

# FEMA's NFIP Predicament: Communities Most Vulnerable to Flooding are the Least Likely to Receive Adequate Assistance

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## I. Introduction

Climate change brings rising sea levels and increasingly frequent extreme weather events.<sup>1</sup> These changes in the world's water system will result in increased coastal and inland flooding.<sup>2</sup> Considering the fact that “[m]ore than [fifty] percent of Americans live in coastal counties, where key infrastructure and evacuation routes are increasingly vulnerable to impacts like higher sea levels, storm surges, and flooding,” flooding is becoming an increasingly dangerous threat to the United States.<sup>3</sup> However, residents of the United States do not share an equal risk to flooding.<sup>4</sup> Flooding disproportionately impacts lower-income communities and communities of color.<sup>5</sup>

Congress has passed multiple pieces of legislation to lessen nationwide flood damages.<sup>6</sup> In particular, Congress created FEMA's Severe Repetitive Loss (“SRL”) Grant Program to mitigate harm from flooding through purchasing the homes of residents of repeatedly flooded areas. This buy-out program is not perfect; there are issues in implementing the program in lower-income communities and communities of color.<sup>7</sup> But, with proactive efforts to resolve

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<sup>1</sup> Rebecca Lindsey, *Climate Change: Global Sea Level*, NOAA (Aug. 14, 2020), <https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level>.

<sup>2</sup> *See id.*

<sup>3</sup> A. Dan Tarlock & Deborah M. Chizewer, *Living with Water in A Climate-Changed World: Will Federal Flood Policy Sink or Swim?*, 46 ENVTL. L. 491, 493 (2016).

<sup>4</sup> Renee Cho, *Why Climate Change is an Environmental Justice Issue*, EARTH INST. (Sept. 22, 2020), <https://blogs.ei.columbia.edu/2020/09/22/climate-change-environmental-justice/>.

<sup>5</sup> *Id.*

<sup>6</sup> Augustus L. Campbell, *Get Oriented: A Brief History of Government's Role in Flood Response & Infrastructure*, in CHANGING FACE OF WATER RIGHTS (2019), [https://1.next.westlaw.com/Document/I3c52020846f511e9adfea82903531a62/View/FullText.html?VR=3.0&RS=cb1t1.0&\\_\\_lrTS=20210113020454365&transitionType=Default&contextData=%28sc.Default%29](https://1.next.westlaw.com/Document/I3c52020846f511e9adfea82903531a62/View/FullText.html?VR=3.0&RS=cb1t1.0&__lrTS=20210113020454365&transitionType=Default&contextData=%28sc.Default%29).

<sup>7</sup> *See* Thomas Frank, *Flooding Disproportionately Harms Black Neighborhoods*, SCI. AM. (June 2, 2020), <https://www.scientificamerican.com/article/flooding-disproportionately-harms-black-neighborhoods/>.

these issues, the program could be crucial in the fight to protect vulnerable communities against flooding.

This paper first analyzes the environmental justice impacts of flooding, followed by a brief history of the creation of FEMA's SRL Grant Program and its buy-out program. This paper then discusses the challenges to equitable implementation of the program, and the opportunities in FEMA's new Risk Rating 2.0. Finally, this paper provides potential pathways to equitable climate mitigation under the Biden Administration.

## **II. The Dangerous and Disproportionate Impacts of Flooding and Climate Change**

Low-income families of color are more likely to live in neighborhoods prone to flooding than affluent white families.<sup>8</sup> This is partially due to the fact that neighborhoods that are frequently flooded experience decreases in housing prices.<sup>9</sup> This entices lower-income families to move into flood zones, despite the dangers associated with the region.<sup>10</sup>

Furthermore, lower-income communities and communities of color are more likely to live near industrial facilities and environmental pollution.<sup>11</sup> Residents in these communities are disproportionately at risk of not only property damage, but the possibility that their water will become contaminated with pollutants from nearby power plants.<sup>12</sup>

As global concentrations of greenhouse gases increase, heavy precipitation in some regions of North America will likely become more frequent.<sup>13</sup> Sea level rise and more powerful hurricanes could increase the area of North America flooded due to storm surge from between

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<sup>8</sup> Brie Sherwin, *After the Storm: The Importance of Acknowledging Environmental Justice in Sustainable Development and Disaster Preparedness*, 29 DUKE ENV'T. L. & POL'Y F. 273, 273 (2019).

