" weather events in order to prove that they are no longer extraordinary.

   As stated in *Gabler* itself, however, existence of an act of God is not a complete bar to liability for negligent actions during a flood. In *Saden v. Kirby*, a group of homeowners sued the New Orleans Sewage and Water Board and Planquemines Parish for injuries suffered during a storm in which ten to twelve inches of rain fell over a twenty-four hour period. The Louisiana Supreme Court agreed with the trial court's determination that the storm was an act of God. Nonetheless, the court stated that when an "act of God' combines or concurs with the conduct of a defendant to produce an injury, the defendant may be held liable for any damages that would not have occurred but for its own conduct or omission." Because the plaintiff's expert was able to convince the trial

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115 *Id.*
116 See *id.* at *3. In this instance, the frequency of the rainfall experienced was estimated to occur once every 500 to 1,600 years. *Id.* at *1.
117 *Id.* at *3-*4.
118 *Gabler*, 470 So. 2d at 152.
120 *Id.* at 424-26. Plaintiffs claimed that the Sewerage and Water Board was negligent in not repairing a water pump in the months leading up to the storm, and that the parish was negligent in its construction of an emergency dam. *Id.* at 424.
121 *Id.* at 427.
122 *Id.* at 428.
judge that the actions of the Sewerage and Water Board led to an additional three inches of flooding, the judgment granting plaintiffs' recovery was affirmed.  

3. Ways to Distinguish Gabler

Gabler certainly implies that a tort cause of action is available against a community that negligently enforces its ordinance requirements. Furthermore, in Saden, the court appeared to have little trouble determining that the New Orleans Sewerage and Water Board had a duty to fix a faulty water pump, and that the failure to do so in a timely manner resulted in a breach of that duty. Similarly, a plaintiff could argue that a NFIP-participating community's failure to enforce the program's requirements constitutes a breach of duty to affected members of the community.

Because the only issue on appeal in Gabler was proximate causation, it can be inferred that the trial court found that the other elements of a tort claim were met: duty, breach of duty, and actual injury. Thus, a potential tort claim against NFIP-participating communities for failure to comply with the terms of the program would look something like this: by joining the NFIP the community undertakes a duty to protect its citizens by enacting ordinances designed to prevent future flood damage; upon breach of this duty, according to some standard of negligence, the property owner suffers actual damage (generally not an issue) that was proximately caused by the breach.

Because a tort action is generally a state common law claim, it is state law that would determine the standard of negligence. Depending on the jurisdiction, the violation of a federal statute may be considered either as evidence of negligence, or even negligence per se. A court likely

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123 Id. at 429. The case was then remanded to the state district court for trial on damages. Id. at 431.
124 Id. at 430.
125 See Hofbauer v. Nw. Nat'l Bank of Rochester, 700 F.2d 1197, 1201 (8th Cir. 1983) (dismissing an action brought under the NFIA on the basis that the plaintiff was not a special class for which the Act was enacted to protect; however, the court acknowledged that a violation of the Act could give rise to a common law negligence claim but left it up to the state courts to make the determination for themselves).
127 See id. The merits of this case were not at issue in this proceeding, as the court was only considering whether to grant a motion appealing the removal of the case from state to federal court. Id. at *1. Ultimately, the case was dismissed because the court held that
would view a violation of the NFIP as mere evidence of negligence. Holding a violation of the NFIP to be negligence per se would stretch the purpose of an act that does not specifically provide for a private cause of action.\textsuperscript{128}

As illustrated by \textit{Gabler}, \textit{Beahm}, and \textit{Saden}, the issue of proximate causation is a difficult barrier for plaintiffs.\textsuperscript{129} Any local government facing suit will almost certainly use an "act of God" defense. However, \textit{Saden} showed that it is possible for a plaintiff to recover even if an act of God is alleged.\textsuperscript{130} To do so, the plaintiff must establish that the acts of the defendant contributed to the damage beyond what would have been caused by the act of God alone.\textsuperscript{131} As was the case in \textit{Saden}, overcoming the act of God defense almost certainly requires an expert.\textsuperscript{132} A class action similar to the one brought in \textit{St. Bernard}\textsuperscript{133} would assist in defraying the cost. Obviously, the mere presence of an expert would not guarantee that the finder of fact would determine that at least some of the damage was caused by the participating community's negligence. For instance, in \textit{Saden}, while the trial judge accepted the expert's determination that the Sewerage and Water Board caused additional damage, the judge sided with the defendants' expert in determining that the parish did not cause additional damage in their construction of an emergency dam.\textsuperscript{134}

