

Looking Beyond the CCCL Program: Other Laws and Programs Affecting Beach Policy in Florida

Levin College of Law's Conservation Clinic

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Perverse Incentives: FEMA, NFIP, & Citizens

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The National Flood Insurance Program

- Disappearance of private flood insurance after Mississippi River flood in 1927
- The National Flood Insurance Act of 1968 recognized that it was not profitable for the private insurance industry alone to provide flood insurance
- Requirements for insurance through the NFIP

Criticism of the NFIP

- Lack of actuarial soundness
- Inadequately maintained or updated flood maps
- Singular focus on flood events
- Guaranteed federal funding means NFIP seeks solvency, at best
- Repetitive-loss payments
- Inadequate enforcement authority

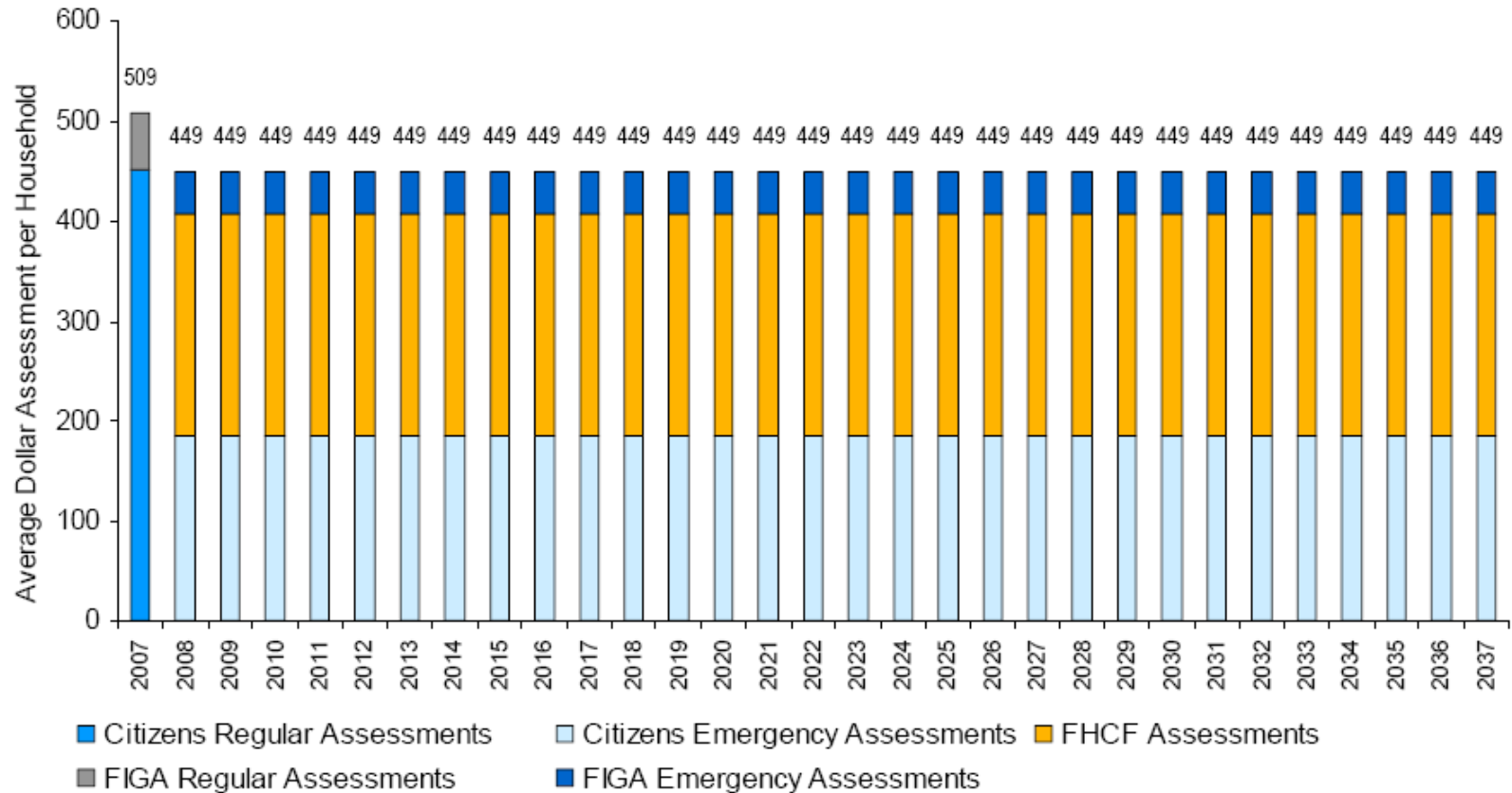
Wind & Water

- Private homeowner insurance versus insurance through the NFIP
 - Flood Exclusions
- Litigation
- Mind the Gap: Multi-Peril Insurance?
- Current Legislation

The State of Subsidies in Florida

- Citizens Property Insurance Corporation
 - State-run insurance company, created by Legislature in 2002
 - Largest property insurer in Florida, with 1.3 million policies in force
- The Florida Hurricane Catastrophe Fund (CatFund)
 - State-run reinsurance company that reinsures both private insurers and Citizens

Annual assessments per average household would extend out thirty years under various scenarios (here, a 1 in 250 storm in 2007)



This illustration does not contemplate the possibility of multiple hurricanes in 2007 or the possibility of hurricanes beyond 2007, which would further constrain funding and result in additional assessments

Note: Number of households is based on 2007 households and is not adjusted for population growth.

Consequences of Subsidies

- Positive feedback loops with negative financial and ecological consequences