<sup>9</sup> *See id.* at 282.

<sup>10</sup> *Id.*

<sup>11</sup> Frank, *supra* note 7.

<sup>12</sup> *Id.*

<sup>13</sup> Lindsey, *supra* note 1.

six and twenty-five percent, to between sixty to 230 percent.<sup>14</sup> Places that currently experience flooding will continue to do so, due to rising seas.<sup>15</sup> Furthermore, some areas will likely experience increases in local flooding.<sup>16</sup>

North America's residents have become more vulnerable to extreme weather events due to large numbers of people moving to and developing regions affected by extreme weather.<sup>17</sup> For example, the Gulf of Mexico region of the United States saw a population increase of 150% from 1960 to 2008.<sup>18</sup> As more and more people inhabited flood-prone areas, the United States government enacted flood-protection policies.

### **III. FEMA's Severe Repetitive Loss Grant Program**

#### **A. History and Purpose of the SRL Grant Program**

In 1968, Congress created the National Flood Insurance Program ("NFIP") "to promote the public interest by providing appropriate protection against the perils of flood losses and encouraging sound land use by minimizing exposure of property to flood losses."<sup>19</sup> NFIP came about because of increasingly expensive disaster relief, lack of private flood insurance, and development in flood-prone areas.<sup>20</sup> NFIP provides financial assistance to homeowners by covering flood-induced physical losses to structures and belongings.<sup>21</sup>

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<sup>14</sup> John Handmer, et al., *Changes in Impacts of Climate Extremes: Human Systems and Ecosystems*, in *MANAGING THE RISKS OF EXTREME EVENTS AND DISASTERS TO ADVANCE CLIMATE CHANGE* 231, 260 (Sebastian Vicuna, Avelino Suarez, eds. 2012), [https://www.ipcc.ch/site/assets/uploads/2018/03/SREX-Chap4\\_FINAL-1.pdf](https://www.ipcc.ch/site/assets/uploads/2018/03/SREX-Chap4_FINAL-1.pdf).

<sup>15</sup> Sonia Seneviratne & Neville Nicholls, *Changes in Climate Extremes and Their Impacts on the Natural Physical Environment*, in *MANAGING THE RISKS OF EXTREME EVENTS AND DISASTERS TO ADVANCE CLIMATE CHANGE ADAPTION* 109, 112 (Matilde Rusticucci & Vladimir Semenov eds., 2012), [https://www.ipcc.ch/site/assets/uploads/2018/03/SREX-Chap3\\_FINAL-1.pdf](https://www.ipcc.ch/site/assets/uploads/2018/03/SREX-Chap3_FINAL-1.pdf).

<sup>16</sup> *Id.* at 113.

<sup>17</sup> Handmer et al., *supra* note 14 at 258.

<sup>18</sup> *Id.*

<sup>19</sup> 42 U.S.C. §§ 4001(c), 4011.

<sup>20</sup> *Id.* § 4001(a); Jennifer Wriggins, *Flood Money: The Challenge of U.S. Flood Insurance Reform in A Warming World*, 119 PENN ST. L. REV. 361, 373 (2014).

<sup>21</sup> *What Flood Insurance Covers*, FEMA, <https://www.floodsmart.gov/flood-insurance/coverage> (last visited Jan. 8, 2021).

In 1973, Congress passed the Flood Disaster Protection Act, which intended to increase participation in NFIP.<sup>22</sup> The Act made flood insurance mandatory for property “in connection with any form of Federal financial assistance for construction or acquisition purposes affecting a property located in a flood-prone area.”<sup>23</sup>

NFIP has struggled to be self-sustaining due to having inadequate funding and exorbitant expenses.<sup>24</sup> One contributing factor to this lack of funding is disproportionate allocation of resources: most of the resources are given to very few of the program’s funders.<sup>25</sup> For example, Congress found that “repetitive loss properties comprise[d] approximately 1 percent of currently insured properties but [were] expected to account for twenty-five to thirty percent of claimed losses.”<sup>26</sup> Congress attempted to lessen the financial burden of recurrently flooded properties with the Flood Insurance Reform Act of 2004, which directed FEMA to create the Severe Repetitive Loss (“SRL”) Grant Program.<sup>27</sup>