4. Other Decisions on a Private Right of Action

The case of \textit{Segall v. Rapkin}, which arose in the United States District Court for the Southern District of New York, is also troubling for private plaintiffs seeking to hold NFIP-participating communities liable for non-compliance.\textsuperscript{135} In that case, the defendant had been subcontracted to conduct a BFE study for the town of Clarktown.\textsuperscript{136} The court applied the general rule that if "congressional intent cannot be inferred from the

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\textsuperscript{128} See Callahan, 2006 WL 1776747 at *2.
\textsuperscript{130} Saden, 660 So. 2d at 428.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} United States v. Parish of St. Bernard, 756 F.2d 1116, 1116 (5th Cir. 1985)
\textsuperscript{134} Saden, 660 So. 2d at 431.
\textsuperscript{136} Id. at 241.
language of the statute . . . and no other source of intent exists, a private right of action cannot be implied." However, the court did not conduct an extensive inquiry into the matter, neither citing St. Bernard nor conducting an in depth analysis of the Cort v. Ash factors. Rather, while acknowledging that a stated purpose of the act was to limit flood damages by enacting proper land use regulations, the court stated that "[i]t is not necessary for private parties to have a right of action under the Act to achieve or further its purposes."

Like the cases previously cited, Segall is distinguishable. First, Segall involved a claim against the subcontractor that did the BFE study, not the community itself. In this context, the court explained that to allow for a private right of action would discourage the purpose of the NFIA because subcontractors would be wary of undertaking the job of conducting the BFE studies required by the NFIA. Furthermore, the court cited the rule of law that no private cause of action can exist for a breach of duty by a government contractor for violating the principal's statutory duties, in this case, the community's. Therefore, a proper reading of Segall is that no private cause of action exists under the NFIA against a private party engaged in activities required by the NFIA. Unfortunately, the Southern District did not make this clear. However, it seems obvious that the court was concerned about holding private parties liable under the NFIA, and did not consider whether a private cause of action could exist against the local community. Most importantly, Segall only discussed whether a private cause of action existed under the statute; the court did not discuss

137 Id.
138 See id. at 240-41.
139 Id. at 241.
140 Id.
141 Id.
142 Id.
143 See Virgin Islands Tree Boa v. Witt, 918 F.Supp. 879, 902 (D.V.I. 1996) (believing the holding in Segall to be that the "NFIA creates neither an express nor implied private cause of action for homeowners to sue government contractors for errors in the contractors' flood insurance studies."). In Witt, the federal district court for the Virgin Islands held that the NFIA created no implied right of action against FEMA itself. Id.
144 See Segall, 875 F.Supp at 240. Even if a future court rejects the argument that the NFIA intends that individual communities be held liable, its holding can at least be limited to federally-insured lending institutions based on its use of limiting language. Mid-Am. Nat'l Bank of Chicago v. First Savs. and Loan Ass'n of S. Holland, 737 F.2d 638, 643 (7th Cir. 1984) ("Absent any indication that Congress intended a federal cause of action in favor of borrowers against lenders . . . this Court is not in a position to create such a cause of action.") (emphasis added).
whether failure to comply with the terms of the NFIA could be used as the basis for a negligence claim.\textsuperscript{145}

