

VOLUME 14:1

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SPECIAL SYMPOSIUM ISSUE



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SHAPE OF THE COAST LEGAL SYMPOSIUM: THE NORTH CAROLINA COASTAL MANAGEMENT CONTEXT

Frank Lopez*
Susan White**
Christine Goebel***

I. INTRODUCTION

On November 13, 2024, North Carolina Sea Grant hosted the *Shape of the Coast Legal Symposium* in conjunction with the North Carolina Coastal Conference, in New Bern, North Carolina.¹ The symposium was developed with longstanding collaborators at the N.C. Department of Environmental Quality (NCDEQ), the University of North Carolina-Chapel Hill's School of Law, Duke University's Environmental Law and Policy Clinic (a joint venture of Duke University's School of Law and Duke University's Nicholas School for the Environment), private practitioners in North Carolina with expertise in coastal law and policy, as well as a former North Carolina/National Oceanic and Atmospheric John A. Knauss Policy Fellow. New Bern, a riverfront city on the Neuse River, is almost an hour away from the Atlantic Ocean and experienced historic damage during Hurricane Florence in 2018, including ten feet of storm surge. The town continues to recover from these impacts, as well as addressing recurrent flooding impacts, and recently fully reopened their renovated convention center for large groups such as the North Carolina Coastal Conference. New Bern offered an excellent place-based and central location for law and policy professionals from around the state to convene to discuss law and policy considerations affecting North Carolina's coastal region.

In 2006, North Carolina Sea Grant (NCSG) was a founding partner in the development of the *Shape of the Coast Legal Symposium*, a North Carolina focused forum for discussion of marine policy and ocean and coastal legal issues

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¹ See [Shape of the Coast Legal Symposium](#), N.C. Sea Grant (last visited Aug. 26, 2025).

with the state as a backdrop. Thanks to the support provided by the National Sea Grant Law Center, and in partnership with the NCDEQ's Office of General Counsel, NCSG developed new partnerships to increase accessibility for this legal learning symposium held in conjunction with NC's Coastal Conference.

A steering committee² from NC accredited law schools selected eight compelling state and federal legal topics and recommended potential session leaders for each of the eight sessions. North Carolina Sea Grant Law Fellows from Duke University, Universities of North Carolina-Chapel Hill and Wilmington, and Wake Forest University were recruited and invited to the symposium and later assisted session leaders as part of writing teams to complete articles for this edition of the SEA GRANT LAW & POLICY JOURNAL (Journal).

The *Shape of the Coast Legal Symposium* (Symposium) was held November 13, 2024, in New Bern, North Carolina. Over 50 participants, including individuals from state and local governments, law schools, non-governmental organizations, local communities, and consulting firms attended. In the post evaluation survey, participants surveyed noted a high probability of using the information provided in their work.

NC Sea Grant created a web page available [here](#) where participants, Journal readers, and the public can access materials developed and presented at the Symposium. The sessions that yielded papers for this special edition include the following topics relevant to North Carolina's coastal management context: 1) an examination of federal flood insurance policy changes and pending legal challenges to implementation, 2) legal aspects of threatened oceanfront structures

² The authors would like to express their deepest gratitude to the members of the Shape of the Coast steering committee: Anderson Tran, former Sea Grant Knauss Fellow; Kai Hardy, Law and Policy Fellow, Maryland Sea Grant; Michelle Nowlin, Co-Director, Duke University Environmental Law and Policy Clinic, Duke University Law School; Donald Hornstein, Thomas F. Taft Distinguished Professor and Director of the Center on Climate, Energy & Economics, UNC School of Law; Todd Roessler, Attorney, Kilpatrick Townsend & Stockton LLP; Amy Wang, Attorney, Ward and Smith, P.A.; Maria Savasta-Kennedy, George R. Ward Term Professor, Clinical Professor of Law and Director of the Externship Program, UNC School of Law; Lauren Fremin, Project Coordinator, National Sea Grant Law Center; & Catherine Janasie, Senior Research Counsel, National Sea Grant Law Center.

on the Outer Banks, 3) coastal wetlands, 4) understanding legal issues surrounding heir properties in North Carolina, 5) conflicts arising from the allocation of sand for beach nourishment, 6) an update on North Carolina off-shore wind energy development policy, and 7) North Carolina's real estate disclosure laws. Through this introductory article, we will set up the Journal articles stemming from the symposium and note additional information provided during the Symposium's sessions.

II. SYMPOSIUM PANELS AND JOURNAL ARTICLES

The Symposium was kicked off by Mary Lucasse of the North Carolina Department of Justice and Sea Grant Law Fellow Zack Griffin, who set the stage for the sessions to follow by familiarizing the Symposium audience with North Carolina's Coastal Area Management Act (CAMA). CAMA has been the coastal management framework for North Carolina for over 50 years. Lucasse highlighted CAMA's accomplishments:

When I talk about CAMA, I always talk about the fact that this is a balancing statute. This is not about, 'Let's do everything we can to only protect natural resources.' No, we balance the rights of development, the rights of property owners, with the need to protect natural resources.³

A large part of CAMA is its land-use planning component. When CAMA was enacted only a small handful of coastal cities or counties had jurisdictional land use plans and development regulations. By 1993 all 20 coastal counties and 67 municipalities (including 59 cities with populations under 5,000) had adopted plans and had them approved by the State's Coastal Resources Commission. Other components of CAMA include development standards, beach and water access, and the preservation of natural areas.⁴

³ See Jennifer Allen, North Carolina Coastal Federation, [Coastal commission lawyer: CAMA a 50-year 'balancing act'](#), COASTAL REV. (June 24, 2025).

⁴ David Owens, [Reflections on 50 years of the NC Coastal Area Management Act](#), COASTAL REV. (June 24, 2025).

Donald Hornstein of the UNC School of Law, aided by Sea Grant Law Fellows Maggie Caudle and Jacob Dowler, followed the CAMA overview by analyzing the state of federal and private insurance policy and their impact on the North Carolina coast. Hornstein drew upon his long-standing relationship with the North Carolina Insurance Underwriting Association (NCIUA), i.e., the Coastal Property Insurance Pool, which is a tax-exempt association of insurance companies authorized to write essential property insurance coverage in North Carolina to familiarize Symposium participants with this potential source of coverage. The NCIUA was created by law to function as a market of last resort to provide adequate essential property insurance to property owners having insurable property in the beachfront and coastal areas of North Carolina.

In their paper prepared for this Journal edition, the team focuses on the history of the National Flood Insurance Program (NFIP) in the context of Risk Rating 2.0 and the legal, political, and economic challenges to federal flood insurance. Risk Rating 2.0, which became policy in the Biden Administration, attempts to align actuarially fair rates and foster opportunities for private flood insurance competition, potentially leading to a more rational U.S. flood risk policy if states and local communities increase accountability for reducing floodplain development risk.

Julie Youngman and Elizabeth Rasheed of the Southern Environmental Law Center, aided by Sea Grant Law Fellows Mary Peyton Brown and Catherine Hunt Cecelski, examined structures threatened by erosion on the Outer Banks, which has caused homes to collapse in the ocean between May 2020 and November 2024. Their article examines the possibility of North Carolina implementing a program, like those in other states, to fund the removal of imperiled oceanfront structures. The authors detail the unique geology of North Carolina's barrier islands and how accelerating sea-level rise and erosion impact them. The discussion then shifts to the pollution resulting from collapsing homes and failing septic systems along the coast, particularly in Rodanthe, an unincorporated coastal town. The article also reviews current federal and state initiatives, like voluntary buyouts and demolitions, aimed at addressing this issue. Finally, it offers insights into successful strategies for such programs.

Environmental Law Attorney Amy Wang of Ward and Smith P.A. moderated a panel discussion composed of Justin McCorcle of the U.S. Army Corps of Engineers-Wilmington District, Samatha Hamilton of Davis Hartman Wright LLP, and Christian Preziosi of Davey Resource Group, Inc. The panel provided an overview of the legal landscape of the definition of "Waters of the United States" (WOTUS) and offered insights into the 2023 Rule revision resulting from the pivotal *Sackett v. EPA* decision from the U.S. Supreme Court. The expert panel also discussed the application of federal wetlands regulations before and following *Sackett*, including the "Conforming Rule" and the jurisdictional determination process in North Carolina. On the state policy side, the panel touched on the North Carolina Farm Bill, which aligns North Carolina's wetland jurisdiction to meet the WOTUS definition and subsequent efforts to address the jurisdictional elimination of ecologically significant North Carolina isolated wetlands (e.g. Carolina Bays, Pocosins).

In their Journal article, Sea Grant Law Fellows Jessica Hardee and Kaylyn Bryant provide a synopsis of wetland policy in the aftermath of the *Sackett v. EPA*. The paper first explores the historical basis of wetlands protection under the Clean Water Act, tracing legal precedents that shaped *Sackett*. Next, the authors discuss the implications of *Sackett* in North Carolina, specifically considering the North Carolina 2023 Farm Act. Finally, the authors propose recommendations for wetland conservation in the state and the role of local government policy and non-profit advocacy.

Heirs' property is a form of land ownership commonly found in rural Southern African American communities. It typically involves land passed down through generations to numerous descendants, who are considered tenants in common. This often occurs because the original owners, lacking access to or distrusting the legal system, did not create formal wills. As a result, the property is intended to be shared equally among all heirs through intestate succession.⁵ Navigating heirs' property ownership can prove challenging for poor rural communities, as well as an obstacle to recovery after their homes and land are

⁵ RORY FLEMING, JACK WILLIAMS, REBECCA NEUBAUER, AND LISA SCHIAVINATO, N.C. SEA GRANT, [SPLITTING HEIRS: THE CHALLENGES POSED BY HEIRS' PROPERTY OWNERSHIP TO COASTAL RESILIENCE PLANNING](#) (2016).

damaged by flooding or other weather events. The lack of clear property title in an heirs' property may inhibit the ability of the occupants of the house to apply for federal financial assistance after a natural disaster. In this situation, the occupants may have few to no resources to repair damage.⁶

Scott Schang of the Wake Forest School of Law and the Director of its Environmental Law and Policy Clinic moderated a heirs' property panel discussion with property law experts including Charlotte Noel Fox of Craige and Fox PLLC-Wilmington, Mavis Gragg, Chief Executive Officer of Heir Shares, Wilson Green of the Land Loss Prevention Project, and Jesse Williams of the Campbell University Law School. North Carolina provides a distinct case study, due to the high prevalence of heirs' property.⁷ In addition, North Carolina has introduced but failed to adopt the Uniform Partition of Heirs' Property Act, which is a model statute designed to reduce involuntary land loss.⁸

For this Journal edition, Sea Grant Law Fellow Emily Mahon outlines a discussion of heirs' property, beginning with its definition and its challenges. The article then investigates the cultural significance of this land and need for solutions that respect communal family ownership. Finally, the article examines how one tool, conservation easements, could be used to prevent land loss, protect cultural heritage, and encourage sustainable land use practices.

The Symposium concluded with a one Continuing Legal Education credit hour session comprising three concise presentations. Todd Roessler of Kilpatrick Townsend presented on "Sand Wars," i.e., the legal and policy challenges surrounding the allocation of sand resources in North Carolina and federal waters for coastal restoration and beach nourishment projects. During the last century, the beaches of over 475 U.S. communities have been restored with over 1.5

⁶ *Id.*

⁷ See HOUSING ASSISTANCE COUNCIL, [A METHODOLOGICAL APPROACH TO ESTIMATE HEIRS' PROPERTY IN THE UNITED STATES](#) (2023).

⁸ THOMAS W. MITCHELL, TEXAS A&M LAW SCHOLARSHIP, [HISTORIC PARTITION LAW REFORM: A GAME CHANGER FOR HEIRS' PROPERTY OWNERS](#) 65 (Cassandra J. Gaither, Ann Carpenter, Tracy Lloyd McCurty, & Sara Toering eds., 2019).

billion cubic yards (cy) (1.2 billion cubic meters (m³) of sand).⁹ North Carolina is one of the six states, (California, Florida, New Jersey, New York, and Louisiana are the others) that account for over 83% of the total volume of sand placed on beaches.¹⁰

North Carolina coastal management regulations require beach nourishment projects to identify a compatible sand source adequate to the project's scope. Sand from the same source may also be used by other applicants. This approach can and has led to resource allocation challenges. Authors Todd Roessler and Madison Williams, a Sea Grant Law Fellow, explore the legal and policy frameworks for sand resource allocation in North Carolina and federal waters (which are three or more nautical miles offshore). They also examine the roles of state and federal agencies and provide recommendations for management of these crucial resources.

The outer continental shelf of North Carolina supports some of the best conditions for potential offshore wind energy along the Atlantic seaboard. The offshore wind industry is expected to create a significant supply chain and jobs in North Carolina. To drive this economic impact, the state has set ambitious goals for offshore wind development. Jennifer Mundt, the North Carolina Department of Commerce Assistant Secretary for Energy and Infrastructure, discussed the status of North Carolina Wind Energy Areas and provided a look at the Bureau of Ocean Energy Management renewable energy development process. Sea Grant Law Fellow Kaitlin Beckom authors the accompanying article, which offers a scientific and legal analysis of offshore wind, focusing on the Atlantic Coast. *Going with the Wind: The Future of Offshore Wind* covers the technology, energy output, and roles of federal and state entities in these projects, concluding with strategies for responsible development and compliance.

The North Carolina Residential Property Disclosure Act (N.C.G.S. 47E) requires sellers of residential property (i.e., 1-4 dwelling units) to disclose known

⁹ Nicole Elko et al., *A century of U.S. beach nourishment*, 199 OCEAN & COASTAL MGMT. 105406 (2021).

¹⁰ *Id.*

conditions and defects to potential buyers. This is done through a Residential Property Disclosure Statement, developed by the North Carolina Real Estate Commission (NCREC). The seller must complete and deliver the form to the buyer no later than the time the buyer makes an offer. Christine Goebel of the North Carolina Department of Environmental Quality and Elise Coby, Sea Grant Law Fellow, provided background on real estate disclosure law in North Carolina and efforts that began over 20 years ago to incorporate disclosure of coastal hazard risk into the Residential Property Disclosure Statement. The latest effort to include coastal hazard risk on the disclosure form has been filed by the Southern Environmental Law Center on behalf of several clients through a Petition for Rulemaking in 2022. In 2023, the NCREC voted to adopt a revised form with several additional flood hazard disclosures, but the revision only requires that property sellers disclose flood hazard information and not other coastal hazard information. In their article *Closing in on Coastal Hazards on the North Carolina Real Estate Disclosure Form*, Goebel and Coby speculate what a North Carolina Hazards Disclosure inclusive of all coastal hazards might look like.

We are grateful to the National Sea Grant Law Center and the Journal for supporting the Symposium and helping our program build a group that could collaborate on future legal and policy learning opportunities for North Carolina audiences.

FLOODING THE ZONE: THE STATE OF FEDERAL FLOOD INSURANCE AT THE BEGINNING OF TRUMP 2.0

Maggie Caudle*

Jacob Dowler**

Donald Hornstein***

The risks of flooding in the United States have never been more apparent, making all the more significant the state of flood insurance and the legal and political volatility of the National Flood Insurance Program. In this Article we discuss the details of “Risk Rating 2.0,” the most significant change to federal flood insurance in half a century, and its legal and political future in the new world of Trump 2.0. And, in addition to describing the details of this new change to federal flood insurance, we describe its advantages and disadvantages in both the newfound political environment in which it operates and its likelihood of continuing to survive its most significant legal challenge in federal court, in State of Louisiana v. Department of Homeland Security.