The SRL Grant Program was created to “eliminate or reduce the damage to residential property and the disruption to life caused by repeated flooding.”<sup>28</sup> Generally, the program provides funding for the following three types of projects:

- “Acquisition or relocation of at-risk structures and conversion of the property to open space;
- Elevation of existing structures; *or*

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<sup>22</sup> 42 U.S.C. § 4002; Rachel Lisotta, *In Over Our Heads: The Inefficiencies of the National Flood Insurance Program and the Institution of Federal Tax Incentives*, 10 LOY. MAR. L.J. 511, 511 (2012).

<sup>23</sup> S. REP. No. 93-583, at 3218 (1973); 42 U.S.C. § 4012(a) (prohibiting federal financial assistance “for acquisition or construction” of property in any area identified as “having special flood hazards” unless the property “is covered by flood insurance”).

<sup>24</sup> Campbell, *supra* note 6.

<sup>25</sup> Lisotta, *supra* note 22, at 518.

<sup>26</sup> Lisotta, *supra* note 22, at 519 (quotation omitted).

<sup>27</sup> FED. EMERGENCY MGMT. AGENCY, GUIDANCE FOR SEVERE REPETITIVE LOSS PROPERTIES 2 [https://www.fema.gov/pdf/nfip/manual201205/content/20\\_srl.pdf](https://www.fema.gov/pdf/nfip/manual201205/content/20_srl.pdf).

<sup>28</sup> *Id.* at 1.

- Dry floodproofing of historic properties.”<sup>29</sup>

In the present discussion, of particular interest is the buyout aspect of SRL Grant program: the purchasing of homes in frequently flooded areas and converting of the land into community space.<sup>30</sup> This aspect of the program is especially crucial for climate mitigation for two reasons. First, it is economically prudent; it focuses on preventing future losses from flood damage.<sup>31</sup> Aside from the dangers of living in a flood area, rebuilding after repeat flooding costs a significant amount of time and money.<sup>32</sup> Second, it gives vulnerable individuals the opportunity to leave repeatedly flooded areas before the worsening effects of climate change make their situation dire. Owners of homes in areas that are frequently flooded may likely find it difficult to selling their homes.<sup>33</sup> Without the ability to sell their house—likely the most valuable asset low-income families have—it may be too costly to relocate.<sup>34</sup> If used to its full potential, the SRL buy-out program could be incredibly helpful in mitigating the disproportional impacts of flooding and climate change.

## **B. Challenges to Equitable Implementation of the SRL Grant Program**

There are two major challenges to the equitable implementation of SRL program. First, the program targets whiter communities.<sup>35</sup> At the same time, it is becoming less accessible to

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<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See Katie Sinclair, *Water, Water Everywhere, Communities on the Brink: Retreat as a Climate Change Adaption Strategy in the Face of Floods, Hurricanes, and Rising Seas*, 46 *ECOLOGY L.Q.* 259, 267–68 (2019).

<sup>33</sup> See David Hunn et al., *Build, Flood, Rebuild: Flood Insurance’s Expensive Cycle*, *HOUS. CHRON.* (Dec. 9, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Build-flood-rebuild-flood-insurance-s-12413056.php>.

<sup>34</sup> See *id.*

<sup>35</sup> James R. Elliot, Phylicia Lee Brown, & Kevin Loughran, *Racial Inequalities in the Federal Buyout of Flood-Prone Homes: A Nationwide Assessment of Environmental Adaptation*, *AM. SOCIO. ASS’N* at 2 (2020), <https://journals.sagepub.com/doi/pdf/10.1177/2378023120905439>; Daniel Cusick, *Racial Inequalities in Housing Extend to Flood Buyout Programs*, *SCI. AM.* (Feb. 19, 2020), <https://www.scientificamerican.com/article/racial-inequalities-in-housing-extend-to-flood-buyout-programs/>.

