

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2017

PHILADELPHIA, FRIDAY, MAY 12, 2017

VOL 255 • NO. 92

An **ALM** Publication

ENVIRONMENTAL LAW

Reauthorization of the NFIP Could Expand Flood Coverage

BY STEPHEN D. DALY

Special to the Legal

On Jan. 10, a Long Island engineering company, GEB HiRise Engineering, and one of its former executives pleaded guilty to charges that they had falsified engineering reports that were used by flood insurance adjusters and federal officials to assess damage to homes caused by Hurricane Sandy. According to the indictment, HiRise, and executive Matthew Pappalardo, rewrote the engineering reports to minimize insurance payments to flood victims under the National Flood Insurance Program (NFIP) in the New York area after the hurricane. Dozens of flood claims may have been undervalued or denied under the program as a result of the fraud.

The case is an emphatic reminder for flood insurance policyholders—a group of about 5 million residential and commercial property owners—of the shortcomings of the NFIP, a federally backed insurance program administered by the Federal Emergency Management Agency (FEMA), which is set to expire on Sept. 30. The concerns of not just policyholders but also insurers and FEMA are currently being debated by members of Congress as they prepare



STEPHEN D. DALY

is an attorney with the environmental, energy and land use law and litigation firm of Manko, Gold, Katcher & Fox, located just outside of Philadelphia. He can be reached at

484-430-2338 or sdaly@mankogold.com.

to reauthorize the NFIP this fall. Major changes could be underway that would affect developers and property owners in areas at risk for flooding.

THE NATIONAL FLOOD INSURANCE PROGRAM

Flooding is both the most expensive and most common natural disaster in the United States. As a consequence, insurers had long hesitated to cover flood damage, which they considered too widely destructive and unpredictable; indeed, until 1968, flood insurance was virtually nonexistent.

In response to a series of catastrophic floods, Congress enacted the National Flood Insurance Act of 1968 (codified at 42 U.S.C. Section 4001), making flood insurance widely available across the United States. The act authorized

the creation of the NFIP that provides subsidized flood insurance to residential and commercial property owners, issued through private insurers.

The act has undergone a series of important changes that have been designed to maximize coverage while also mitigating flood risk. Most notably, shortly after NFIP was created, Congress passed the Flood Disaster Protection Act of 1973, which made flood insurance mandatory for virtually any property owner attempting to secure a mortgage in “Special Flood Hazard Areas,” i.e., identified areas subject to a one percent or greater chance of flooding in any given year, 42 U.S.C. Section 4012a.

THE STANDARD FLOOD INSURANCE POLICY

Today, FEMA administers the NFIP across more than 22,000 communities. The vast majority of policies are administered through NFIP’s “Write-Your-Own Program,” which authorizes private insurers to issue flood policies under the NFIP in exchange for an expense allowance for policies written and claims processed. At the same time, the federal government retains responsibility for underwriting the losses and pays claims and associated expenses.

The federal government drafts the scope of coverage for NFIP as well. Congress granted FEMA broad authority to issue regulations establishing the “general terms and conditions of insurability,” including the nature and limits of loss that may be covered. Thus, flood insurance is issued to property owners using the standard flood insurance policy (SFIP), the terms and conditions of which are codified in the Code of Federal Regulations. See 44 C.F.R. Section 61, App’x A(1), “Standard Flood Insurance Policy Dwelling Form.” The SFIP “must be used in the Flood Insurance Program” and “no provision of the said documents shall be altered, varied, or waived” without the express written consent of the FEMA official responsible for administering the NFIP (see 44 C.F.R. Section 61.13(d)). Consequently, for nearly every property owner with flood insurance, their prospect of recovery for losses turns on the language of the SFIP.

As currently written, the SFIP does not necessarily provide coverage for all losses associated with flooding. The SFIP defines “flood” broadly as “a general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties” from overflow of inland or tidal waters, unusual and rapid accumulation or runoff of surface waters from any source, or mud flow. Yet the SFIP provides coverage only for “direct physical loss by or from flood” to a building and its contents, meaning that the building must be directly and physically damaged by a flood. Property owners, therefore, cannot recover losses for mere inundation; rather, the property owner must show that the movement of surface water or the resulting pressure from the movement caused damage to the insured property. Further, if structural damage is found to be attributable to

some pre-existing condition at the property, coverage will be denied.

The SFIP also contains a series of exclusions that limit coverage for losses from events that many property owners would likely consider caused by “flooding.” For example, the SFIP does not insure for physical loss caused by rain or snow. More to the point, the SFIP does not insure for loss to property “caused directly by earth movement even if the earth movement is caused by flood.” As federal courts have repeatedly made clear, structural damage to a building that is caused by any earth movement is not covered under the clear and unambiguous terms of the SFIP. The SFIP’s definitions

Insurers had long hesitated to cover flood damage, which they considered too widely destructive and unpredictable; indeed, until 1968, flood insurance was virtually nonexistent.

and exclusions are likely to catch a property owner off guard when they try to recover losses after a flood event.

THE CASSIDY-GILLIBRAND PROPOSAL

The fraud involving the manipulation of the HiRise engineering reports provides a salient example for how policyholders are often at the mercy of determinations made by engineering consultants as to whether the damage to their properties falls within the definition of a covered loss. With the current flood insurance program set to expire in September, a recent proposal submitted in the Senate

for the reauthorization of the NFIP would potentially alleviate some of these concerns by clarifying definitions in the SFIP and giving policyholders access to the engineering reports as a matter of course.

Specifically, on April 27, Sens. Bill Cassidy, R-Louisiana, and Kirsten Gillibrand, D-New York, introduced draft legislation to reauthorize the NFIP for 10 years. The Cassidy-Gillibrand proposal includes several provisions that are intended to increase the accountability of NFIP contractors, including a provision that requires final engineering reports for any claim for losses covered by the NFIP to be provided to the policyholder, as well as a provision requiring annual reviews of engineering firms that are participating in the NFIP.

Perhaps most significantly, however, the Cassidy-Gillibrand proposal includes a provision that would erase the “earth movement” exclusion in the SFIP, thereby ensuring that claims will not be denied when earth movement is caused by a flooding event. Such a provision would be welcomed by policyholders, although it would likely result in an increase in claims for a program that is already underwater. It will be important for property owners and practitioners representing them to monitor NFIP as it continues to be debated by members of Congress through the September expiration date. •

MANKO | GOLD

KATCHER | FOX LLP

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

Reprinted with permission from the May 12, 2017 edition of THE LEGAL INTELLIGENCER © 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com. # 201-05-17-04