I. INTRODUCTION

It is difficult to capture the volatility that buffets flood insurance in 2025. During President Trump’s first term, the National Flood Insurance Program (NFIP) unveiled “Risk Rating 2.0,” described as “the biggest change in the way the NFIP calculates flood insurance premiums since the program began in 1968.”¹ The Administration, however, chose to defer its implementation to 2021, the year after the next presidential election. Politically, this was a wise choice. The politics of flooding were on full display between 2012 and 2014 when Congress sought to “right-price” flood insurance only to backtrack given the widespread opposition

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¹ See DIANE P. HORN, CONG. RSCH. SERV., IN11777, [NATIONAL FLOOD INSURANCE PROGRAM RISK RATING 2.0: FREQUENTLY ASKED QUESTIONS](#) 1 (2024).

of voters whose insurance premiums would rise.² Thus, after Joe Biden won the 2020 election, it made political sense for the Federal Emergency Management Agency (FEMA) and the NFIP to implement Risk Rating 2.0, as planned, in 2021, early in the new President’s term. Indeed, given the apparent support for Risk Rating 2.0 from both President Trump and President Biden, one might think this to be a rare instance of bipartisan agreement. Yet this was hardly the case. In 2022, the Supreme Court formalized its “major question doctrine” in *West Virginia v. EPA*,³ and, in June 2023, the Attorneys General of ten “Red” states filed suit in a New Orleans federal court, in *State of Louisiana v. Department of Homeland Security*,⁴ claiming among other things that Risk Rating 2.0 violated the doctrine.⁵ Although the trial court refused in March 2024 to enjoin Risk Rating 2.0,⁶ the court’s final judgment will ultimately be reviewed by the Court of Appeals for the Fifth Circuit, a circuit known for its anti-regulatory jurisprudence.⁷

This, of course, assumes that the NFIP’s initiative survives that long because, in 2025, Risk Rating 2.0 has met Trump 2.0. It’s not simply that FEMA-bashing was on particular display in the closing weeks of the 2024 presidential election,⁸ but conservative-leaning policy entrepreneurs such as those at the Cato Institute and the authors of Project 2025 have proposed that flood insurance be left increasingly to the private market.⁹ In January 2025, President Trump by Executive Order created a “FEMA Review Council,” to consider unknown agency changes,¹⁰ and in February 2025 the Department of Homeland Security (DHS) was said to have terminated the employment of over 200 FEMA staffers,

² See, e.g., Alexander Lemann, [Rolling Back the Tide: Toward an Individual Mandate for Flood Insurance](#), 26 FORDHAM ENV’T L. REV. 166, 168 (2015) (describing a “political backlash” against flood insurance reform).

³ *West Virginia v. EPA*, 597 U.S. 697 (2022).

⁴ See *infra* note 94.

⁵ *Id.*

⁶ *Id.*

⁷ See Tad Bartlett, [A Year of Transition at the Agenda-Setting 5th Circ.](#), LAW360 (Dec. 20, 2023, 4:33 PM) (referring to the Fifth Circuit as “aggressively conservative”).

⁸ Kelly Doty & Taylor Thomson, [Trump Criticizes FEMA Response During Helene Storm Damage Tour in North Carolina](#), NBC 15 NEWS (Oct. 22, 2024, 3:12 PM).

⁹ See *infra* notes 84–88.

¹⁰ See [Trump Establishes Council to Review Federal Disaster Response Agency](#), REUTERS (Jan. 26, 2025, 11:31 PM).

including Christopher Page who had recently accepted the position of Chief of the NFIP.¹¹

Yet, precisely because the NFIP may be on the chopping block, it has never been more important to appreciate the full range of its strengths and weaknesses. After all, despite its shortcomings, it is not difficult to imagine “solutions” that turn out to be much worse. Thus, we first summarize those aspects of the program’s history and design that should be especially salient to reformers today, including an explanation of the NFIP’s Risk Rating 2.0 program. Then, before pivoting to the legal issues in the judicial challenge to Risk Rating 2.0 currently pending in Louisiana, we consider two issues with which the NFIP and its reformers must inevitably grapple: the link between flood insurance and flood resiliency that may ultimately determine whether floods are insurable at all, and the potential capacity of the private market to insure flood risks. After that, we consider the prospects for Risk Rating 2.0 in light of the challenges brought against it in *State of Louisiana v. Department of Homeland Security*.

II. THE NFIP: HISTORY, EFFICACY, AND CRITICISMS

The NFIP was established in 1968 through the National Flood Insurance Act (NFIA) in response to escalating flood-related damages and the limited availability of private flood insurance.¹² Prior to the NFIP, flood disasters often left homeowners reliant on federal disaster relief, which was costly and inefficient.¹³ The NFIP was designed to provide affordable flood insurance while

¹¹ Brianna Sacks et al., [*FEMA is Losing Scores of Employees. What Does That Mean for Disaster Recovery?*](#), WASH. POST (Feb. 18, 2025).

¹² AM. INSTS. FOR RSCH. ET AL., [*A CHRONOLOGY OF MAJOR EVENTS AFFECTING THE NATIONAL FLOOD INSURANCE PROGRAM*](#) 1, 1-12 (2002) (providing a brief account of the policy concerns that led to the NFIP’s implementation and the political and economic pressures that have wrought significant changes in the 21st century).

¹³ Scott Gabriel Knowles & Howard C. Kunreuther, *Troubled Waters: The National Flood Insurance Program in Historical Perspective*, 26 J. OF POL’Y HIST. 327, 332 (2014) (analyzing the roles that the 1927 Mississippi floods, 1964 Alaska earthquake, and 1965 Hurricane Betsy played in catalyzing the development of the program).

encouraging communities to adopt floodplain management regulations to mitigate flood risks.¹⁴

Administered by FEMA, the NFIP operates on a three-pronged approach: (1) risk identification through flood mapping, (2) floodplain management and mitigation, and (3) insurance coverage.¹⁵ In exchange for community participation in the NFIP and adherence to floodplain management standards, residents and businesses may access federally backed flood insurance. Additionally, the Flood Disaster Protection Act of 1973 mandated flood insurance for properties in Special Flood Hazard Areas (SFHAs) with federally-backed mortgages, significantly expanding the NFIP's reach.¹⁶

Despite its goals, the NFIP faced financial instability due to repeated flooding events and subsidized insurance rates that did not reflect actual risk. By the early 2000s, mounting debt and increased claims from major disasters such as Hurricanes Katrina and Rita underscored the need for reform.¹⁷

A. Biggert-Waters Flood Insurance Reform Act of 2012

Recognizing the NFIP's financial vulnerabilities, Congress enacted the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12) to transition the program toward actuarial soundness.¹⁸ BW-12 sought to eliminate longstanding

¹⁴ See *id.* at 336-43 (adding that coverage for home and business owners was not the only major goal of the NFIP at its conception, but rather that coverage was meant to be a first step to increasing the safety and resiliency of flood-prone communities, ultimately reducing the need for the NFIP to play as substantial a role in economic resiliency in those communities).

¹⁵ See *id.* at 347 (noting that while there were three main prongs of approach for the NFIP, the first prong, flood mapping, has been neglected far more than the other two prongs).

¹⁶ See *id.* at 337-38 (citing 42 U.S.C. § 4002 and noting the prevalence of federally backed mortgages in the US real estate market and the wide-ranging implications of insurance requirements for all properties encumbered by such mortgages).

¹⁷ AM. INSTS. FOR RSCH. ET AL., *supra* note 12, at 84.

¹⁸ Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, 126 Stat. 405 (2012) (codified as amended at 42 U.S.C. §§ 4001-4131). Among the first of the congressional findings and declarations of purpose is a clear concern about the "alarming" increase in both frequency of and destruction caused by floods. *Id.* at § 4002(a).

subsidies and require flood insurance premiums to reflect full flood risk based on updated FEMA flood maps.¹⁹

Key provisions of BW-12 included:

- Elimination of subsidized premiums, which phased out subsidies for many policyholders, including owners of second homes, businesses, and properties with severe or repetitive losses;
- Rate increases, which required annual rate hikes of 5-25% for policyholders until they reached full risk-based pricing;
- Flood mapping enhancements, which directed FEMA to update flood maps using improved technology and data; and
- Reserve funding requirements, which created a reserve fund to reduce reliance on federal disaster relief.²⁰

Further, BW-12 instituted a policy which required purchasers of homes subject to flood insurance requirements to immediately pay actuarially fair premiums—as opposed to the gradually increasing premiums for existing policy holders—which effectively froze real estate markets in otherwise high-demand areas.²¹

Although intended to stabilize the NFIP, BW-12 resulted in dramatic premium increases for many policyholders, particularly in coastal and high-risk flood zones.²² Homeowners who had previously relied on subsidized insurance

¹⁹ *Id.* at § 4014(g). In addition to the rapid, albeit not immediate, increase in premiums for existing policy holders, the Act also barred subsidies for any new policies. *Id.*

²⁰ *See generally id.* at §§ 4001–4131. *See also id.* at §§ 4014–4015 for most of the provisions relating to premium increases and withholding of subsidies.

²¹ Alexander B. McDonnell, *The Biggert-Waters Flood Insurance Reform Act of 2012: Temporarily Curtailed by the Homeowner Flood Insurance Act of 2014—A Respite to Forge an Enduring Correction to the National Flood Insurance Program Built on Virtuous Economic and Environmental Incentives*, 49 WASH. U. J. L. & POL'Y 235, 260 (2015). The author notes that while these policies were effective for discouraging development of high-risk areas, the trade-off of pricing many other homeowners and small businesses may be too much of a negative to overcome.

²² Austin Johnson, *Biggert-Waters and Rising Tides: Searching for Enduring Reform to the National Flood Insurance Program in Today's Politics*, 57 HOUS. L. REV. 227, 234 (2019).

saw premiums rise by hundreds or even thousands of dollars annually, sparking public outcry and bipartisan pressure to scale back the reforms.²³

B. The Homeowner Flood Insurance Affordability Act of 2014

In response to the backlash against BW-12, Congress passed the Homeowner Flood Insurance Affordability Act of 2014 (Affordability Act) to mitigate the financial impact on policyholders. The Affordability Act's major provisions included:

- Limits on rate increases, which capped premium increases at 18% per year for primary residences and 25% per year for businesses and secondary homes;
- Restoration of grandfathering, which allowed properties to retain lower rates even if new flood maps indicated higher risk;
- Refunds, which required FEMA to reimburse policyholders who had already experienced steep rate increases due to BW-12;
- An affordability study and consumer protections; and
- An NFIP surcharge, which imposed a \$25 annual surcharge for primary residences and a \$250 surcharge for second homes and businesses to offset revenue losses.²⁴

The Affordability Act provided temporary relief to policyholders, but it did not resolve NFIP's structural issues, particularly its \$20+ billion debt and the challenge of accurately pricing risk while maintaining affordability.²⁵ The affordability study was intended to precede subsidies for poorer homeowners. However, those subsidies were never rolled out, which, contrary to the NFIP's

²³ *Id.* at 234-37.

²⁴ Homeowner Flood Insurance Affordability Act of 2014, Pub. L. No. 113-89, 128 Stat. 1020 (2014).

²⁵ DIANE P. HORN, CONG. RSCH. SERV., IN10784, [NATIONAL FLOOD INSURANCE PROGRAM BORROWING AUTHORITY](#) (2025).

stated goal of increasing the number of policy holders, actually resulted in many policy holders dropping their flood coverage because of its expense.²⁶

The implementation of BW-12 would have significantly altered the financial burden for many homeowners, particularly those who had long relied on subsidized rates. A 2025 report from the Congressional Research Service estimated that nearly 20% of NFIP policyholders—over 1 million properties—were receiving subsidized rates that BW-12 sought to eliminate.²⁷ This meant that homeowners in coastal and flood-prone areas faced premium increases that, in some cases, tripled their annual costs.²⁸ As a result, many property owners, particularly in Louisiana, Florida, and New Jersey, saw their housing costs skyrocket, prompting concerns over displacement and declining property values.²⁹

The Affordability Act's rollback of certain BW-12 provisions was a direct response to these affordability concerns. By reinstating grandfathering provisions and limiting annual premium hikes, the Affordability Act prevented many homeowners from experiencing immediate financial hardship. However, critics argue that the Affordability Act also weakened NFIP's financial sustainability by continuing subsidies that kept the program from reaching actuarial soundness.³⁰

Moreover, despite the Affordability Act's relief measures, some property owners continued to face higher costs, particularly those in newly mapped high-

²⁶ See *infra* note 69.

²⁷ DIANE P. HORN & BAIRD WEBEL, CONG. RSCH. SERV., [INTRODUCTION TO THE NATIONAL FLOOD INSURANCE PROGRAM](#) 18 (2025).

²⁸ See [Flood Insurance: FEMA's New Rate-Setting Methodology Improves Actuarial Soundness but Highlights Need for Broader Program Reform](#), GEN. ACCT. OFF. (July 31, 2023). The authors further consider that these states make up a disproportionate amount of NFIP policies, and thus, rapidly and drastically increased premiums disproportionately contribute to a decrease in the number of NFIP policies maintained.

²⁹ See Carolyn Kousky & Erwann Michel-Kerjan, *Examining Flood Insurance Claims in the United States: Six Key Findings*, 84 J. RISK AND INS. 819, 829 (2017).

³⁰ Melissa Tier, *Overcoming Contemporary Reform Failure of the National Flood Insurance Program to Accelerate Just Climate Transitions*, J. PUB. AND INT'L AFFS. May 5, 2021. The author makes point of the fact that the Affordability Act was a political compromise pandering to outraged constituents at the cost of the original goal of the BW-12. The author argues further that Congress must find an alternative that sufficiently accounts for public outcry while disincentivizing new development insured at actuarially unfair rates.

risk zones.³¹ A study found that while the Affordability Act prevented the most extreme premium spikes, many homeowners still faced increases of up to 18% per year,³² leading to financial strain and concerns about insurance affordability in vulnerable communities.³³ The long-term impact of these reforms remains a key issue as NFIP continues to operate under financial duress.

III. RISK RATING 2.0

In recent years, flooding has worsened in many parts of the country, and experts worry that climate change will only exacerbate this problem.³⁴ Because of an increase in need and lack of funding for flood insurance, FEMA was forced to reevaluate its method for determining flood risk in 2019. Only about 12% of homeowners carried flood insurance in 2022, a decrease from just a few years prior.³⁵ Many homeowners remain uninformed about the true risk of flooding in their homes.³⁶ The NFIP attempts to remedy this but does not always offer the type of coverage people seek.³⁷ The NFIP is of course not the only option, as homeowners have private flood insurance available as well, but FEMA's program tends to be more affordable overall.³⁸

The NFIP's new underwriting platform, Risk Rating 2.0, was first implemented in 2021 in response to an increase in losses that surpassed

³¹ DIANE P. HORN, CONG. RSCH. SERV., IN11777, [NATIONAL FLOOD INSURANCE PROGRAM RISK RATING 2.0: FREQUENTLY ASKED QUESTIONS](#) 1, 2 (2024).

³² *Id.* at 2.

³³ Tier, *supra* note 30. While not the focus of this article, the author makes an important point of the failure of both the BW-12 and the Affordability Act to implement any substantial equity-based exceptions for premium increases. While the Affordability Act did reduce the startling impact of sudden and extreme premium increases, it did so largely across the board, while most of the public outcry was instigated by the failure of the BW-12 to ease the effects on single-home owners and small businesses.

³⁴ Larry P. Atkinson et al., *Sea Level Rise and Flooding Risk in Virginia*, 5 SEA GRANT L. & POL'Y J. 3, 7–8 (2013) (discussing the correlation between sea level rise and flooding on the Virginia coast).

³⁵ Karl Susman, *Risk Rating 2.0: FEMA's New Flood Insurance Program*, 51 BRIEF 58, 60 (Winter 2022) (explaining the benefits of Risk Rating 2.0).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

premiums. The previous model was based entirely on FEMA-sourced data. It used a flood insurance rate map and zone system, basing rates on property foundation and elevation of the structure. The old program only assumed a 1% chance per year of a flood occurring on the property, and “considered only two sources of risk: river flooding and coastal flooding.”³⁹ In comparison, Risk Rating 2.0 uses “additional risk variables in its pricing models, including flood frequencies, multiple flood types . . . and even distance to a water source.”⁴⁰ In addition to FEMA data, the new program uses data from other governmental agencies as well as third-party sources, which are not disclosed, but likely include private insurance.⁴¹ The percentage increase is now a much broader range, taking the new data into account to consider individual flood risk for properties.⁴² FEMA claims that this program will more accurately determine which properties have a greater flood damage risk based on factors like construction material, occupancy type, and number of floors.⁴³ Compared to the previous model which used a roughly 1% chance of both coastal and fluvial flooding, Risk Rating 2.0 uses commercial catastrophe models to estimate damage from infrequent, severe events.⁴⁴

Early estimates of Risk Rating 2.0 premiums showed that about a quarter of policyholders would actually see their premiums decrease, as the new program takes the size of a home into account, where the previous one did not. Policyholders with smaller houses were previously paying a disproportionate amount, something Risk Rating 2.0 looks to address.⁴⁵ According to initial research, only 4% of policyholders would see an increase of twenty dollars or more per month, while the remaining policyholders would see a minimal increase.⁴⁶ Between 2015 and 2021, data show that premiums increased on

³⁹ HORN, *supra* note 31, at 1.