black and lower income residents.<sup>36</sup> One reason for this disparity is that today’s neighborhoods still reflect the past efforts of the Federal Housing Administration to keep housing areas segregated by race.<sup>37</sup> Housing areas with more white residents are often “better positioned politically, financially, and administratively to develop successful proposals for federal buyout assistance, net of local flood damage.”<sup>38</sup> Another reason for the inequal administration of the buy-out program is that lower-income communities tend to lack access to the legal expertise needed to navigate the bureaucratic and complex application system.<sup>39</sup> One scholar suggests that this issue can be lessened by training attorneys who serve lower-income communities and communities of color in flood-risk areas on how to manage applying for the program.<sup>40</sup>

Another issue regarding equitable implementation of the buyout program is the possibility that the program can hurt, rather than help, black communities. There is evidence that the program can cause the “trapping [of] vulnerable property owners in degraded neighborhoods, reducing housing supply, compromising neighborhood integrity, shrinking the property tax base, . . . and creating higher per capita cost of infrastructure and basic services for local governments.”<sup>41</sup> Thus, some black communities are understandably reluctant to participate in the program.<sup>42</sup> For example, concerns of injustice led community leaders of the historically black neighborhood of Kashmere Gardens in Houston to “rall[y] to suppress local buyout offers, which were framed as a new type of urban renewal looking to remove black residents from their

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<sup>36</sup> See Elliot, *supra* note 35 at 4.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> *Id.* at 4.

<sup>39</sup> See *id.* at 20.

<sup>40</sup> Email from Donald T. Hornstein, Aubrey L. Brooks Distinguished Professor of Law, U.N.C. School of L., to Lauren Corey (Dec. 7, 2020).

<sup>41</sup> Thomas Ruppert, John Fergus & Enio Russe-Garcia, *Managing Property Buyouts at the Local Level: Seeking Benefits and Limiting Harms*, 48 ENV'T. L. REP. 10520, 10521 (June 2018), <https://www.flseagrant.org/wp-content/uploads/ELR-final-pdf.pdf>.

<sup>42</sup> See Elliott, *supra* note 35 at 12.

neighborhoods.”<sup>43</sup> The desire to preserve black communities from both flooding damage and economic suppression calls for a new approach to the buyout program.

#### **IV. NFIP and Risk Rating 2.0**

Some have proposed making NFIP more financially stable by raising premiums, to reflect the risks of flood more accurately.<sup>44</sup> In 2012, Congress passed the Biggert-Walters Flood Insurance Reform Act in an attempt to make the NFIP more self-sustaining by eliminating subsidies.<sup>45</sup> However, this was met with strong opposition.<sup>46</sup>

Raising premiums to accurately reflect risk of flood disproportionately negatively impacts low-income homeowners. First, flood insurance is mandatory for those with federally backed homeowners. If someone is unable to pay the premium, she could lose her mortgage. Furthermore, premiums that accurately reflect flood risk could be too expensive for many people to afford, causing low-income people to be unprotected from financial impacts of flood damage.

In October of 2021, an initiative with similar goals as the Biggert-Walters Flood Insurance Reform Act will take effect.<sup>47</sup> Risk Rating 2.0 is a FEMA regulatory program that “will fundamentally change the way FEMA rates a property’s flood risk and prices insurance,” and make NFIP premiums more accurately reflect the risks of flood associated with the properties.<sup>48</sup> The program is intended to make the NFIP rates more “sens[ible],” and “easier to understand.”<sup>49</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> Sinclair, *supra* note 32 at 282.

<sup>45</sup> See 42 U.S.C. § 4004.

<sup>46</sup> Sinclair, *supra* note 32 at 282.

<sup>47</sup> *Risk Rating 2.0*, FEMA, <https://www.fema.gov/flood-insurance/work-with-nfip/risk-rating> (last updated July 18, 2020)

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

FEMA plans to use “a combination of models to support the development of rates.”<sup>50</sup> Generally, Risk Rating 2.0 is meant to make premium rates “fair.”<sup>51</sup> FEMA states that, “[t]he new risk rating plan will use easier-to-understand rating characteristics for each property, such as: [d]istance to the coast or another flooding source, [d]ifferent types of flood risk[, and] [t]he cost to rebuild a home.”<sup>52</sup> FEMA further provides that Risk Rating 2.0 will deliver “key benefits to policyholders, communities, and the flood insurance industry” by: “[c]reat[ing] an individualized picture of a property’s risk,” “[p]rovid[ing] rates that are easier to understand for agents and policyholders, [r]eflect[ing] more types of flood risk in rates, “[u]s[ing] the latest actuarial practices to set risk-based rates,” and “[r]educ[ing] complexity for agents to generate a quote.”<sup>53</sup>