The Seventh Circuit's opinion in \textit{Mid-America National Bank of Chicago v. First Savings & Loan Ass'n of South Holland}, while reaffirming the notion that private parties are not intended to be liable under the NFIA, suggests in dicta that perhaps individual communities were intended to be liable.\textsuperscript{146} In that case, the Seventh Circuit held that federally-insured lending institutions were not liable under sections 4012a(b) and 4104a of the NFIA to borrowers who were not informed that their properties were located in flood zones and thus were uninsured against flood damages.\textsuperscript{147} Despite the statutory duties apparently placed on lenders, the court ruled that the "statutory scheme of the Flood Program reveals no indicia of legislative intent to create an implied federal cause of action under Sections 4012a(b) or 4104a."\textsuperscript{148} The Seventh Circuit reasoned that the primary purpose of the NFIA "was to diminish, by implementation of sound land use practices and flood insurance, the massive burden on the federal treasury of escalating federal flood disaster assistance."\textsuperscript{149} Therefore, the court reasoned that absent an express cause of action, no implied cause of action should be read into those sections of the NFIA because the federal government can achieve its objectives based on its oversight of federally-insured lending institutions.\textsuperscript{150} Thus, if a federally-insured lender fails to properly require a borrower to purchase flood insurance, federal institutions such as the FDIC could impose sanctions on the non-complying banks.\textsuperscript{151}

A plausible reading of \textit{Mid-America} is that the court was unwilling to provide for a federal cause of action because the federal government itself had the ability to police non-compliance. This argument falls flat

\textsuperscript{145} See Segall, 875 F.Supp. at 240.
\textsuperscript{146} See generally Mid-Am., 737 F.2d at 642.
\textsuperscript{147} \textit{Id.} at 640. Section 4012a(b) prohibits federally-insured lending institutions from issuing a loan for a property located in a flood zone unless flood insurance has been purchased. 42 U.S.C. § 4012a(b) (2000). Section 4104a requires the lending institution to notify prospective borrowers that the property is located in a flood zone at a reasonable time prior to the closing of the loan. 42 U.S.C. § 4104a (2000).
\textsuperscript{148} Mid-Am., 737 F.2d at 642.
\textsuperscript{149} \textit{Id. But see} Tex. Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025, 1033 (D.D.C. 1978) (stating that the goal of the NFIA is one of "protecting property owners ... against flood damage resulting in personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources.") (quoting from 42 U.S.C. § 4001(a)(1) (2000) (emphasis added)).
\textsuperscript{150} See Mid-Am., 737 F.2d at 642.
\textsuperscript{151} See \textit{id.}
when considering a private suit against a non-complying community. The only policing power the federal government has over a non-complying community is the ability to suspend it from the program; for reasons discussed supra, this means of policing is ineffective and inefficient. Given that one purpose of the NFIA is getting communities to adopt sound regulations to prevent flooding and federal disaster expenditures, the federal government’s ability to police participating communities should be at least as strong as its ability to police peripheral participants such as lending institutions.

Thus, if courts are steadfast in their refusal to permit the federal government to bring a cause of action against participating communities, the only other way to ensure compliance with the NFIA is to allow private citizens to bring suit. Otherwise, it is a stretch of the imagination and strict constructionism to state that Congress intended for such a comprehensive program as the NFIA to remain virtually unenforceable. Admittedly, there may be too much momentum against the existence of a private cause of action for most courts to be willing to allow such a suit.\(^{152}\) Although many of the cases refusing to recognize a private right of action may be distinguishable, it is easier for a court to hold that if Congress intended for a private cause of action, it would have explicitly provided one.\(^{153}\)

V. \textbf{WHY AN IMPLIED CAUSE OF ACTION IS THE BEST SOLUTION}

Opponents of an implied cause of action have some valid arguments for their position. Congress did have the opportunity to provide an express cause of action, yet failed to do so. Furthermore, nothing is preventing Congress from amending the statute. Also, a new federal cause of action would obviously increase litigation, and thus, even if they were not liable, communities would have to budget for increased litigation costs, drawing money away from important services. Instead of spending money on litigation, the argument goes, homeowners should use the political process to encourage communities to spend their funds at the local level to try and solve the problems associated with flood-related damages.

\footnote{\textit{See, e.g.}, Ford v. First Am. Flood Data Serv., Inc., slip op., No. 1:06CV00453, 2006 WL 2921432, at *3 (M.D.N.C. 2006) (in an action against a flood determination company for conducting a faulty determination, the court granted the company’s 12(b)(6) motion to dismiss for failure to state a claim by relying on the fact that an “overwhelming majority of both federal and state courts refuse to allow either private federal or common law claims arising out of violations of the Act.”).}

\footnote{\textit{Id.} at *7.}
However, even if an implied cause of action—either by the federal government or by individual citizens—against non-complying communities is not a perfect option, it is likely the most effective option. Congress has not traditionally been proactive about solving the problem of flood-related damages, choosing rather to take on the matter after-the-fact. Furthermore, despite some encouraging signs, history has shown that communities are unlikely to be able to solve the problem on their own, due both to amount of cooperation required and the difficulty in maintaining political will.