⁴⁰ Susman, *supra* note 35, at 61.

⁴¹ *Id.* at 62.

⁴² *Id.* (providing a broad analysis of the new system with the caveat that the article does not go into great detail about Risk Rating 2.0 methodology).

⁴³ *Id.* Additional factors include foundation and elevation of the building, prior insurance claims, and height of the lowest floor relative to ground level.

⁴⁴ DIANE P. HORN, CONG. RSCH. SERV., R45999, [NATIONAL FLOOD INSURANCE PROGRAM: THE CURRENT RATING STRUCTURE AND RISK RATING 2.0](#) 7–8 (2022).

⁴⁵ Susman, *supra* note 35, at 61.

⁴⁶ *Id.*

average between 6% and 11% per year.⁴⁷ It was implemented in phases, allowing insurers to choose between the old pricing method and the new program between October 2021 and March 2022.⁴⁸ After April of 2022, Risk Rating 2.0 was applied to all new and renewed policies. The program is still in effect today.

Although some policyholders have seen rate increases, the increases are limited by statute.⁴⁹ The Affordability Act of 2014 only allows for premium increases of up to 18% annually for primary residences.⁵⁰ Other types of property are able to be increased by 25% per year until they reach their fair market rates.⁵¹ Additionally, Risk Rating 2.0 policyholders may receive mitigation credits for taking steps to reduce flood risk, such as elevating machinery above the lowest floor and installing flood openings.⁵² They can also submit an elevation certificate to the NFIP to give more substantive information about the elevation of their building and potentially receive lower rates.⁵³

The NFIP's Community Rating System (CRS) also applies under Risk Rating 2.0. This program allows municipalities that participate in the NFIP to choose to adopt mitigation efforts beyond those required to receive premium discounts for all policyholders within the community.⁵⁴ Discounts for communities that take such steps range from 5 to 45%.⁵⁵ CRS uses a points-based system, and over 1,500 of about 22,000 communities that participate in the NFIP have chosen to take advantage of CRS. Many of these communities are populous, meaning over 70% of NFIP policyholders see some benefit from CRS.⁵⁶

⁴⁷ HORN, *supra* note 31, at 2–3.

⁴⁸ Susman, *supra* note 35, at 62.

⁴⁹ Homeowner Flood Insurance Affordability Act of 2014, *supra* note 24.

⁵⁰ *Id.*

⁵¹ HORN, *supra* note 31, at 2.

⁵² FED. EMERGENCY MGMT. AGENCY, [RISK RATING 2.0 FREQUENTLY ASKED QUESTIONS](#) 2 (2022).

⁵³ *Id.* at 4.

⁵⁴ Brian McWalters, *Before the Deluge: Federal Policy and Flood Resiliency*, 34 GEO. ENV'T L. REV. 467, 481–82 (2022).

⁵⁵ *Id.* Communities that participate in the CRS are scored based on a points system and may obtain discounts for everyone in their population, but must comply on a large community-wide scale.

⁵⁶ *Id.* at 483.

Although the program more accurately estimates flood risk based on a variety of factors, Risk Rating 2.0 has increased rates for many policyholders. Some scholars cite equity concerns, expressing worry especially about the ability of low-income policyholders in at-risk areas to keep up with the changing rates.⁵⁷ And, although CRS is a tool that can place some of the burden on municipalities rather than policyholders, evidence suggests that it is not being taken advantage of nearly as much in less populous areas.⁵⁸ The NFIP's goal is to increase coverage, but the increased rates could ultimately prevent this from happening.

On the other side of the spectrum, some are concerned Risk Rating 2.0 is not ambitious enough to keep up with the fast pace of climate change and the NFIP's increasing debt.⁵⁹ Though the program is gradually increasing rates for many policyholders, the premiums "continu[e] to lag far below actuarially sound levels."⁶⁰ Even when flooding causes significant damage, the NFIP will usually provide subsidized coverage without requiring the policyholder to take steps to reduce risk.⁶¹ In areas prone to flooding, this can prove to be costly for the NFIP.⁶² Additionally, though CRS and other mitigation efforts are meant to prevent flooding, their positive impacts may be reduced by NFIP's facilitation of construction in floodplains due to its subsidized rates.⁶³

When Risk Rating 2.0 was implemented, it faced a considerable amount of backlash from policyholders and states alike. In September of 2021, just a week before the new program was scheduled to take effect in October, two Mississippi Senators wrote a letter to FEMA encouraging a delay in its implementation.⁶⁴ Republican Senators Roger Wicker and Cindy Hyde-Smith were joined by congressmembers from both sides of the aisle in expressing support for a more

⁵⁷ See, e.g., *id.* at 484–85.

⁵⁸ *Id.* at 483.

⁵⁹ See e.g. Albert C. Lin, *Public Insurance as a Lever for Semi-Managed Climate Retreat*, 58 GA. L. REV. 1535, 1548 (2024).

⁶⁰ *Id.*

⁶¹ *Id.* (explaining the reasons for the NFIP's "sizeable debt").

⁶² *Id.*

⁶³ *Id.* at 1547.

⁶⁴ Press Release, Sen. Roger Wicker, [Wicker, Hyde-Smith Urge FEMA to Delay Flood Insurance Changes that Would Raise Premiums](#) (Sept. 22, 2021).

accurate rating method to prevent insolvency for the NFIP.⁶⁵ They expressed concern that many policyholders would be forced to drop their coverage altogether under the new program.⁶⁶ Additionally, they criticized FEMA's handling of the process and its choice to implement the program at the beginning of hurricane season.⁶⁷

IV. THE POLITICAL AND ECONOMIC CHALLENGES FACING THE NFIP IN TRUMP 2.0

Simply framing the possible future of Risk Rating 2.0, and possibly even the NFIP itself, in early 2025 is no easy task. On the one hand, deficit hawks in Congress are increasingly hostile to the idea of perpetually bailing out an insurance program that does not charge the actuarially fair rates needed to keep it solvent.⁶⁸ Yet on the other hand, apart from the Attorneys Generals of those ten states suing to block Risk Rating 2.0 precisely because they want to maintain low rates, there is evidence that NFIP's rate increases are already playing a role in record numbers of homeowners dropping NFIP flood insurance over affordability concerns.⁶⁹ The contrast between these two data points suggest that, whatever the outcome of *State of Louisiana v. Department of Homeland Security*, a coherent national policy toward flood risks needs to confront both the increasing risks of

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* (“With NOAA predicting the rest of this hurricane season to have above-normal activity, we worry that Risk Rating 2.0 will leave flood providers overburdened by the additional responsibility of learning a new, unfamiliar and untested rating system.”)

⁶⁸ See, e.g., Zachary Warmbrodt, [House Passes Flood Insurance Renewal in Wake of Massive Storms](#), POLITICO (Nov. 14, 2017, 7:38 PM) (“‘A federal program that conceals actual risk through artificially low rates is neither compassionate nor responsible,’ Rep. Dennis Ross (R-Fla.) said.”); Jamie Dupree, [Some Republicans Grumble as House Approves \\$36.5 Billion Hurricane Aid Bill](#), PALM BEACH POST (Oct. 13, 2017, 2:53 AM) (“‘I am disappointed that Congress chose to bail out the National Flood Insurance Program (NFIP) on the backs of the American taxpayers,’ said Rep. Roger Williams (R-TX), one of six Texas Republicans who voted against the hurricane aid package.”).

⁶⁹ [Private Flood Insurance Expands After NFIP Changes](#), BURNS & WILCOX (Oct. 23, 2023) (“By August of last year, hundreds of thousands of homeowners had reportedly dropped NFIP policies.”); Thomas Frank, [Hundreds of Thousands Drop Flood Insurance as Rates Rise](#), E&E NEWS (Aug. 8, 2022, 6:25 AM) (“since October, more than 425,000 people have discontinued the coverage they had through FEMA’s National Flood Insurance Program”).

flooding and the capabilities of individuals and communities to remain financially viable and safe as they confront those risks.

This raises an initial, and in some respects, overarching issue: the link between the NFIP and flood resilience. Of all the consequences of extreme weather, the risk of flooding is by far the most common and results in the most property damage and loss of life, both within the United States and worldwide.⁷⁰ In part, that explains why, after the Great Mississippi Flood of 1927, Congress budgeted funds for the federal government’s build-out of dams up and down the Mississippi River, an amount “in fiscal terms [that] was more expensive than anything else the federal government had ever undertaken except World War I.”⁷¹ But it also explains why, as flood losses continued to mount despite these structural projects—because the projects themselves encouraged people to move into the “protected” floodplains⁷²—a federal task force concluded in 1966 that a more integrated approach was required that included restrictions on floodplain development.⁷³ The result was Congress’ enactment of the NFIP itself in 1968 as a way to implement the task force’s recommendations⁷⁴ and in particular its requirement that participating communities restrict further floodplain development if they wanted their residents to qualify for NFIP coverage.⁷⁵

Thus, local governments’ failure to keep up their end of the bargain may be one possible reason for the NFIP’s financial difficulties. This makes it all the more significant that, when the United States government brought suit in Louisiana on just this theory, the Fifth Circuit rejected the attempt, holding that

⁷⁰ See [Understanding Flood Risk](#), NASA (last visited July 30, 2025).

⁷¹ See Christine A. Klein & Sandra B. Zellmer, *Mississippi River Stories: Lessons From a Century of Unnatural Disasters*, 60 SMU L. REV. 1471, 1484 (2007).

⁷² See A. Dan Tarlock, *United States Flood Control Policy: The Incomplete Transition from the Illusion of Total Protection to Risk Management*, 23 DUKE ENV’T L. & POL’Y F. 151, 166 (2012).

⁷³ See JAMES M. WRIGHT, ASS’N OF STATE FLOODPLAIN MANAGERS, *THE NATION’S RESPONSES TO FLOOD DISASTERS: A HISTORICAL ACCOUNT* 29 (Wendy L. Hessler, ed., 2000).

⁷⁴ *Id.* at 30.

⁷⁵ See 42 U.S.C. §§ 4001(a), 4001(c). Congress included in its official findings when it established the NFIP that, “a program of flood insurance can promote the public interest by . . . encouraging sound land use by minimizing exposure of property to flood losses.” *Id.* § 4001(c).

such a cause of action was not explicitly provided in the statute.⁷⁶ And the result of such a holding may explain why one author concluded that rapid land use development in Louisiana was itself responsible for what the author categorized as “land- development-induced flooding.”⁷⁷ A similar problem arises to the extent states fail to enforce the NFIP’s so-called “SI/SD” (substantial improvement/substantial damage) standards, which require those property owners who must significantly rebuild after a flood to do so guided by the local government’s currently-in-place zoning laws.⁷⁸ This can mean significantly increased rebuilding costs, such as those requiring new construction to be “elevated” above base-flood elevation. To the extent any/all of these problems exist, one obvious solution, rather than jettisoning the NFIP altogether, is to arm FEMA and the federal government with the power to enforce the “deal” that local governments undertook when they joined the program in the first place—to restrict new developments in flood zones and to ensure that homes are, in fact, built back better.

There is, of course, more than one way to skin the cat. And, in addition to playing hardball with a local jurisdiction’s promise to restrict development in floodplains, it is also possible to provide inducements for local jurisdictions to go above-and-beyond their current codes and undertake additional measures that reduce flood risks in their territories. And this is precisely what NFIP has done in its CRS program, which provides jurisdiction-wide rate reductions to those NFIP communities that agree to adopt varying types of flood-reduction programs. These can range from fairly small premium reductions (*e.g.*, 5%) for such modest undertakings as promoting general flood awareness to far greater premium

⁷⁶ See *United States v. Par. of St. Bernard*, 756 F.2d 1116, 1119, 1123 (5th Cir. 1985). Although there have been criticisms that FEMA has more enforcement power than this 5th Circuit decision suggests, see, *e.g.*, Joel Scata, [FEMA Turning Blind Eye to NFIP’s Influence on Land Use](#), NRDC (June 7, 2017). There is also evidence that FEMA views this possible constraint as hamstringing efforts to enforce local land-use violations. *Id.* (“FEMA narrowly interprets the concept of land use authority and finds the agency lacks the power to proscribe the type of development which may occur in a floodplain.”).

⁷⁷ See Madison Gaines, Comment, *The Quest for Land Development Leaves Louisiana Under Water—What the Flood? An Analysis on Land Development-Induced Flooding and How Louisiana Can Stay Above Water*, 11 *LSU J. ENERGY L. & RES.* 307, 309 (2023).

⁷⁸ See Dean Adler et al., *Changing the National Flood Insurance Program for a Changing Climate*, 49 *ENV’T L. REP.* 10320, 10324 (2019).

reductions (up to 45%) for those jurisdictions that undertake and finance ambitious (and expensive) programs that markedly reduce flood risks.⁷⁹ Needless to say, as Risk Rating 2.0 increases rates in many jurisdictions, the (political) attraction to local governments of these sorts of ambitious programs will grow.⁸⁰ Or, to put it another way, the NFIP is currently structured to increase resiliency while reducing rates, possibly squaring the circle that has to date been a longtime goal of the program.⁸¹

All that said, the NFIP alone can hardly be the sole answer to physical flood resiliency. It is imperative that state and local governments adopt measures such as land-use restrictions and ever-improving building codes to reduce the damage caused by destructive weather that is already all but locked into our atmosphere.⁸² And it is equally important that federal investments in climate resiliency continue. Such expenditures have been supported by bipartisan majorities in Congress even in some of the most politically polarized periods in recent history,⁸³ and their cost-effectiveness have been repeatedly proven.⁸⁴ That said, two recent proposals attributed to Project 2025 are worth considering. One involves a “disaster deductible,” something first proposed by the Obama Administration, which would require each State to spend a significant amount of its own funds annually on

⁷⁹ See, e.g., FED. EMERGENCY MGMT. AGENCY, COMMUNITY RATING SYSTEM DISCOUNT FREQUENTLY ASKED QUESTIONS (2024).

⁸⁰ See, e.g., Louis Llovio, [Fort Myers Flood Insurance Costs to Drop by 20%](#), BUS. OBSERVER (Jan. 15, 2025, 11:05 AM). Fort Myers, after losing its CRS rating, hired and worked with consultants on “best practice recommendations and launched several capital improvement projects,” and was rewarded with an additional 15% discount in NFIP policy premiums. *Id.*

⁸¹ See, e.g., JESSE GOUREVITCH & NICHOLAS PINTER, WHARTON RISK MGMT. AND DECISION PROCESSES CTR., ISSUE BRIEF: FEMA’S COMMUNITY RATING SERVICE: WORTH THE EFFORT? 8 (2022) (“The results here suggest the CRS pays for itself through reduced flood damages and NFIP claims.”).

⁸² See, e.g., Donald T. Hornstein, *Public Investment in Climate Resiliency: Lessons from the Law and Economics of Natural Disasters*, 49 Ecology L. Q. 137, 162 (2022) (“In 2004, when Hurricane Charley made landfall at the Punta Gorda/Port Charlotte area of Florida . . . insurance-industry researchers found that the new building codes reduced loss frequency among homeowners by 60 percent and the severity of losses of those suffering damage by 42 percent.”); J. David Cummins et al., *Federal Financial Exposure to Natural Catastrophe Risk*, in MEASURING AND MANAGING FEDERAL FINANCIAL RISK 61, 63 (Deborah Lucas ed. 2010) (estimating the net present value of the unfunded liability of the next seventy-five years’ worth of federal extreme weather expenditures to be between \$1.2 trillion and \$7.1 trillion).