- Post-disaster relief entrenches the belief that, after an extreme but not unexpected severe weather event, the government will compensate the coastal property owners

The Endangered Species Act and Habitat Conservation Plans: Can We Go Statewide?

Michael McDonnell

Florida's State Wide Habitat Conservation Plan

Using Mitigation Measures in a Habitat
Conservation Plan to Address Impacts to
Sea Turtle Habitat from Climate Change
and Sea Level Rise

Endangered Species Act

- Prohibits “take” of an endangered species.
 - 16 U.S.C. 1538(a)(1)(B)
- **Take** is defined broadly and includes to harm or kill a species and to destroy habitat.
 - 16 U.S.C. 1531(19) and 50 C.F.R. 17.3.

ESA: Incidental Take Permits

- FWS can issue Incidental Take Permits (ITPs).
 - 16 U.S.C. 1539 (a)(1)(B)
- ITPs allow **take** of an endangered species
 - 16 U.S.C. 1539 (a)(1)(B)
- Must include a Habitat Conservation Plan (HCP).
 - 16 U.S.C. 1539 (a)(2)(A)

HCPs: Brief Overview

- Mandatory component of an ITP
- Legalizes incidental take
- Includes mitigation measures
- No active conservation is required

Habitat Conservation Plans

- FWS must find that :
 - the taking will be incidental,
 - the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking, and
 - the taking will not appreciably reduce the likelihood of the survival and recovery of the species
- 16 U.S.C. § 1539(a)(2)(B).

Habitat Conservation Plans

- Must Include:
 - **impact** of the taking,
 - **means to minimize and mitigate those impacts**, and
 - alternatives actions considered by the applicant

16 U.S.C. § 1539 (a)(2)(A)(i-iii).

HCPs: Mitigation Measures

- Preservation of existing habitat
 - Enhancement/restoration
 - Creation of new habitats
 - Buffer areas
 - Modifications of land use practices, and
 - Restrictions on access
- (<http://www.fws.gov/endangered/hcp/hcpplan.html>)

HCPs required to Conserve?

- Appears not.
 - District Court for District of Columbia:
 - *the ESA does not require HCPs “to promote or maintain the recovery of the species.”*
- However, FWS is required to implement changes for foreseen circumstances.