Although the policy is put forth with good intentions, it does not address the inevitable disproportionate impacts the raised premiums will have on lower-income communities.<sup>54</sup> FEMA states that “[b]y reflecting the cost to rebuild, the new rating plan will also aim to deliver fairer rates for owners of lower-value homes.”<sup>55</sup> However, it is unclear outside of this one property characteristic what additional considerations and aid FEMA will provide to assure lower-income communities will not see drastic, disproportionate rate increases. Therefore, Risk Rating 2.0 has much room for improvement.

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*



## V. The Biden Administration

During the presidential race, the Biden-Harris team emphasized their commitments to climate mitigation, environmental justice, and the protection of vulnerable communities.<sup>56</sup> The Biden Administration should consider a new approach to the SRL Grant Program. One possible alternative approach to the program's current approach is an individual-and-community method which would keep communities together by moving families from the most-at risk homes into less risky homes in the same community. The properties purchased by the buy-out program would be then aggregated to create positive public spaces, such as parks and open space, that benefit the community. This approach would not be too dissimilar from the purpose FEMA's Hazardous Mitigation Grant Program which "buys out at-risk homes and relocated residents to higher ground."<sup>57</sup> However, the Biden Administration should implement a more just approach which would result in communities remaining intact.

Risk Rating 2.0 will launch nine months after President-Elect Joe Biden takes his place in the Oval Office.<sup>58</sup> This gives the president-elect the opportunity to address the inadequacies of the program regarding the protection of lower-income communities. It would be prudent of the incoming administration to seize the moment and turn Risk Rating 2.0 into a program that is truly just. A possible solution to this dilemma is to generally make premiums more accurately reflect risk, while also providing financial assistance to low-income homeowners to help them pay higher premiums. This sort of program would prioritize helping low and middle-income

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<sup>56</sup> *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, BIDEN HARRIS, <https://joebiden.com/climate-plan/> (last visited Jan. 8, 2021).

<sup>57</sup> Kyle Bagenstose, Dinah Pulver & Kevin Crowe, *Millions of Americans Think They're Safe From Flood Waters. They Aren't*, USA TODAY (June 29, 2020), <https://www.usatoday.com/in-depth/news/investigations/2020/06/29/real-estate-millions-more-homes-risk-flood-might-need-insurance/3217450001/>; see Cusick, *supra* note 35.

<sup>58</sup> *Risk Rating 2.0*, *supra* note 71 ("FEMA decided to adjust implementation of Risk Rating 2.0 by one year to October 1, 2021).

people who live in high-risk areas, and, in effect, allow them to qualify for lower flood insurance premiums.<sup>59</sup> These changes would also make it easier for them to move out of floodplains.<sup>60</sup>

## **VI. Conclusion**

Communities of color and lower income communities are particularly vulnerable to the dangers associated with flooding.<sup>61</sup> Therefore, it is crucial that policies intended to protect residents from flooding damages, such as the SRL Program, offer sufficient protection to the communities that so desperately need it. However, in practice, the SRL Program is more accessible to affluent white communities than lower income communities and communities of color.<sup>62</sup> There are potential pathways to equitable climate mitigation. In particular, the incoming Biden-Harris administration has the opportunity to adjust Risk Rating 2.0 so it more accurately reflects risk, while also helping low income homeowners pay higher premiums.

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<sup>59</sup> Dena Adler et al., *Changing the National Flood Insurance Program for a Changing Climate*, 49 ENV'T L. REP. 10320, 10323 (2019), <https://cityofraleigh0drupal.blob.core.usgovcloudapi.net/drupal-prod/COR16/NFIPChangingClimate.pdf>.

<sup>60</sup> *Id.*

<sup>61</sup> Sherwin, *supra* note 8.

<sup>62</sup> Elliot, *supra* note 35 at 2–4.