⁸³ See Hornstein, *supra* note 82, at 159.

⁸⁴ See GOUREVITCH & PINTER, *supra* note 81, at 8 (alluding to benefit-cost paybacks of 5:1).

disaster preparedness before becoming eligible for federal disaster assistance grants.⁸⁵ Project 2025 also suggests a parallel reform, reducing the federal government's share of financing for smaller disasters to 25% from their current level of 75-90%,⁸⁶ something that might incentivize states to support more ex ante flood resiliency measures, and perhaps to insist more strongly that local governments oppose building in floodplains, because now a greater share of damage would be the financial responsibility of the state.

But perhaps the biggest public-policy reform endorsed by Project 2025 and such free-market-oriented organizations as the CATO Institute, is to shift flood insurance from the NFIP to the private market.⁸⁷ At a very high level of generality, the concept is not an impossible one, as significant levels of private flood insurance are currently offered in over one dozen countries.⁸⁸ And there is nothing preventing private companies right now from seeking to offer private flood insurance in the United States—and indeed there have been more than a handful of such companies that have received approval to do so by state departments of insurance.⁸⁹ But all that said, as of 2017, private carriers were said to account for only 3.5-4.5% of flood insurance policies in the United States.⁹⁰ On the other hand, as of 2023, “of the 22 percent of homeowners report[ing] that they [were] at risk of a flood [a small subset to be sure]... 78 percent purchased flood insurance—35 percent from a private insurance provider and 43 percent through

⁸⁵ See, e.g., Andrew Rumbach, [Disaster Management and Project 2025](#), PLACE & RESILIENCE (Nov. 11, 2024).

⁸⁶ *Id.*

⁸⁷ See, e.g., *id.* (“Perhaps the most significant change recommended [by Project 25] would be to wind down the National Flood Insurance Program and replace it with private insurance options ‘starting with the least risky areas currently identified by the program’”); IKE BRANNON & ARI BLASK, CATO INST., REFORMING THE NATIONAL FLOOD INSURANCE PROGRAM: TOWARD PRIVATE FLOOD INSURANCE 1 (2017).

⁸⁸ See JUSTIN R. PIDOT, GEORGETOWN ENV'T L. & POL'Y INST., COASTAL DISASTER INSURANCE IN THE ERA OF GLOBAL WARMING: THE CASE FOR RELYING ON THE PRIVATE MARKET 13 (2007) (citing SWISS RE, FLOODS AN INSURABLE RISK? A MARKET SURVEY (1998) (reporting that “Argentina, Brazil, Canada, Czech Republic, France (with national reinsurance), Germany (with storm surge excluded), Israel, Italy, Japan, Poland, Portugal, South Africa, Taiwan, and the United Kingdom” all provide flood insurance largely through private insurance companies).

⁸⁹ See, e.g., David W. Clausen, [5 Best Private Flood Insurance Companies](#), COASTAL INS. (2024).

⁹⁰ CAROLYN KOUSKY ET AL., RES. FOR THE FUTURE, [THE EMERGING PRIVATE RESIDENTIAL FLOOD INSURANCE MARKET IN THE UNITED STATES](#) (2018).

the National Flood Insurance Program.”⁹¹ This indicates a slight increase in the attractiveness of the private insurance market, a fact confirmed by an overall increase in private flood placements by 8% between 2022 and 2023.⁹²

What are we to make of this? Certainly one possibility is that, between 2017 and 2023, the pricing of private flood policies became relatively more attractive precisely because of the rate increases of NFIP policies put into place since 2021 by Risk Rating 2.0. And this, in turn, suggests that, of all the public-policy options currently open to the Administration in Trump 2.0, the last thing that should be jettisoned is Risk Rating 2.0. By “right-pricing” flood insurance to actuarially fair levels, Risk Rating 2.0 is making private flood insurance more competitive.

That said, there remains the affordability issue that Congress addressed in 2014. Then, to reprise, Congress confirmed its commitment to increasing NFIP rates albeit at a slower pace, while also requiring the completion of an affordability study to consider legislative options for making flood insurance affordable for those who could not afford it. In 2016, the Government Accountability Office reported to Congress on a variety of ways it could address the issue, including means-tested assistance programs and/or basing assistance on the cost of mitigating a home’s risk of damage.⁹³ Of course, other options are to require a state to share in the costs of any added assistance to its citizens, not only to help reduce the costs to the federal government, but also to incentivize states both to prevent further development in flood plains and to fund flood-risk-reduction projects within their jurisdictions to qualify for CRS flood-insurance discounts, which would then both reduce costs to their taxpayers and to a state’s share of any means-tested assistance program.

At this point, there are risks to being too prescriptive in light of the velocity of change currently swirling around both FEMA and the NFIP at the beginning of

⁹¹ [*Facts & Statistics: Flood Insurance*](#), INS. INFO. INST. (2025) (citing a Triple-I/Munich Re Consumer Survey).

⁹² [*Spotlight on Flood Insurance*](#), INS. INFO. INST. (June 5, 2025).

⁹³ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-190, [NATIONAL FLOOD INSURANCE PROGRAM OPTIONS FOR PROVIDING AFFORDABILITY ASSISTANCE](#) (2016).

Trump 2.0. Accordingly, we turn instead to discuss the current state of the litigation challenging Risk Rating 2.0 in Louisiana.

V. LOUISIANA V. DEPARTMENT OF HOMELAND SECURITY

A recent case from the Eastern District of Louisiana has created challenges for Risk Rating 2.0.⁹⁴ Ten states, including Louisiana, as well as an array of local governmental entities, sued the Department of Homeland Security (DHS) and FEMA over the new Risk Rating 2.0 initiative.⁹⁵ In this case, Louisiana, along with the other plaintiffs, filed a motion for preliminary injunction, while DHS and other defendants responded with a motion to dismiss.⁹⁶ The plaintiffs' motion was denied by the court, while the defendant's motion was granted in part and denied in part.⁹⁷

Plaintiffs raised a range of issues, including the claims that the NFIP is: (1) contrary to law in four different ways; (2) arbitrary and capricious for failing to account for important aspects of the problem and considering other inappropriate factors; (3) arbitrary and capricious for failure to consider reliance interests; (4) arbitrary and capricious for departing from prior policy without sufficient justification; (5) arbitrary and capricious because it rests on pretextual bases; (6) in violation of the APA's notice-and-comment requirement; (7) in excess of FEMA's statutory authority; (8) contrary to a constitutional right; and (9) in violation of the National Environmental Policy Act (NEPA).⁹⁸

Plaintiff states assert that they will suffer direct harm because of Risk Rating 2.0, including infringement on the role of the states' mitigation efforts, loss of state tax revenues, decreased property values and resources to mitigate flood risks, and increased costs.⁹⁹

⁹⁴ Louisiana v. Dep't of Homeland Sec., 726 F. Supp. 3d 653 (E.D. La. 2024).

⁹⁵ *Id.*

⁹⁶ *Id.* at 666.

⁹⁷ *Id.* at 664.

⁹⁸ *Id.* at 666.

⁹⁹ *Id.* at 673.

In its ruling, the Eastern District of Louisiana first addressed Article III standing, which DHS had challenged, and determined that the states and policyholders, as well as three parishes, have standing, having plausibly alleged that they have experienced or will experience direct harm as a result of Risk Rating 2.0.¹⁰⁰ The remaining plaintiffs' claims were dismissed.¹⁰¹ The court also dismissed the plaintiffs' NEPA claims for lack of standing, leaving only the first eight claims detailed above.¹⁰² Four of the eight claims have to do with arbitrary and capricious review, leaving the court to decide if FEMA has exceeded its statutory authority by implementing Risk Rating 2.0.¹⁰³

Lastly, the court chose not to impose a preliminary injunction on DHS as it is an "extraordinary and drastic remedy," used only in cases where plaintiffs can show a substantial likelihood of irreparable injury.¹⁰⁴ The court determined that plaintiffs' situation failed to meet these requirements, but the remaining claims from plaintiffs were allowed to proceed.¹⁰⁵ Thus, there are eight remaining claims: four pertaining to allegations that Risk Rating 2.0 is not in accordance with law, and four related to questions of fact requiring arbitrary and capricious review.¹⁰⁶

A. Plaintiffs' "Not in Accordance With Law" and "Major Question Doctrine" Challenges

Apart from the arbitrary and capricious claims, four of the five other claims remain.¹⁰⁷ One asserts that Risk Rating 2.0 violates the major questions doctrine.¹⁰⁸ Count IX of the complaint, alleging a violation of NEPA, was

¹⁰⁰ *Id.* at 686.

¹⁰¹ *Id.*

¹⁰² *Id.* at 695.

¹⁰³ *Id.* at 666.

¹⁰⁴ *Id.* at 688–89.

¹⁰⁵ *Id.* at 695.

¹⁰⁶ *Id.* at 666.

¹⁰⁷ *Id.*

¹⁰⁸ Complaint at 121–39, *Louisiana v. Dep't of Homeland Sec.*, 726 F. Supp. 3d 653 (E.D. La. 2024) (No. 2:23-cv-01839).

dismissed in Judge Papillon’s original ruling.¹⁰⁹ The remaining four claims address other aspects of Risk Rating 2.0 that plaintiffs allege are contrary to law.

- i. Plaintiffs claim Risk Rating 2.0 exceeds FEMA’s statutory authority.

The plaintiffs cite 5 U.S.C. § 706(2)(A) and (C), which provide that courts must reverse agency actions which are not in accordance with law or exceed statutory authority.¹¹⁰ The statute referenced is the NFIP which permits FEMA to make flood insurance available at reasonable rates “insofar as practicable.”¹¹¹ Plaintiffs allege that Risk Rating 2.0 does not meet this standard as the new rates make “flood insurance functionally unavailable in many communities.”¹¹²

Although it is questionable whether Risk Rating 2.0 even violates the requirement for reasonable prices under the 1968 statute, plaintiffs fail to mention the 2012 Biggert-Waters Act and the 2014 Affordability Act. In both 2012 and 2014, Congress demanded that flood insurance rates go up to adapt to changing conditions.¹¹³ As previously discussed, BW-12 sought to reassess rates to make them actuarially fair.¹¹⁴ The 2014 Affordability Act sought to keep rates somewhat more manageable for homeowners by instituting price caps.¹¹⁵ Risk Rating 2.0 does not contradict either of these statutes, and plaintiffs’ claim simply cites FEMA’s concession that rates will rise, resting on the further assumption that the increase is both unfair and excessive.¹¹⁶

¹⁰⁹ *Id.* at 140–41.

¹¹⁰ *Id.* at 122.

¹¹¹ *Id.* (quoting 42 U.S.C. §§ 4011(a), 4015(b)(2)).

¹¹² *Id.*

¹¹³ Biggert-Waters Flood Insurance Reform Act of 2012, *supra* note 18; Homeowner Flood Insurance Affordability Act of 2014, *supra* note 24.

¹¹⁴ 42 U.S.C. §§ 4001–131.

¹¹⁵ Homeowner Flood Insurance Affordability Act of 2014, *supra* note 24.

¹¹⁶ Complaint, *supra* note 108, at 122.

ii. Alleged Violation of the Administrative Procedure Act
Notice-and-Comment Requirements

Plaintiffs allege that FEMA violated the notice-and-comment rulemaking provision outlined in 5 U.S.C. § 553(c).¹¹⁷ They assert that per the Administrative Procedure Act (APA), the agency can make a more informed decision on rulemaking by allowing interested persons to participate through sharing written data or views.¹¹⁸ The plaintiffs concede that there are exceptions to this requirement, such as emergency situations, delaying a result of serious harm, or rules related to internal practice or procedure.¹¹⁹ Defendants deny this allegation in their answer but do not respond with any substantive arguments.¹²⁰ However, it is likely that the agency will ultimately argue one of these exceptions or argue that notice was properly provided. Because of the delay in implementation of the program and the information that was provided throughout, it is likely the court will find notice was given.

iii. Plaintiffs claim that Risk Rating 2.0 contradicts a
constitutional right

Plaintiffs' third legal claim is based on the Spending Clause of the Constitution, which has been interpreted to mean that when the federal government provides conditional funding, the recipient must "voluntarily and knowingly" accept the terms or give the recipient no choice but to accept.¹²¹ Plaintiffs argue states participating in the NFIP do not voluntarily and knowingly participate in the program, but are instead required to in order to receive federal funding.¹²² Plaintiffs argue that the only way to return to voluntary participation would be to go back to the prior insurance rates.¹²³

¹¹⁷ *Id.* at 133–34.

¹¹⁸ *Id.* at 134.

¹¹⁹ *Id.*

¹²⁰ Defendants' Answer to Complaint at 83, *Louisiana v. Dep't of Homeland Sec.*, 726 F. Supp. 3d 653 (E.D. La. 2024) (No. 2:23-cv-01839).

¹²¹ Complaint, *supra* note 108, at 138.

¹²² *Id.*

¹²³ *Id.* at 139.

The NFIP and CRS are voluntary programs, where at no point are the states required to participate.¹²⁴ The states are arguing in a way that they were promised affordable insurance, but BW-12 and the Affordability Act authorized Congress to set new rates. Whether the states view these rates to be fair is a separate question. Although it may be burdensome to be excluded from receiving federal funding, all states have the option to comply with the NFIP requirements and receive that funding at any time. In no way is participation forced, nor is flood insurance a constitutional right of which plaintiffs are being deprived.

iv. Count VII: The Major Questions Doctrine

Although the major questions doctrine had previously been used as a tool to interpret the scope of the *Chevron* doctrine in cases such as *FDA v. Brown and Williamson Tobacco Corp.*,¹²⁵ it was first recognized as an independent doctrine in *West Virginia v. EPA*.¹²⁶ This case first arose in 2015, when the U.S. Environmental Protection Agency (EPA) proposed the Clean Power Plan to reduce emissions at coal plants, in part by shifting to electrical generation by alternative sources of energy.¹²⁷ The agency implemented this plan under Section 111 of the Clean Air Act, which authorized regulation of existing sources of pollution.¹²⁸ But when the Clean Power Plan finally reached the Supreme Court, the Court determined that Section 111 was too slender a reed on which to base EPA authority to dramatically regulate a fundamental sector of the economy—a public-policy determination which the Court termed a “major question” requiring explicit legislative approval, a jurisdictional approach that the Court had not used quite this way before.¹²⁹ The Court reasoned that Congress likely never intended

¹²⁴ Defendants’ Answer to Complaint, *supra* note 120, at 86–87.

¹²⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

¹²⁶ *West Virginia v. EPA*, 597 U.S. 697 (2022).

¹²⁷ *Id.*

¹²⁸ *Id.* Under Section 111, EPA determines the “best system of emission reduction” for existing sources. For coal and natural gas plants, this meant requiring undertaking practices to burn coal in a cleaner way, as well as a “generation shift,” which shifted production of electricity to lower-emitting producers.

¹²⁹ *Id.* at 700. The Supreme Court stayed the Clean Power Plan in 2016 with the change in presidential administration, and in 2019 the EPA determined the original Plan exceeded its power under Section 111 of the Clean Air Act. *Id.* at 698.

to delegate such a politically and economically significant decision to a single agency in so obscure a manner.¹³⁰

The interpretation of the new and sometimes unclear major questions doctrine can be vastly different by the lower courts. The Fifth Circuit has generally determined the major questions doctrine to arise in cases “concern[ing] ‘questions of deep economic and political significance.’”¹³¹ This phrase was originally used in *Texas v. United States*, which dealt with a challenge to the Deferred Action for Childhood Arrivals (DACA) program in Texas, which was determined to be a major question.¹³² The opinion dismissed how significantly more people would be eligible for a similar program, the Deferred Action for Parents of Americans (DAPA), and instead focused on the potentially severe economic effects of the rescission of DACA.¹³³

The Fifth Circuit also applied the major questions doctrine in *Louisiana v. Biden*, a case that challenged President Biden’s Contractor Vaccine Mandate, which required federal contractors to be vaccinated for COVID-19.¹³⁴ The order was implemented under the Property and Administrative Services Act, and Judge Kurt D. Engelhardt determined that the vaccine mandate fell under the major questions doctrine.¹³⁵ Judge Engelhardt used the same economic and political significance test to justify his ruling against Biden, but relied mostly on regulatory history in making his decision.¹³⁶ The judge concluded that Biden’s action “constituted ‘an enormous and transformative expression in’ the President’s power under the Act”.¹³⁷ The Fifth Circuit was the only circuit facing the vaccine mandate issue that gave a direct reason for applying the doctrine: “that the President should be treated the same as an agency” because Article II of the

¹³⁰ *Id.* at 749. This eliminated the generation shifting component of the plan but kept the first part, which sought to improve cleaner burning of coal.