HCP: No Surprises Rule

- Protects land owners and permit holders from **“unforeseen circumstances”**
 - 50 C.F.R. 17.22(b)(5)(iii)
- FWS will not require the commitment of additional land or financial compensation
 - 50 C.F.R. 17.22(b)(5)(iii) and 63 Fed. Reg. 8859 (Feb. 23, 1998).

No Surprises Rule

- **Foreseen** circumstances?
 - "If additional ... mitigation measures ARE deemed necessary to respond to changed circumstances and WERE provided for in the plan's operating conservation program, the PERMITTEE will implement the measures specified in the plan"
 - 50 C.F.R. 17.22 (b)(2)(5)(i)

Permit Revocation Rule

- An ITP shall not be revoked unless it will **appreciably reduce** the likelihood of the **survival or recovery** of the species.
 - 50 C.F.R. 17.22(b)(8); 16 U.S.C. 1539(a)(2)(B)(iv)
- PRR “significantly narrows the circumstances under which the [FWS] may revoke a permit.”
 - Spirit of the Sage Council v. Kempthorne, 511 F.Supp.2d 31, 41 (D.D.C. 2007)

Conclusion: What NSR and PRR Means for a State Wide HCP?

- NSR requires that effects from sea level rise be seen as “foreseen” circumstances
- PRR’s low standard for revoking permit requires that HCP get it right the first time

5-Point Policy

- Use of “**adaptive management**” in HCP.
- However, only an internal **policy**.
 - *Compare* NSR and PRR