A. Challenges in Amending the NFIA

If the courts refuse to grant a cause of action based in some form on the NFIA, Congress could always amend it to explicitly provide a cause of action against communities that participate in the program but fail to abide by its requirements. Such a cause of action could take two forms. First, Congress could provide for a cause of action on behalf of the federal government against participating communities that fail to fulfill their obligations, similar to the cause of action rejected in *St. Bernard*. Second, Congress could allow suit to be brought by injured residents against their respective NFIP-participating communities if the communities have failed to fulfill their obligations under the program.

However, either proposal would likely face an uphill battle. While providing the federal government a cause of action would likely survive any legal challenge, it would face significant political opposition, especially from the development lobby. An amendment allowing for a citizen suit would not only face the same political pressure, but would also face legal challenges based on federalism concerns.

Furthermore, history illustrates the difficulties in overcoming political opposition to amending the NFIA. For example, one author writing in 1992 suggested that Hurricane Andrew “should serve as a wake-up call to Congress that the NFIP's problems must be tackled immediately.” However, proposed amendments in the fall of 1992 passed the House but

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154 See Griffith, supra note 27, at 742. When Congress does act regarding the dangers of flooding, it is usually in favor of the development lobby, such as the Housing and Community Development Act of 1977 which allowed communities that do not participate in the NFIP to remain eligible for federally assisted housing financing. *Id.*

155 *Id.* at 740. Prophetically, the author predicted that Congress was lucky it had a chance to act after Hurricane Andrew because at least it “managed to miss major low-lying metropolitan areas such as New Orleans.” *Id.* at 741.
failed in the Senate. Again, the development lobby proved to be highly influential.157

B. Problems with Relying on Local Communities

Based on the difficulty of amending the NFIA to provide a cause of action, if an alternative can be found, it should certainly be pursued. Although much of this paper has been critical of local governmental enforcement of floodplain regulations, there is some evidence that local awareness of the problem is increasing. As people grow tired of suffering flood-related losses, it is logical to believe that they will demand that local and state officials improve the situation. Despite some local governments' historical failure to fully perform their duties under the NFIP, political pressures might finally be causing them to pay closer attention to the problem.

The Delaware River Basin Flood Mitigation Task Force is a good first step and suggests that perhaps local and state governments can remedy the problem on their own initiative. For instance, the Task Force actually recommended more stringent regulations concerning construction around floodways than those required by the NFIP. In addition, the Task Force recommended that communities within the Delaware River Basin adopt the Association of State Floodplain Managers' (ASFPM) "No Adverse Impact" approach. This approach "ensures that the actions of one property owner or a community do not adversely impact the properties and rights of other property owners." Recommendations such as those made by the Task Force are more responsive to the needs of local governments. Instead of a "one-size-fits-all" approach, once state and local governments decide to fix the problem, they can tailor their regulations to their unique circumstances. Of course, this assumes that local governments are aware of the problem and believe that they are the ones who should fix it. As noted by the Task Force, each of the Delaware River Basin's 838 communities must meet, discuss, and agree to conform their local regulations to consistent standards if the Task

156 Id. at 728 n.6.
157 See id. at 764.
158 See generally TASK FORCE, supra note 50.
159 Id. at 63. The federal standard allows for a one foot rise in flood depths in determining floodways; the more stringent standard would allow for only a 0.2 foot rise. Id.
160 Id. at 45.
161 Id. at 66.
Force’s recommendations are to be implemented and be effective.\textsuperscript{162} In addition, history raises a legitimate question as to whether the Task Force’s recommendations will ever be adopted, and more importantly, whether they will actually be enforced.