¹³¹ Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661, 674 (2023) (discussing the similarities of the three Fifth Circuit opinions regarding the major questions doctrine as of 2023).

¹³² *Id.* (citing *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022)).

¹³³ *Id.* at 674–75.

¹³⁴ *Id.* at 675 (citing *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022)).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

Constitution confers upon the President the responsibility for the actions of the Executive Branch.¹³⁸

In August 2023, the Fifth Circuit applied the major questions doctrine in *Texas v. Nuclear Regulatory Commission*, which involved prohibiting licensing of nuclear storage facilities by the Nuclear Regulatory Commission.¹³⁹ Judge James C. Ho focused mostly on political significance rather than economic, arguing that nuclear waste was a matter of public concern and has been long contested.¹⁴⁰ The Fifth Circuit held an exception to a jurisdictional requirement in the Hobbs Act, which requires the plaintiff to be a party in the underlying agency proceeding, pushing the boundaries of earlier decisions.¹⁴¹ The Fifth Circuit made an exception to this for Texas under dicta from prior cases, which created a circuit split.¹⁴² This decision is now being appealed to the Supreme Court,¹⁴³ which will give the Court the chance to set a clearer precedent for interpretation of the major questions doctrine.¹⁴⁴

The economic and political significance test has been used in at least three District Court cases within the Fifth Circuit.¹⁴⁵ In *United States v. Empire Bulk Ltd.*, the doctrine was defined as applying to “issues of major national significance.”¹⁴⁶ This case dealt with a ship owned by Empire Bulk Ltd., which failed to meet recordkeeping standards implemented to reduce pollution.¹⁴⁷ The

¹³⁸ Ling Ritter, Note, *Elephants in Mouseholes: The Major Questions Doctrine in the Lower Courts*, 76 STAN. L. REV. 1381, 1404 (2024) (explaining the variation in reasoning of the lower courts to applying the major questions doctrine to presidential actions).

¹³⁹ Brunstein, *supra* note 131, at 675.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ This article was written before the U.S. Supreme Court decided this case. For more information, see *NRC v. Texas*, No. 23-1300, slip op. (U.S. June 18, 2025).

¹⁴⁴ Jack Jones, [The Fifth Circuit's Nuclear Decision Presents an Opportunity to Resolve Major Confusion About Major Questions](#), YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 2, 2024). The decision will likely offer some “much-needed clarity on the boundaries of the doctrine.”

¹⁴⁵ Brunstein, *supra* note 131, at 675–76.

¹⁴⁶ *Id.* at 676 (citing *United States v. Empire Bulk Ltd.*, No. CR 21-126, 2022 WL 3646069 (E.D. La. Aug. 24, 2022)).

¹⁴⁷ *United States v. Empire Bulk Ltd.*, No. CR 21-126, 2022 WL 3646069 1, 2 (E.D. La. Aug. 24, 2022).

court determined that this enforcement shift was not significant enough to implicate the major questions doctrine.¹⁴⁸ Some courts have determined relevant factors in addition to this test, such as “whether the agency action would ‘bring about an enormous and transformative expansion in its regulatory authority,’” a test used by Judge Terry A. Doughty in *Louisiana v. Becerra*.¹⁴⁹ The case dealt with a vaccine mandate by the Department of Health and Human Services that was challenged by 24 states. The court found that the mandate triggered the major questions doctrine, though the decision was later vacated and remanded.¹⁵⁰

A common theme among use of the major question doctrine, at least in the Fifth Circuit district courts, seems to be reliance on Justice Gorsuch’s concurrence in *West Virginia v. EPA*.¹⁵¹ It is worth noting that all three district court opinions in the Fifth Circuit relying on this concurrence were written by Republican appointees. Justice Gorsuch’s opinion provides a three-part test to determine if an agency action triggers the doctrine: “the agency ‘(1) ‘claims the power to resolve a matter of great ‘political significance,’ (2) ‘seeks to regulate ‘a significant portion of the American economy,’ or (3) ‘seeks to intrud[e] into an area that is the particular domain of state law.’”¹⁵² The test then uses four factors to determine if there is clear congressional authorization.¹⁵³ The three Republican appointees in the Fifth Circuit that elected to use this test all combined the first two factors, building upon the economic and political significance test, an interpretation which differs from that of the majority in *West Virginia v. EPA*.¹⁵⁴

¹⁴⁸ *Id.*

¹⁴⁹ Brunstein, *supra* note 131, at 676 (citing *Louisiana v. Becerra*, 629 F. Supp. 3d 477 (W.D. La. 2022)).

¹⁵⁰ Brunstein, *supra* note 131, at 676 (citing *Louisiana v. Becerra*, 629 F. Supp. 3d 477 (W.D. La. 2022)). This decision was later vacated and remanded after the Supreme Court decided *Biden v. Missouri*, but gives us insight into how the Fifth Circuit has chosen to interpret the doctrine.

¹⁵¹ Natasha Brunstein, *The Major Questions Doctrine Applied: Evidence From the Lower Courts*, 48-SUM ADMIN. & REG. L. NEWS 13, 14. (quoting *West Virginia v. EPA*, 597 U.S. 697 (2022)).

¹⁵² *Id.*

¹⁵³ *Id.* (consolidating the *West Virginia v. EPA* test into a numbered list as follows: (1) the legislative provisions on which it relies, (2) the focus of the statute in relation to the problem, (3) past interpretations by the agency, and (4) any mismatch with agency expertise).

¹⁵⁴ *Id.*

Some judges tweaked the Gorsuch factors or added additional factors to their test. Justice Gorsuch’s opinion characterized the major questions doctrine as a “necessary safeguard for federalism” in addition to the protections already afforded by the Tenth Amendment.¹⁵⁵ Compared to the majority decision, Gorsuch seems to characterize this as more of a constitutional issue, claiming that the case involved “basic questions about self-government, equality, fair notice, federalism, and the separation of powers.”¹⁵⁶ He opined that the major questions doctrine serves to protect unintentional or unexpected intrusions on these interests.¹⁵⁷ The result reached by the court in the appeal of *Texas v. Nuclear Regulatory Commission*, discussed further below, will be telling as to which justices follow the Roberts majority and which follow Gorsuch’s concurrence.

Similar to other circuits, the economic and political significance test seems entrenched in Fifth Circuit litigation; however, the Fifth Circuit still differs drastically in how broadly it is willing to apply the doctrine, such as the “enormous and transformative expression” test found in *Louisiana v. Biden*.¹⁵⁸ Given the continued application of the economic and political significance test, it seems likely that the court will at least rest on that piece as a framework for the current *Louisiana v. Department of Homeland Security* litigation. Because the plaintiffs have already asserted the economic impact of the program as a primary issue, it is likely economics will play a major role if the court determines this to be a major question.

The Supreme Court’s decision in the appeal of *Texas v. Nuclear Regulatory Commission* in March could also have an impact on the present litigation. It will be an opportunity for the Court to clarify the meaning of the major questions doctrine under *West Virginia v. EPA*, and may provide some guidance as to whether the Fifth Circuit should continue to rely on their current economic and political significance test or turn to the Gorsuch concurrence.

¹⁵⁵ Ritter, *supra* note 138, at 1412.

¹⁵⁶ *West Virginia v. EPA*, 597 U.S. 697, 742 (2022).

¹⁵⁷ Amy Howe, [Supreme Court Curtails EPA’s Authority to Fight Climate Change](#), SCOTUSBLOG (June 30, 2022, 2:48 PM),.

¹⁵⁸ *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022).

The Plaintiffs in *Louisiana v. Department of Homeland Security* suggest that the court should be skeptical of FEMA’s statutory authority and must point to “‘clear congressional authorization’ to regulate in [such a] manner.”¹⁵⁹ They touch on the economic and political significance test, emphasizing the alleged ambiguity of FEMA’s statutory authority to implement Risk Rating 2.0 and suggesting that the power prescribed to FEMA is modest, but not this broad.¹⁶⁰ Citing to *West Virginia v. EPA* among other associated cases, plaintiffs allege political and economic significance because of alleged threats to the population in coastal communities, as well as the economic industries they contain.¹⁶¹ Defendants deny the assertion that they lack authority to implement the program.¹⁶²

Judge Darrell James Papillon is a Biden appointee. Although political leanings and appointments are not always an indicator of how a doctrine will be applied, it does seem Republican appointees are more often relying on the major questions doctrine in this Circuit, so we could see Judge Papillon go a different direction.¹⁶³ The Fifth Circuit’s general willingness to broadly apply the major questions doctrine to presidents and the executive branch as a whole may be an indicator that it will take a broad reading here, but it is more likely that as a Biden appointee, if Judge Papillon chooses to adopt a major questions approach, he will focus more on the economic and political significance test, as that will likely be sufficient here and stays consistent with most lower court decisions. Due to the broad range of application of this doctrine in the Fifth Circuit, it would not be at all surprising if the district court decided to apply it here, as well as if the case goes up to the Fifth Circuit Court of Appeals. On the other hand, the relatively recent introduction of this doctrine and other issues may persuade the court to lean more on questions of fact if they choose to strike the program down.

Although the Fifth Circuit may be the most easily persuaded to strike down Risk Rating 2.0 in *Louisiana v. Department of Homeland Security*, the plaintiffs

¹⁵⁹ Complaint, *supra* note 108, at 136. (quoting *West Virginia v. EPA*, 597 U.S. at 700).

¹⁶⁰ *Id.* at 135–37.

¹⁶¹ *Id.* at 136.

¹⁶² Defendants’ Answer to Complaint, *supra* note 120, at 85.

¹⁶³ See e.g., Brunstein, *supra* note 131, at 677.

face an uphill battle on questions of law. As discussed above, there is a strong reason to consider the merits of a major questions analysis in the Fifth Circuit, especially due to its generally more muscular interpretation of the doctrine. However, there are strong arguments for FEMA's authority to adjust rates as they see fit, even if on a broad scale, such as they did with BW-12. Much of the impact of Risk Rating 2.0 is yet to be seen due to the relatively new development of the program, and the plaintiffs have a heavy burden to prove this decision is economically and politically significant enough to outweigh FEMA's interest in creating actuarially fair rates, especially when they are still regulated by the Affordability Act. The court was right not to sustain defendants' motion to dismiss this case, but it will still be difficult for plaintiffs to prevail.

B. Plaintiffs' "Arbitrary and Capricious" Claims

The plaintiffs allege four separate manners by which the defendants, the Department of Homeland Security, and others, violated the arbitrary and capricious doctrine: (1) "failing to account for important aspects of the problem and considering other inappropriate factors;" (2) "failure to consider reliance interests;" (3) "departing from prior policy without sufficient justification;" and (4) "rests on pretextual bases."¹⁶⁴ The questions presented for plaintiffs and defendants alike in this case are: how has the Fifth Circuit developed the arbitrary and capricious doctrine, and how will that doctrine interplay with the plaintiffs' claims? In this section, we will endeavor to elucidate the Fifth Circuit's unique brand of arbitrary and capricious review, if it can in fact be called unique at all, and analyze how each of the above alleged violations may be analyzed through that lens.

¹⁶⁴ Louisiana v. Dept. of Homeland Sec., No. 2:23-cv-01839 – Mar. 28, 2024 Order (Document 100) at 4 (E.D. La. 2024) (granting Defendants' motions to dismiss in part, dismissing Defendants' motions to dismiss in part, dismissing most Plaintiff parishes' claims and all Plaintiff municipalities without prejudice, dismissing Plaintiffs' NEPA claim without prejudice, and denying Plaintiffs' motion for preliminary injunction).

i. The Fifth Circuit’s Approach to Arbitrary and Capricious Review

The arbitrary and capricious standard, codified in 5 U.S.C. § 706(2)(A), requires that courts set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁶⁵ Traditionally, this has been understood to mean that an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹⁶⁶

However, the Fifth Circuit has at times applied this standard with a more exacting level of scrutiny, particularly in cases where regulatory action is perceived to be overreaching or where states challenge federal authority.¹⁶⁷ The Supreme Court has applied a more deferential approach to arbitrary and capricious review, emphasizing that courts should not second-guess agency policymaking so long as the agency provides a rational explanation supported by the record.¹⁶⁸ Unsurprisingly, many of the cases considered below as evidence of the Fifth Circuit’s particular flavor of arbitrary and capricious review are cited throughout the plaintiffs’ complaint.¹⁶⁹

In *Texas v. United States*, the Fifth Circuit struck down the Biden administration’s immigration enforcement priorities in part because DHS failed to

¹⁶⁵ 5 U.S.C. § 706(2)(A).

¹⁶⁶ *Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29, 43 (1983).

¹⁶⁷ See discussion *supra* pp. 25–28.

¹⁶⁸ This is evident in *DOC v. New York*, 588 U.S. 752 (2019), where the Court upheld the general principle of deference but found the agency’s justification for adding a citizenship question to the census to be pretextual. The Supreme Court’s more deferential standard of review appears to be at odds with the Fifth Circuit’s application of the doctrine. This will be an important dynamic to consider moving forward, especially as the Supreme Court considers upcoming challenges to President Trump’s decisions, e.g., his decision to rescind the EPA’s “endangerment finding.” Matthew Daly, [EPA Head Urges Trump to Reconsider Scientific Finding that Underpins Climate Action, AP Sources Say](#), ASSOCIATED PRESS (Feb. 26, 2025, 4:45 PM). The endangerment finding was upheld a few years ago by a D.C. Circuit panel, and its rescission will likely be staunchly opposed by environmental organizations nationwide. [D.C. Circuit Dismisses Attacks on EPA’s Finding that Greenhouse Gases Endanger People’s Health and Well-Being](#), ENV’T DEF. FUND (May 25, 2023).

¹⁶⁹ Complaint, *supra* note 108 at 125–133.

consider the financial burdens the policy shift would impose on states.¹⁷⁰ Under *State Farm* arbitrary and capricious review, an agency must consider “important aspect[s] of the problem” before issuing a rule or policy.¹⁷¹ The Fifth Circuit has repeatedly held that state financial burdens constitute such an important aspect. In *Texas v. United States*, the court found that DHS had ignored the economic costs imposed on Texas by the new enforcement guidance, particularly in areas such as public healthcare, education, and law enforcement expenses related to undocumented immigrants.¹⁷² The court emphasized that states bear substantial costs when the federal government alters immigration policy, and failing to assess these costs was enough of an injury to give the Plaintiffs standing.¹⁷³ This reasoning aligns with other Fifth Circuit decisions where courts have invalidated agency actions for disregarding state financial impacts, such as *Louisiana v. Biden*, which struck down an executive order pausing oil and gas leasing due to its economic consequences for energy-producing states.¹⁷⁴

In *Texas v. Biden*, the Fifth Circuit Court of Appeals held that DHS failed to provide a reasoned justification for terminating the Migrant Protection Protocols (MPP), commonly known as the “Remain in Mexico” policy.¹⁷⁵ The Fifth Circuit emphasized that DHS’s June 1, 2021, memorandum terminating the MPP did not consider several critical factors, including the states’ reliance interests, the benefits provided by the MPP, potential alternatives to termination, and the implications of Section 1225 of the Immigration and Nationality Act (INA).¹⁷⁶ Furthermore, the court criticized DHS for not adequately addressing the benefits that the MPP had provided in managing border security and immigration

¹⁷⁰ *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022). The reasoning in this case closely mirrors an argument advanced by the plaintiffs in the present case. See below for a more thorough examination of how the Fifth Circuit may apply that same logic to Risk Rating 2.0.

¹⁷¹ *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

¹⁷² *Texas v. United States*, 50 F.4th at 517-19.

¹⁷³ *Id.* at 518.

¹⁷⁴ *State of Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022).