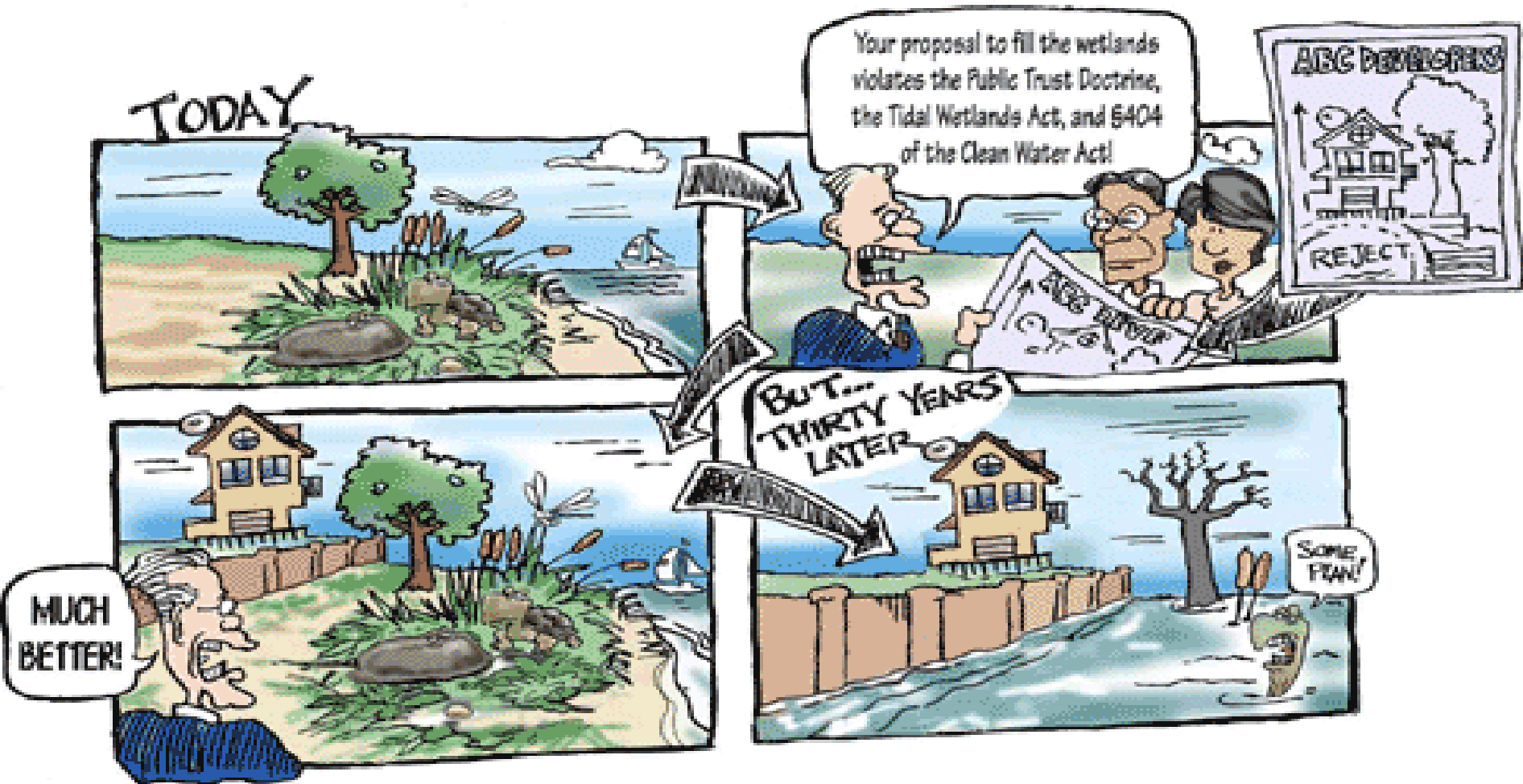
Climate Change Mitigation Measures

- None to date
- Difficulties
 - Uncertainty of effects
 - Regional differences
- However, not per se precluded
 - 5 Points Policy
 - Mitigation measures outside impact area
 - NSR exception for “foreseen” circumstances

Possible Mitigation Measures

- Rolling Easements
- Deed Restrictions
- Advantages:
 - Forward looking
 - Cheaper than emergency “after the fact” measures
 - Slowly diminishing property values

The End



Property & Planning for the Future: Can We Get Comprehensive in Our Approach?

Yee Huang

Critical Obstacles

- Uncertainty & information gaps
- Temporal discrepancies
- Public perception
- Political will & funding
- Litigation

A Survey of Initiatives

- General
 - Data & information collection; mapping
 - Retreat policies & discouraging development
 - Incorporating sea-level rise considerations into existing activities and monitoring
- Specific
 - Maine: Statutory Mandate
 - Maryland: Public Outreach
 - Rhode Island: Coastal Resources Management Council

Florida Cities & Counties

- Miami-Dade County & Climate Change Advisory Task Force
- Collier County
- New Smyrna Beach, Volusia County
- Monroe County

Florida's Comprehensive Planning and Growth Management Act and Sea-Level Rise

- Required Elements
 - Coastal Management
 - Infrastructure
 - Transportation
 - Conservation
- Optional Elements
 - Safety
 - Historic and Scenic Preservation

Coastal Management Element

- Objectives? To maintain, enhance, and restore the living and non-living qualities of the coastal zone environment
- Strategies?
 - identify and acquire hazardous coastal properties
 - map and identify critical areas; designate special SLR zones
 - eliminate public expenditures that subsidize development in hazardous areas

Infrastructure Element

- Objectives? To designate general future municipal services needs
- Strategies?
 - Include SLR considerations in regular monitoring and assessments
 - Limits on new publicly-funded infrastructure and rebuilding of existing infrastructure
 - Allow use of special taxing district for rebuilding?

Transportation Element

- Objectives? To identify and designate travel routes
- Strategies
 - Limits on new roads in at-risk areas
 - Consider impact of SLR on placement and construction

Implementing Comp Plan Elements via Zoning

- Prohibit hazardous uses near coastline
- Promote open space uses with minimal infrastructure
- Designate different temporal zones based on SLR and based on life-expectancy of development
- Decrease setbacks to allow more landward development

Implementing Comp Plan Elements via Land Development Regulations

- Setbacks from beach
- Downzoning; transfer of development rights
- Limitations on new construction and rebuilding
 - Rolling easement
 - Building designed to be moved/dismantled
 - Own add'l property to which to relocate

Conclusions & Recommendations

- Continued research & data collection
- Public access to information
- Extend timelines
- Indicator events