Clearly, multi-government cooperation is necessary for any effective change. As the Task Force noted, “development may be occurring in the floodplain of one State or community that may be adversely affecting other States and communities. Development in the floodplain . . . results in adverse impact somewhere . . .”\textsuperscript{163} Obviously, one of the key barriers in getting communities to agree to solutions is the cost associated with adopting them. In recommending that the communities within the Delaware Basin re-map their flood zones, the Task Force recognized that the FEMA Map Modernization Funds are not sufficient and that the states comprising the Task Force must contribute funding to cover the cost.\textsuperscript{164} The Task Force noted that it is of critical importance that NFIP mandates continue to be fully funded by Congress.\textsuperscript{165}

C. A Judicial Remedy Is the Best Remedy

Instead of waiting, perhaps endlessly, for local governments to reach agreement as to what actions should be taken, or for Congress to amend the NFIP, a federal cause of action would provide a much more direct incentive for individual communities to abide by NFIP regulations. Even if communities are now more willing to solve the problem, an implied cause of action would give them the impetus to maintain their newfound resolve, and would also give them a justification for not bowing to the pressures of the development lobby.

CONCLUSION

Hurricane Katrina caused billions of dollars in damages\textsuperscript{166} and contributed to the deaths of at least 1,710 people.\textsuperscript{167} Obviously, not all of

\textsuperscript{162}Id. at 68.
\textsuperscript{163}Id. at 66.
\textsuperscript{164}Id. at 60.
\textsuperscript{165}Id.
\textsuperscript{166}Michael Kunzelman, State Farm Settles in Katrina Damage Suit, WASH. POST, Jan. 20, 2007, at D2.
\textsuperscript{167}Wil Haygood, Scattered by Katrina, Linked by a Church; Pastor and his Wife Keep Tabs on Their Far-Flung Flock, WASH. POST, Aug. 26, 2006, at A1.
the damage and death caused by Katrina was due to noncompliance with the NFIP. However, Katrina did illustrate the type of destruction and chaos flooding can cause. It also showed that physical barriers, such as dams and levees, are insufficient to prevent flooding. The NFIP was intended to complement such physical measures in an attempt to prevent, or at least mitigate, flood-related damages. Unfortunately, it seems that every time a major weather event occurs, whether it be in the Gulf Coast or along the banks of the Delaware, the failure of the NFIP is apparent. Flooding continues, federal expenditures increase, and families attempt to rebuild only to still be at the risk of future flood damages.

The NFIP's failure should not come as a surprise because there is no method of enforcement except suspension from the program itself. Suspension from the program is insufficient as a means of enforcement because it allows local governments to keep past benefits from the program without fulfilling their obligations. It is as if a party to a contract could intentionally breach and walk away from his obligations. While the breaching party may not get his intended benefits, in this case federal aid, the injured party also receives nothing. Of course, contract law does not work this way. An injured party receives some measure of damages. Yet, in this instance, the injured party in the contract, the federal government, has no recourse. Similarly, when a private party undertakes a duty, by virtue of contract or otherwise, breaches that duty, and injures those intended to benefit from the contract, the injured parties receive damages. Yet, in this instance, the intended beneficiaries, members of a flood-prone community, have no recourse against the local governments who undertook a duty to enact sound land use ordinances. The most frustrating aspect of this scenario is that allowing for either or both causes of action would immediately make the NFIP a more effective program for mitigating future flood damages.

Courts are rightfully wary of recognizing new implied causes of action. However, courts have recognized implied causes of action in other contexts where it was clear that a cause of action was justified by the purpose of a statutory scheme. For instance, the Supreme Court has read into Title IX an implied private cause of action against educational institutions that receive federal aid but do not comply with the requirements for receiving that aid. A similar line of reasoning is available for the Court in the context of the NFIP. Of course, it would be helpful in bringing the issue before the Supreme Court if one of the Courts of Appeals expressly

disagreed with the Fifth Circuit's *St. Bernard* decision. Despite the fact that most of the existing case law seems to oppose any cause of action under the NFIP, courts, including the Supreme Court, are not insulated from current events, and hopefully will realize that the NFIP as currently interpreted does not fulfill either its purpose or its goals. Recognizing an implied cause of action against non-complying participating communities in either the federal government or in private citizens would go a long way towards achieving the NFIP's goal of preventing excessive flood damages, a goal that has not yet been achieved in its nearly forty-year existence.

\[169\] See supra notes 134-53 and accompanying text.