¹⁷⁵ *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021). This case was later reversed and remanded by the Supreme Court on the grounds that the states lacked legal standing to bring their challenge. See *Biden v. Texas*, 597 U.S. 785 (2022).

¹⁷⁶ *Texas v. Biden*, 20 F.4th at 989. Specifically, the court highlighted that DHS failed to account for the financial and administrative burdens that states like Texas and Missouri would face due to increased numbers of noncitizens released into their territories. *Id.* at 970.

processing. By overlooking these positive aspects and not exploring viable alternatives to a complete termination of the program, DHS's decision-making process was deemed deficient.¹⁷⁷

All that to say, the Fifth Circuit appears more than willing to rigorously review factual assertions and historical treatment of statutory language by agencies.¹⁷⁸ By emphasizing statutory constraints, the Fifth Circuit effectively curtails agencies' ability to interpret statutes dynamically. It is clear that the Fifth Circuit is laboring under fairly distinct notions of the arbitrary and capricious doctrine. What remains to be discussed is how each of the below allegations by Louisiana and other plaintiffs interact with these recent precedents.

ii. Failure to Account for Important Aspects of the Problem and Consideration of Inappropriate Factors

The first allegation—that the agency failed to consider important aspects of the problem while considering inappropriate factors—aligns with one of the central inquiries under arbitrary and capricious review.¹⁷⁹ Under *State Farm*, agency action is unlawful if the agency “entirely failed to consider an important aspect of the problem.”¹⁸⁰

The Fifth Circuit has often applied this standard stringently, particularly where state plaintiffs argue that the federal government has disregarded economic impacts or state regulatory interests.¹⁸¹ For example, in *Texas v. United States*, the court faulted the agency for failing to adequately assess how its policy would impact state expenditures.¹⁸² In the case of Risk Rating 2.0, Louisiana and the

¹⁷⁷ *Id.* at 1004. Furthermore, the court criticized DHS for not adequately addressing the benefits that MPP had provided in managing border security and immigration processing. By overlooking these positive aspects and not exploring viable alternatives to a complete termination of the program, DHS's decision-making process was deemed deficient.

¹⁷⁸ See generally *id.*

¹⁷⁹ *Michigan v. EPA*, 576 U.S. 743, 750, 752 (2015).

¹⁸⁰ *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

¹⁸¹ See e.g., *Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022); *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130 (5th Cir. 2021); and accompanying discussion on pages 25–27.

¹⁸² *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022).

other plaintiffs argue that DHS and FEMA failed to fully account for the economic consequences on homeowners and state insurance markets.¹⁸³ Specifically, the Complaint claims that DHS and FEMA failed to account for the mitigating effects of levees on flood damages. Given the Fifth Circuit’s past willingness to strike down agency actions for failure to consider state interests, this argument may be particularly persuasive.¹⁸⁴ The defendants, for their part, deny all the allegations under this section.

iii. Failure to Consider Reliance Interests

The second allegation—the agency’s failure to consider reliance interests—is a particularly potent challenge under recent precedent.¹⁸⁵ In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court reinforced that when an agency’s action upends settled expectations, it must consider reliance interests.¹⁸⁶ The Fifth Circuit has embraced this principle, often holding agencies to a high standard when policies disrupt regulated entities or state interests.¹⁸⁷ For example, in *Wages and White Lion Investments*, the Fifth Circuit invalidated an FDA decision in part because it failed to adequately account for the reliance interests of regulated entities.¹⁸⁸

In the context of Risk Rating 2.0, Louisiana and other plaintiffs argue that FEMA failed to account for the expectations of homeowners who structured financial decisions around prior flood insurance pricing models.¹⁸⁹ Given the Fifth Circuit’s emphasis on reliance interests, this argument may receive significant attention and could form a key basis for invalidating Risk Rating 2.0.¹⁹⁰

¹⁸³ Complaint, *supra* note 108 at 125–128.

¹⁸⁴ See e.g., *Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022); *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130 (5th Cir. 2021); and accompanying discussion on pages 25–27.

¹⁸⁵ Complaint, *supra* note 108 at 128–130.

¹⁸⁶ *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1 (2020).

¹⁸⁷ *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130 (2021).

¹⁸⁸ *Id.* at 1139.

¹⁸⁹ Complaint, *supra* note 108 at 129.

¹⁹⁰ See *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021); *supra* note 121; and accompanying discussion.

iv. Departure from Prior Policy Without Sufficient Justification

The third allegation—that the agency unlawfully departed from prior policy without sufficient justification¹⁹¹—has frequently been a point of contention in the Fifth Circuit.¹⁹² In particular, the Fifth Circuit has taken a strong stance against abrupt policy changes that lack detailed explanation, especially when prior policies were long standing and well established.¹⁹³

In *Biden v. Texas*, the Fifth Circuit initially ruled that the Biden administration’s termination of the Migrant Protection Protocols was unlawful due to a failure to justify the policy shift adequately.¹⁹⁴

In the case of Risk Rating 2.0, the plaintiffs argue that FEMA’s new methodology represents a radical departure from the prior insurance rating system without sufficient explanation.¹⁹⁵ Given the Fifth Circuit’s track record, this claim may have substantial traction if the court finds FEMA’s justifications lacking.¹⁹⁶

v. Pretextual Basis for the Rule

The final allegation—that the rule rests on a pretextual basis—presents a more challenging but still significant claim.¹⁹⁷ In *Department of Commerce v. New York*, the Supreme Court held that agency action is unlawful if it is based on

¹⁹¹ Complaint, *supra* note 108 at 130–131.

¹⁹² See e.g., *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022); *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130 (5th Cir. 2021); and accompanying discussion on pages 25–27.

¹⁹³ *Rest. L. Ctr. v. United States Dep’t Lab.*, 120 F.4th 163, 174 (5th Cir. 2024).

¹⁹⁴ *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021).

¹⁹⁵ Complaint at 125–133, *Louisiana v. Dep’t of Homeland Sec.*, No. 2:23-CV-01839 (5th Cir. June 1, 2023).

¹⁹⁶ See Shane Pennington, [Fifth Circuit Review—Reviewed: The Agency Losing Streak Under Loper Bright Continues](#), YALE J. ON REGUL.: NOTICE & COMMENT (Sept. 9, 2024). Here, the author considers a recent Fifth Circuit case decided on the basis of arbitrary and capricious review. The author points out the Court’s attention to the fact that longstanding agency policies have some persuasive capacities, but fully lacks the power to control.

¹⁹⁷ Complaint, *supra* note 108 at 125–133.

pretext.¹⁹⁸ While courts are generally hesitant to delve into agency motives, the Fifth Circuit has shown some willingness to entertain pretext arguments, particularly where there is evidence that an agency’s stated rationale does not align with the administrative record.¹⁹⁹ For example, in *Louisiana v. Biden*, the court scrutinized an executive order on oil leasing, suggesting that the agency’s stated reasoning may have been pretextual.²⁰⁰ Similarly, in *Texas v. Biden*, the Fifth Circuit examined whether DHS’s stated rationale for its immigration policy was genuine.²⁰¹

In the Risk Rating 2.0 litigation, plaintiffs argue that FEMA’s justification for the new rating system—ostensibly based on actuarial soundness—masks other motivations, such as political pressure or an effort to reduce federal expenditures.²⁰² If the Fifth Circuit finds inconsistencies in FEMA’s rationale, it may be inclined to view the policy as pretextual, thereby strengthening the plaintiffs’ case.²⁰³

Overall, the Fifth Circuit’s approach to arbitrary and capricious review has increasingly emphasized rigorous scrutiny of agency action, particularly where state plaintiffs argue that the federal government has ignored economic impacts, reliance interests, or prior policy justifications.²⁰⁴ In *Louisiana v. Department of Homeland Security*, the plaintiffs’ allegations align closely with previous cases where the Fifth Circuit has struck down agency rules. While the ultimate outcome

¹⁹⁸ *Dep’t of Com. v. New York*, 588 U.S. 752, 785 (2019).

¹⁹⁹ *Texas v. Biden*, 20 F.4th 928, 963 (5th Cir. 2021).

²⁰⁰ *State of Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022).

²⁰¹ *Texas v. Biden*, 20 F.4th 928, 993 (5th Cir. 2021).

²⁰² Complaint at 12–5133, *Louisiana v. Dep’t of Homeland Sec.*, No. 2:23-CV-01839 (5th Cir. June 1, 2023).

²⁰³ *Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022).

²⁰⁴ In *Restaurant Law Center v. United States Department of Labor*, 120 F.4th 163 (5th Cir. 2024), the Fifth Circuit opted to outright dismiss the Department of Labor’s (DOL) interpretation of the Fair Labor Standards Act, reasoning that Congress could not “have intended the tip credit to turn on such a fine distinction.” *Id.* at 176. Rather than defer to the DOL’s expertise, the Court engaged in an analysis of whether Congress had intended to delegate any “line-drawing” or policy decisions to the Department, and secondly whether the Department had drawn a reasonable line. *Id.* at 166. The Fifth Circuit opted to consider this as an arbitrary and capricious judgment, but it could better be framed as a ‘not in accordance with law’ issue. *Id.*

remains uncertain, the circuit's recent jurisprudence suggests that these claims will receive a thorough and potentially critical review.

VI. CONCLUSION

Both the NFIP and Risk Rating 2.0 face legal and political challenges to a greater extent in 2025 than ever before in recent years. Generally speaking though, whatever its temporary fate is in the Fifth Circuit, Risk Rating 2.0 should ultimately prevail when all judicial avenues are exhausted. Moreover, Risk Rating 2.0 is consistent with President Trump's longstanding commitment to actuarially fair rates and, to that extent, increasingly may allow room in the market for private flood insurance to compete—a priority for some free-market-oriented reformers. Of course, the political future of FEMA and even the NFIP may be in flux. Most likely, however, the NFIP will be seen as too important a program to eliminate quickly given its importance to policyholders and local real estate markets. Far less clear, however, given congressional support for federal budget reductions, is the possibility of creating a much-needed subsidy program for those low-income and moderate-income households for which rising flood insurance rates are especially salient. In the end, it is not an overstatement to conclude that the United States is at an inflection point in its federal approaches to flood risks—risks that are only increasing.

COME HELL OR HIGH WATER: EXPLORING ONE SOLUTION FOR THREATENED OCEANFRONT HOUSES

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Rasheed***, and Catherine Hunt Cecelski****

This article explores potential programmatic solutions for addressing the burgeoning crisis of houses collapsing into the ocean, especially along the Outer Banks of North Carolina, as a result of decades of sea level rise, shoreline erosion, and storm activity. The article first provides background on the unique geology of the barrier islands that constitute so much of North Carolina's coast, the effects of accelerating sea level rise and coastline erosion rates on those islands and structures built there, and the coastal pollution caused by the resulting structural failures, including collapsing houses and malfunctioning septic systems. The article then describes a variety of state and federal efforts that have been implemented, primarily elsewhere, that could be useful in addressing the problem of threatened oceanfront structures on the North Carolina coast, focusing on those programs that use voluntary buyouts and demolition of threatened structures to move structures out of harm's way and return the land to the public trust. The authors conclude that, with sufficient funding, a voluntary buyout program could be a viable solution for North Carolina and identify features that may make such a program more likely to succeed in the state.

I. INTRODUCTION

Eleven houses collapsed into the ocean in the Outer Banks village of Rodanthe, North Carolina, in the three and a half years between May 2020 and November 2024, with three falling during a single week in September 2024.¹

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¹ [*Cape Hatteras National Seashore: Threatened Oceanfront Structures*](#), NAT'L PARK SERV., (listing dates and addresses of each collapse) (last updated Feb. 5, 2025) [hereinafter *Cape*

Each collapsed structure left a miles-long debris field in its wake, littering the beaches and near shore waters of Cape Hatteras National Seashore² and neighboring communities with an astonishing array and amount of hazardous materials: dangerous nail-studded boards, shattered windows and other broken glass, insulation foam, drywall, asphalt shingles, household chemicals, fiberglass shards, and items potentially containing lead and asbestos.³ Other houses in Rodanthe are damaged, leaning, and on the verge of collapse, with the ocean flowing under them at high tide.⁴ Multiple houses in nearby Buxton are nearing the same predicament.⁵ While many of the oceanfront houses on the Outer Banks have become increasingly unstable, their septic tanks have also become exposed and unmoored, often before the house collapses, directly discharging raw sewage onto public beaches and into ocean waters.⁶ This untenable situation poses extreme health and safety risks to residents of the Outer Banks and visitors to the National Seashore and will likely endanger people and wildlife for many years. As the ocean continues to erode the North Carolina shoreline, these collapses are likely the beginning of a much more widespread crisis that may eventually affect structures throughout the barrier island system of North Carolina's coastline.

These structural failures result from a combination of forces as natural barrier island migration processes are disrupted or exacerbated by accelerating sea level rise and shoreline erosion. Due to the rapid rates of shoreline erosion at Rodanthe specifically, approximately 6 to 14 feet of beachfront is being lost each year, with similarly high erosion rates elsewhere on North Carolina's Outer

Hatteras Threatened Oceanfront Structures]; Anna Phillips, [*Another Outer Banks Home Falls into the Ocean. More Are Still at Risk*](#), WASH. POST (Nov. 15, 2024).

² When Cape Hatteras National Seashore was established in 1953, several villages were already located on the barrier islands that constitute the Seashore, including Rodanthe, Buxton, Hatteras, and Ocracoke. The Seashore occupies the entire width of the island between villages, but at the villages, the Seashore may only occupy the land between the village and the ocean, which in some cases has been reduced by erosion to only the sand beach.

³ See, e.g., Catherine Kozak, [*'Total Mess' After Third Rodanthe House in Four Days Falls*](#), COASTAL REV. (Sept. 26, 2024); Catherine Kozak, [*Superintendent 'Disappointed,' Unsurprised by 7th Collapse*](#), COASTAL REV. (Aug. 22, 2024).

⁴ WRAL, [*Oceanfront Outer Banks Homes on Verge of Collapse*](#), YOUTUBE (Sept. 17, 2024).

⁵ Johnny Diaz, [*Two Outer Banks Homes Collapse into the Ocean in North Carolina*](#), N.Y. TIMES (Sept. 22, 2024) (noting that Rodanthe and Buxton especially face issues with houses potentially collapsing into the ocean).

⁶ WRAL, *supra* note 4.

Banks, depending on the precise location.⁷ Houses that were once comfortably built inland are now precariously perched on the sandy beach, straddling the high tide line or even situated fully on the wet sand beach in some cases. Septic tanks that may have once been adequately buried with their septic fields above the water table are now discharging human waste directly onto the sandy beach, into the ocean, or into the rising groundwater table.⁸ Threats from sea level rise, hurricanes, and erosion are only getting progressively worse as a result of climate change.

This article explores one potential solution that other states have implemented, and even more states have considered: a state program with funding dedicated to addressing oceanfront structures in danger of collapsing. The first Part provides background on the unique geology of the barrier islands that constitute so much of North Carolina's coast and the effects of accelerating sea level rise and coastline erosion rates on those islands. The second Part elaborates on the pollution caused by collapsing houses and failing septic systems on the beaches of Rodanthe and elsewhere on North Carolina's coast. The third Part describes efforts by federal agencies and other states to design and implement programs to address the problem of collapsing structures in coastal areas and riparian floodplains, most notably by voluntary buyouts and demolition of threatened structures, returning the land to the public trust. The fourth and final Part makes observations about lessons learned and features that may make such programs more likely to succeed.

⁷ Other examples of rapid erosion rates in developed areas of the North Carolina coast include: up to 11.8 feet per year on the eastern shore of Buxton, 17.6 feet per year at the southern end of Hatteras Island, 15.6 feet per year at North Topsail Island, and 15.2 feet per year at the eastern tip of Bald Head Island. See [Online GIS Layer](#), *Erosion Rates (2020) – Oceanfront*, N.C. DIV. COASTAL MGMT., (From the selection of map layers, turn on the layer labeled “Oceanfront Erosion Rates 2020 (ft/yr).”).

⁸ Catherine Kozak, [A Cycle of Septic Repairs, Washouts On Park Service Beaches](#), COASTAL REV. (Nov. 4, 2022).



Figure 1: *Debris associated with house collapse*, NAT'L PARK SERV. (Sept. 20, 2024), <https://www.flickr.com/photos/capehatterasnps/54008888455/in/album-72177720320480249> (depicting 23001 GA Kohler Court).

II. A PRIMER ON BARRIER ISLAND GEOGRAPHY AND THE EFFECTS OF GLOBAL CLIMATE CHANGE

*Water is the softest thing, yet it can penetrate mountains and earth.*⁹

North Carolina's unique Outer Banks barrier island system comprises a string of long, narrow islands along approximately 175 miles of the state's coastline.¹⁰ Additional islands and beaches in the southernmost coastal counties

⁹ LAO TZU, TAO TE CHING (4TH CENTURY BC).

¹⁰ [Outer Banks](#), NCPEDIA (last visited July 9, 2025).

bring the total to 320 miles of ocean shoreline in the state.¹¹ The barrier islands are separated from the mainland by a series of sounds and waterways and from each other by inlets connecting the Atlantic Ocean to those sounds.

An unobstructed barrier island will migrate landward over time as the tide washes over the island, carrying sand from the ocean side and depositing it on the sound side in overwash fans.¹² The construction of houses, hotels, and other oceanfront structures, however, interrupts this natural process. When people use manmade dunes, sandbags, jetties, groins, and other methods to artificially halt the landward migration of barrier islands and thereby protect oceanfront structures, they can exacerbate the erosion of the oceanside beaches.¹³ When waves cannot wash over the island, their force is focused on the oceanside shoreline, increasing erosion. These effects are felt especially strongly during hurricanes, nor'easters, and other storms.

¹¹ *Id.* (measuring from the Virginia border through Currituck, Dare, Hyde, and Carteret County). The coastlines of Onslow, Pender, New Hanover, and Brunswick Counties boast numerous islands as well, for a total of 320 miles of ocean shoreline in North Carolina. [Coastal Facts](#), N.C. BEACH, INLET AND WATERWAY ASS'N (last visited July 9, 2025); [Division of Coastal Mgmt.](#), N.C. DEP'T OF ENV'T QUALITY (last visited July 9, 2025).

¹² Stanley R. Riggs et al., [Eye of a Human Hurricane: Pea Island, Oregon Inlet, and Bodie Island, Northern Outer Banks, North Carolina](#), in AMERICA'S MOST VULNERABLE COASTAL COMMUNITIES 46–50 (Joseph T. Kelley et al., 2009) [hereinafter *Eye of a Human Hurricane*]; ORRIN H. PILKEY ET AL., THE WORLD'S BEACHES: A GLOBAL GUIDE TO THE SCIENCE OF THE SHORELINE 40, 112 (2011) [hereinafter THE WORLD'S BEACHES].

¹³ THE WORLD'S BEACHES, *supra* note 12, at 227–33 (explaining barrier island geography and migration and the effects of efforts to hold barrier islands in place, and explaining, “All over the world, we have crowded buildings up against the shoreline, right next to beaches that are widely recognized to be retreating (migrating westward). But instead of moving landward with the rising sea level as they naturally would, these beaches are forced to stay in place in order to protect the buildings”); *id.* at 230 (“[L]arge buildings will precipitate heroic attempts (that will inevitably fail) to hold the shoreline in place, and meanwhile the beach will be history”).



Figure 2: Sandbags at North Topsail Island, Julia Furr Youngman (Jan. 8, 2023) (on file with author).

The village of Rodanthe is located on a particularly unstable portion of Hatteras Island, which is a barrier island. In 1991, scientists sponsored by the North Carolina Department of Transportation studied North Carolina's barrier island shoreline to identify areas most vulnerable to erosion.¹⁴ They concluded that North Carolina's "[c]oastal highways grow more vulnerable each year as long term erosion, which includes the periodic effects of seasonal storms and hurricanes, shortens the distance between the shoreline and the

highway."¹⁵ They identified multiple critically vulnerable areas, including several on Hatteras Island in the vicinity of the villages of Rodanthe, Buxton, and Hatteras, as well as Pea Island National Wildlife Refuge, which is located just north of Rodanthe.¹⁶ These areas have particularly high erosion rates (up to 15 feet per year) where the creation of new inlets is most likely to occur.¹⁷ Hatteras Island is already only one-quarter mile wide in some locations in the Refuge and north of Rodanthe, and generally is becoming narrower over time as the ocean and frequent severe storms erode its eastern shoreline and threaten to sever it into segments.¹⁸

Additionally, seasonal changes in wave action will ordinarily cause barrier island systems like the Outer Banks to lose sand during the winter, when wave

¹⁴ JOHN S. FISHER & MARGERY F. OVERTON, CTR. FOR TRANSP. ENG'G STUDIES, OPTIONS FOR NORTH CAROLINA COASTAL HIGHWAYS VULNERABLE TO LONG TERM EROSION 1-1 (Aug. 1991).

¹⁵ *Id.*

¹⁶ *Id.* at 5-2 to 5-8.

¹⁷ *Id.*; *Eye of a Human Hurricane*, *supra* note 12, at 44-48.

¹⁸ Cornelia Dean, [A North Carolina Lifeline Built on Shifting Sands](#), N.Y. TIMES (Mar. 5, 2012).

action is stronger, and build back up again during the summer, when wave action is lower.¹⁹ Storm surges associated with tropical storms, hurricanes, and other severe weather events can move large volumes of sand from the beachfront to the sound side of a barrier island; increasingly severe storm surges associated with sea level rise and climate change exacerbate this sand loss to further increase beachfront erosion.²⁰

A system of dunes is artificially maintained on Hatteras Island to protect the state highway that runs the length of the island from erosion.²¹ Yet, those dunes prevent the ocean overwash that would otherwise deposit sand on the sound side of the island and allow it to expand westward.²² The result of the natural forces working on the island combined with efforts to shore up the road is a continual narrowing of the island and its beaches over time. The same phenomenon occurs on other barrier islands along the North Carolina coast, particularly at the northern ends of each island and in other points where erosion rates are greatest.

Accelerating sea level rise is exacerbating and disrupting these natural processes. Sea level rise is accelerating worldwide because of global warming, which is melting glaciers and ice sheets and causing thermal expansion of seawater.²³ Together these processes have caused global mean sea level to rise by 8–9 inches since the 1800s,²⁴ with “[s]ea levels off the southeastern U.S.” rising at “about triple the global average” over the past decade.²⁵ Accelerating sea level

¹⁹ Catherine Schmitt, *Sand Beach in Winter*, NAT’L PARK SERV. (last visited June 23, 2025).

²⁰ DAVID J. MALLINSON ET AL., *PAST, PRESENT AND FUTURE INLETS OF THE OUTER BANKS BARRIER ISLANDS, NORTH CAROLINA*, 1–3 (Dec. 2008).

²¹ John Tucker, *The History of the Outer Banks Dunes*, OUR STATE (Sept. 15, 2015); Robert Dolan & Paul Godfrey, *Dune Stabilization and Beach Erosion*, NAT’L PARK SERV. (1971).

²² Tucker, *supra* note 21; Dolan & Godfrey, *supra* note 21.

²³ William V. Sweet et al., *Sea Level Rise*, in CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT 334–35 (David J. Dokken et al. eds., 2017); *see generally* Christine Lynn May et al., *Ch. 9: Coastal Effects*, in FIFTH NATIONAL CLIMATE ASSESSMENT, 444–86 (A.R. Crimmins et al. eds., 2023) (discussing the impacts of sea level rise on coastal communities).

²⁴ Rebecca Lindsey, *Climate Change: Global Sea Level*, NAT’L OCEANIC ATMOSPHERIC ADMIN. (Aug. 22, 2023).

²⁵ Chelsea Harvey, *Southeastern U.S. Seas Are Rising at Triple the Global Average*, SCI. AM. (Apr. 11, 2023).

rise along the Atlantic coast of the United States will further increase coastal erosion rates,²⁶ with the Outer Banks experiencing some of the highest rates of sea level rise.²⁷

The National Oceanic and Atmospheric Administration (NOAA) 2022 Sea Level Rise Technical Report shows that under the most likely modeling scenarios, Hatteras Island will experience between approximately 1.7 to 2.1 feet of sea level rise from 2022 to 2060 and 4.0 to 5.4 feet by 2100.²⁸ Coastal erosion will also be exacerbated by other climate-induced changes such as increased storm intensity and changes in prevailing currents, both of which are projected to lead to increased erosion and beach loss. The Atlantic coast already sees more Category 4 and Category 5 hurricanes now as compared to the 1980s, and North Carolina ranks second among U.S. states for the number of tropical storms and hurricanes that have affected its shores.²⁹ Even a single hurricane or major storm can remove considerable amounts of sand from a beach, particularly if that beach was previously artificially filled.³⁰

In sum, the combination of natural barrier island migration, sea level rise, high tide flooding, subsidence, and natural sand movement throughout the year will speed up erosion, exposing more oceanfront homes to the forces that will eventually cause them to collapse into the ocean.

²⁶ See Stephen P. Leatherman et al., *Sea Level Rise Shown to Drive Coastal Erosion*, 81 EOS TRANSACTIONS AM. GEOPHYSICAL UNION 55, 55 (2000) (finding that over 80% of beaches on the U.S. east coast have experienced erosion); Roshanka Ranasinghe et al., *Climate Change Impact Assessment for Inlet-Interrupted Coastlines*, 3 NATURE CLIMATE CHANGE 83, 83 (2013).

²⁷ *Climate Change Connections: North Carolina (Outer Banks)*, ENV'T PROT. AGENCY [hereinafter "EPA"] (last visited July 10, 2025).

²⁸ *Sea Level Rise Viewer*, NAT'L OCEANIC ATMOSPHERIC ADMIN. (last visited July 10, 2025).

²⁹ David Anderson et al., *Our Changing Climate*, in THIRD NAT'L CLIMATE ASSESSMENT 20 (2014); Brian Donegan, *North Carolina Second Only to Florida for U.S. Tropical Storms and Hurricanes*, WEATHER CHANNEL (Sept. 11, 2018).

³⁰ See, e.g., Michalis I. Voutsoukas et al., *Sandy Coastlines Under Threat of Erosion*, 10 NATURE CLIMATE CHANGE 260, 260, 262 (Mar. 2, 2020) (discussing how sea level rise, climate change, and development are causing sandy beaches to erode globally); Jennifer M. Johnson et al., *Recent Shifts in Coastline Change and Shoreline Stabilization Linked to Storm Climate Change*, 40 EARTH SURFACE PROCESSES AND LANDFORMS 569, 569–71 (2014).

III. IMPACTS OF THREATENED AND COLLAPSING HOUSES ON BARRIER ISLANDS

*Water is not a solid wall, it will not stop you. But water always goes where it wants to go, and nothing in the end can stand against it.*³¹

Accelerating rates of sea level rise occurring in places with rampant coastal development being protected with hardened structures like sandbags and jetties have created a perfect storm of worsening shoreline erosion in many portions of the Outer Banks. For example, the village of Rodanthe—which was established prior to the creation of Cape Hatteras National Seashore in 1937—abuts the landward boundary of the Seashore and relies on sandbags for artificial armoring to protect against erosion.³² There, as elsewhere in the Outer Banks, artificial dunes were built to protect the highway that runs the length of the island from the tides.³³ Over time, however, the shoreline of the Seashore has eroded considerably, such that multiple Rodanthe beach homes that may once have been built landward of the sand dunes have now become stranded in the surf.³⁴ Since 2020, eleven such houses have collapsed into the ocean at the Seashore, and more are on track to follow suit.³⁵

The houses in Rodanthe were not built to withstand constant battering from the waves. Unsurprisingly, houses located at the waters' edge on swiftly eroding sections of shoreline eventually succumb to the ocean. When these houses collapse, they are broken into pieces and swept away by the tide within a few short hours, and their debris is strewn over many miles of National Seashore

³¹ MARGARET ATWOOD, *THE PENELOPIAD* 43 (2005).

³² *See, e.g.*, 16 U.S.C. § 459 (providing for acquisition of lands not within the limits of established villages for the creation of Cape Hatteras National Seashore); 36 C.F.R. § 7.58(b)(1)(ii) (naming Rodanthe as one of the villages referred to in 16 U.S.C. § 459). Catherine Kozak, *Myriad Problems led to Rodanthe's Doomed Beach Houses*, COASTAL REV. (Dec. 2, 2022).

³³ Jeremy Markovich, *NC Highway 12 is North Carolina's Line in the Sand*, OUR STATE (Aug. 31, 2020).

³⁴ Will Thomas, *Rodanthe Home That Used to be Hundred Yards From the Water Now Sits in the Ocean*, WTKR (Sept. 11, 2024).

³⁵ *Supra* note 1.

beaches and into the ocean.³⁶ These dangerous debris fields contain nails, boards, broken glass, broken furniture, and an array of hazardous and toxic substances, including insulation foam, drywall, asphalt shingles, household chemicals, fiberglass shards, and potentially lead and asbestos.³⁷ The hazards created by one landowner allowing their home to collapse into the ocean can result in miles of beach closures that prevent summer tourists from visiting the area, and in turn adversely impact the economies of Rodanthe, Dare County, and North Carolina.³⁸ Within Cape Hatteras National Seashore, the National Park Service has been forced to use its own grant funding to clean up the home debris, as “owner-initiated cleanup efforts have not always adequately restored beaches.”³⁹

In addition to creating unsightly hazards on the beaches that are dangerous to tourists and local residents alike, this hazardous debris can have an unwanted negative cascade of effects on the marine environment.⁴⁰ The coast of Cape Hatteras hosts a unique array of marine species due to the convergence of the cold Labrador and warm Gulf Stream Currents, which represent the latitudinal range limits for many cold-water and warm-water tropical species, respectively.⁴¹ The mixing of the two currents creates an area that is particularly rich with nutrients and attracts myriad varieties of ocean life, making it one of the most biodiverse areas in the world.⁴² Some of the species that live fully or part-time in these

³⁶ News Release, Michael Barber, [After Houses Collapse, Contractors, Volunteers and National Park Service x Clean Miles of Beach at Cape Hatteras National Seashore](#), Nat’l Park Serv. (May 17, 2022). Debris that is pulled out to the ocean by heavy winds or the same wave energy that caused the house to fall in the first place can end up littering miles down the shore due to longshore drift. See [Offshore Water: Coastal Processes](#), GEOL. SURVEY IRELAND (last visited July 10, 2025).

³⁷ *Supra* note 3.

³⁸ For example, more than two-thirds of the roughly 2.86 million visitors to Cape Hatteras National Seashore in 2022 visited between May and September. See [Cape Hatteras NS](#). NAT’L PARK SERV. (last visited July 10, 2025). Additionally, total spending by visitors to Cape Hatteras National Seashore in 2022 was \$645 million. See Jennifer Allen, [NC’s Coastal National Parks Boost Economy by \\$1B in 2022](#), COASTAL REV. (Aug. 25, 2023).

³⁹ [Cape Hatteras Threatened Oceanfront Structures](#), *supra* note 1.

⁴⁰ [Why is Marine Debris a Problem?](#), NAT’L OCEANIC ATMOSPHERIC ADMIN., MARINE DEBRIS PROGRAM (Mar. 1, 2024).

⁴¹ Sam Athey, [Outreach and Action: An Update from Hope Spot Hatteras](#), MISSION BLUE (May 1, 2017), <https://missionblue.org/2017/05/outreach-and-action-an-update-for-hope-spot-hatteras/>.

⁴² [Atlantic North Carolina Outer Banks, Shining Sea](#), MARINE CONSERVATION INST., <https://perma.cc/8TSK-TYSZ> (last visited June 25, 2025).

waters include the critically endangered leatherback sea turtle, North Atlantic right whale, blue whale, and threatened loggerhead sea turtle.⁴³ In addition, numerous protected shorebird species use the beaches of Cape Hatteras for nesting, foraging, roosting, and migrating, including the threatened piping plover and other rare or protected species including terns, oystercatchers, skimmers, and pelicans.⁴⁴ Both sport and commercial fish such as red drum, bluefin tuna, king mackerel, and flounder also call the waters off of Cape Hatteras home.⁴⁵ These fish make up part of the commercial seafood industry that contributes roughly \$155 million to North Carolina's economy annually.⁴⁶

The hazardous debris left behind by collapsed oceanfront homes can injure marine life, including protected marine species, shorebirds, and commercially valuable fish, through various means, including direct contact, entanglement, and habitat alteration. Depending on each item's size and density, the marine debris created by a fallen beach house either sinks, floats (potentially washing ashore), or remains suspended in the water column.⁴⁷ The spatial distribution of debris that sinks in the water column and settles in deep ocean communities varies, with high concentrations likely accumulating in submarine canyons where the debris takes longer to break down.⁴⁸ While more is known about debris at or near the surface, more research is required to fully understand the scope of deep ocean debris and

⁴³ [*Leatherback Turtle*](#), NAT'L OCEANIC ATMOSPHERIC ADMIN. (last updated Feb. 26, 2025); [*North Atlantic Right Whale*](#), NAT'L OCEANIC ATMOSPHERIC ADMIN. (last updated Dec. 20, 2024); [*Blue Whale*](#), NAT'L OCEANIC ATMOSPHERIC ADMIN. (last updated Sept. 28, 2023); [*Loggerhead Turtle: Conservation and Management*](#), NAT'L OCEANIC ATMOSPHERIC ADMIN. (last visited July 11, 2025).

⁴⁴ [*Piping Plover*](#), FISH & WILDLIFE SERV. (last visited July 11, 2025); [*Cape Hatteras: Common and Protected Birds*](#), NAT'L PARK SERV. (last visited July 11, 2025).

⁴⁵ [*Species Profiles*](#), N.C. DEP'T OF ENV'T. QUALITY (last visited July 11, 2025) (listing common marine species found off the coast of North Carolina).

⁴⁶ Jane Harrison, [*Blue Economy: Four Big Takeaways From Our Study of North Carolina's Seafood Industry*](#), COASTWATCH (Mar. 17, 2022).

⁴⁷ [*Ocean Pollution and Marine Debris*](#), NAT'L OCEANIC ATMOSPHERIC ADMIN. (last updated Mar. 25, 2025); [*Ten Things You Should Know About Marine Debris*](#), NAT'L OCEANIC ATMOSPHERIC ADMIN. (last updated Oct. 10, 2017).

⁴⁸ Ivan Hernandez et al., [*Marine Litter in Submarine Canyons: A Systematic Review and Critical Synthesis*](#), 9 FRONTIERS IN MARINE SCI. 1, 3 (Sep. 2, 2022); [*Marine Debris Program: Habitat Damage*](#), NAT'L OCEANIC ATMOSPHERIC ADMIN. (last updated Feb. 7, 2023).

its impacts on marine life.⁴⁹ Debris that floats or remains suspended in the water column can damage commercial fishing gear and can directly endanger marine life in various ways, including through entanglement with the debris or ingestion of the debris.⁵⁰ For marine life, entanglement with debris can mean death or loss of limbs,⁵¹ and ingestion of floating debris by turtles, birds, marine mammals, or fish can also be fatal.⁵² Additionally, both floating and sunken debris harm the marine environment and resident organisms by leaching or directly adding chemical pollutants to the water.⁵³ Asphalt shingles, for example, already cause a concerning amount of stormwater pollution due to runoff of small particles of asphalt and heavy metals like lead and cadmium into waterways—directly dumping the shingled roof of an entire large house into the ocean doubtlessly raises even more severe toxic pollutant concerns.⁵⁴ The debris that remains on the beach can, similarly, be hazardous to shorebirds and other beach-dwelling species, via ingestion of toxins, entanglement, physical injuries, and blocking access to foraging and nesting areas. These hazards created by marine debris only add to the stress that marine organisms are already experiencing as a result of warming oceans and other human-induced adverse habitat changes.⁵⁵

⁴⁹ Christopher K. Pham et al., *Marine Litter Distribution and Density in European Seas, From the Shelves to Deep Basins*, PLOS ONE, April 2014, at 1, 3–4.

⁵⁰ [What Are The Impacts of Marine Debris?](#), NAT'L OCEANIC ATMOSPHERIC ADMIN. (last visited July 11, 2025).

⁵¹ [Entanglement of Marine Life: Risks and Response](#), NAT'L OCEANIC ATMOSPHERIC ADMIN. FISHERIES (last visited July 11, 2025).

⁵² [Ingestion](#), NAT'L OCEANIC ATMOSPHERIC ADMIN. MARINE DEBRIS PROGRAM (last updated Feb. 7, 2023).

⁵³ E.g., [What Do You Know About Talking Trash?](#), NAT'L OCEANIC ATMOSPHERIC ADMIN. MARINE DEBRIS PROGRAM (June 10, 2020) (discussing the effects of microplastics in the marine environment).

⁵⁴ See, e.g., Mingteh Chang et al., *Roofing as a Source of Nonpoint Water Pollution*, 73 J. ENV'T. MGMT. 307, 307–308 (2004) (discussing how storms and roofing runoff can impact water quality).

⁵⁵ As ocean water warms to historically high temperatures, the level of dissolved oxygen in the water decreases while the level of dissolved carbon dioxide rises, which can create acidic oxygen-depleted dead zones. [Ocean Warming](#), WOODS HOLE OCEANOGRAPHIC INST. (last updated 2024). These dead-zones can deplete phytoplankton populations—which comprise the lower portion of the marine food chain and are highly sensitive to changes in water quality and water chemistry—and result in an adverse cascade in other trophic levels such as fish and larger marine organisms like whales and dolphins. Andrew S. Brierley, *Plankton*, 27 CURR. BIOL. R478, R478, R481–82 (2017). The stress of marine debris from collapsed houses compounds the stresses from global climate change.

In addition to the physical and chemical hazards caused by structural debris from houses (e.g., board, nails, pipes, glass, and shingles) and the houses' contents (e.g., carpets, furniture, appliances, and chemicals), beachfront houses imperiled by shoreline erosion often have failing septic tanks associated with them, which create further hazards to both public health and the health of beachfront ecosystems.⁵⁶ Septic systems treat wastewater from homes in areas where traditional centralized sewer systems and wastewater treatment facilities are not available, such as on barrier islands like the Outer Banks.⁵⁷ They function by routing a home's wastewater and sewage into the buried septic tank; solids settle to the bottom of the tank while liquids are discharged via pipes into a nearby drain field.⁵⁸ Then, the liquid slowly percolates through the soil, allowing bacteria and other harmful viruses and nutrients to be filtered out.⁵⁹ However, a failure in this system can cause "untreated sewage to be released and transported to where it shouldn't be."⁶⁰ System failures can result from rising groundwater tables or surface water inundation and can result in sewage and contaminated water containing harmful coliform bacteria, viruses, and nutrient pollution being carried directly into surface waters—in the case of the homes in Rodanthe, into the ocean.⁶¹

In the case of oceanfront homes built near beaches that are rapidly disappearing thanks to sea level rise and erosion, septic tank systems that were once adequately buried with their septic fields above the water table become exposed to daily inundation by the tides. The encroaching ocean washes away the sand that had buried the tank and septic field and raises the groundwater table.⁶² In other words, many of the septic systems associated with oceanfront houses at Rodanthe are located hazardously close to the ocean, where they become prone to

⁵⁶ THE WORLD'S BEACHES, *supra* note 12, at 241–43.

⁵⁷ Will Atwater, [NC Focuses on Helping Municipal Water and Sewer Systems, But Septic Owners Will Have to Wait](#), NC HEALTH NEWS (Sept. 5, 2024).

⁵⁸ [How Septic Systems Work](#), U.S. ENV'T PROT. AGENCY (last updated Jul. 16, 2024).

⁵⁹ *Id.*

⁶⁰ [Signs of Septic System Failure](#), WASH. DEP'T OF HEALTH (last visited June 26, 2025).

⁶¹ See, e.g., [Septic System Impacts on Water Sources](#), U.S. ENV'T PROT. AGENCY (last updated Jul. 16, 2024) (discussing the impacts on water quality if septic system is not working properly); Catherine Kozak, *supra* note 8.

⁶² Kozak, *supra* note 8.

failure because of both rising groundwater from underneath and tidal flooding from above. Storms and tides can also physically damage components of a septic system, for instance by detaching pipes or breaking seals or other components.⁶³ Depending on their condition, oceanfront septic systems may be discharging human waste directly onto the sandy beach or into the ocean.⁶⁴



Figure 3: *Debris Associated with House Collapse*, NAT'L PARK SERV. (Sept. 20. 2024), <https://www.flickr.com/photos/capehatterasnps/54008888865/in/album-72177720320480249> (showing three exposed, detached septic tanks plus debris at 23001 GA Kohler).

These failing septic systems create myriad hazards. As one treatise explains, “[i]n beach communities, malfunctioning septic tanks are a big

⁶³ *Id.*

⁶⁴ *Id.*

problem,” as “untreated or partially treated sewage” containing *E. coli* and other pathogens ends up in the water and on the beaches where families swim and build sandcastles.⁶⁵ These same pathogens can harm wildlife as well as humans. For example, septic-borne pathogens can also bioaccumulate in filtering marine organisms such as oysters and cause illness in people who eat them or swim in the contaminated water.⁶⁶ Nutrient pollution from septic failures can also cause harmful algal blooms.⁶⁷ Harmful algal blooms can lead to oxygen depletion and fish kills, and toxin-producing cyanobacteria can contaminate shellfish and cause severe adverse health effects to persons exposed to the toxin.⁶⁸ The economic impacts of shutting down shellfish fisheries and beach access until the threat of pollution or algal blooms has passed “can be extensive.”⁶⁹

In sum, the harms caused by houses collapsing on eroding shorelines like Rodanthe’s extend far beyond the initial debris field on the beach. Marine debris from these houses can harm marine wildlife and habitats through both chemical and physical pollution, and the full extent of these adverse impacts to the marine environment is still being understood. The additional pollution of sewage-borne nutrients and pathogens from failing septic tanks associated with these houses further underscores the threats that these structures pose to both marine ecosystems and human health and safety if left unaddressed. Finally, the costs associated with closing beaches to deal with the debris fields left behind when houses collapse into the tide and the deterrent effect of the debris fields and septic issues themselves are harmful to local tourism-based economies. It is thus incumbent upon North Carolina and other government entities to take proactive steps to incentivize, require, or even undertake the safe removal of these imperiled oceanfront structures and their appurtenances, including septic systems, before these harms can result from their collapse.

⁶⁵ THE WORLD’S BEACHES, *supra* note 12, at 241–43.

⁶⁶ WASH. DEP’T OF ECOLOGY, [FOCUS ON FECAL COLIFORM BACTERIA](#) (Dec. 2005).

⁶⁷ [Are Late Summer Algae Blooms a Sign of Septic System Failure?](#), SUPECK SEPTIC SERV. LLC (last visited July 11, 2025).

⁶⁸ [The Effects: Dead Zones and Harmful Algal Blooms](#), U.S. ENV’T PROT. AGENCY (last updated Feb. 5, 2025); [Fish Kills and Die Offs](#), MINN. DEP’T OF NAT. RES. (last visited June 26, 2025) (describing how human activity can lead to harmful environmental effects).

⁶⁹ [Algal Blooms](#), NAT’L INST. OF ENV’T HEALTH SCIS. (last visited July 11, 2025).

IV. ADDRESSING THE CRISIS OF COLLAPSING AND THREATENED OCEANFRONT STRUCTURES

*The persistent tides – the pulse of the sea – do not discriminate;
they push against all the varied shores on Earth.*⁷⁰

In 2023, an interagency work group was formed in North Carolina “to discuss, research, and provide ideas [to] help improve management of threatened oceanfront structures.”⁷¹ Led by the Director of the Division of Coastal Management of the North Carolina Department of Environmental Quality and the Superintendent of the National Parks of Eastern North Carolina (which includes Cape Hatteras National Seashore), the work group held meetings and public workshops to identify and explore short- and long-term solutions.⁷² Experts on various topics were invited to attend the workshops, give presentations, and answer questions posed by work group members.⁷³ The public workshops focused on financial assistance opportunities, the role of public and private insurance, and legal and regulatory authorities.⁷⁴ The group’s efforts culminated in a report released in August 2024, which summarized the group’s findings.⁷⁵

The remainder of this article will focus on the report’s “Long-Term Idea 3,” which proposes that the North Carolina State Government “[c]onsider authorizing a new, state program with funding dedicated to addressing threatened oceanfront structures.”⁷⁶ The report suggests that such a program might include “matching funds,” “a public/private partnership framework for increased flexibility and efficiencies in property acquisition, removal and relocation

⁷⁰ Attributed to oceanographer Jacques Cousteau in David Krieger, [Captain Cousteau’s Legacy: Rising to Our Full Stature as Human Beings](#), NUCLEAR AGE PEACE FOUNDATION (JULY 20, 1997).

⁷¹ N.C. DEP’T ENV’T QUALITY & NAT’L PARK SERV., [MANAGING THREATENED OCEANFRONT STRUCTURES: IDEAS FROM AN INTERAGENCY WORK GROUP](#) 1 (Aug. 2024) [hereinafter NC Threatened Structures Workgroup Report].

⁷² *Id.* at 1, 4.

⁷³ *Id.* at 4, 8, 12.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1.

⁷⁶ *Id.* at 6–7.

projects,” and “[i]nnovative, market-based solutions such as conservation easements or tax credits.”⁷⁷

Federal government agencies and other state governments have already studied, developed, and even funded and implemented programs that can serve as examples and offer lessons for carrying out this recommendation.⁷⁸ As discussed below, these government entities have focused on providing for some version of buyouts or monetary incentives for the owners of at-risk buildings, designed to promote relocation or removal of the threatened structures before they collapse and cause the kind of destruction previously discussed.

A. Existing Approaches to the Problem—Federal Programs

i. *National Flood Insurance Program Amendments*

Congress created the National Flood Insurance Program (NFIP) to (1) “provide flood insurance in flood-prone areas to property owners who otherwise would not be able to obtain it and to reduce the government’s cost *after floods*,” and (2) reduce national flood risk by creating and enacting floodplain management standards.⁷⁹ The NFIP is managed by the Federal Emergency Management Agency (FEMA) and administered only to communities that participate voluntarily.⁸⁰ Participating communities “are required to adopt land use and [flood] control measures” that meet the federally designated minimum standards set by FEMA.⁸¹ Communities can adopt more stringent floodplain

⁷⁷ *Id.* at 7.

⁷⁸ *Infra* Subpart A–B.

⁷⁹ Diane P. Horn, [A Brief Introduction to the National Flood Insurance Program](#), CONG. RES. SERV. 1 (Jan. 2, 2025) (emphasis added).

⁸⁰ *Id.* Outside the scope of this paper are the effects on disaster cleanup, preparedness, and response for communities if FEMA is eliminated or if its funding is cut significantly. *See* Rebecca Hersher, [The Trump Administration Says it Wants to Eliminated FEMA. Here’s What We Know](#), NPR (June 26, 2025); Press Release, Fed. Emergency Mgmt. Agency, [FEMA Ends Wasteful, Politicized Grant Program, Returning Agency to Core Mission of Helping Americans Recovering From Natural Disasters](#) (Apr. 4, 2025) (announcing that funding under the Building Resilient Infrastructure and Communities grant program was cut). This article assumes these funding options are still available to states, Tribes, and communities going forward.

⁸¹ Horn, *supra* note 79.

management standards if they wish.⁸² Under the NFIP, participating communities must work with FEMA to develop Flood Insurance Rate Maps (FIRMs) and identify Special Flood Hazard Areas (SFHAs).⁸³ FIRMs are used to identify property owners in SFHAs and are subject to FEMA’s mandatory purchase requirement, and to establish the management standards that communities must adopt.⁸⁴

Currently, the NFIP does not sufficiently address the problems faced by owners of houses on the verge of collapse along the North Carolina coast for several reasons. First, a standard NFIP policy covers only losses due to erosion-related flooding caused by “[c]ollapse or subsidence of land along the shore of a lake or similar body of water as a result of erosion or undermining caused by waves or currents of water *exceeding anticipated cyclical levels*.”⁸⁵ NFIP policies do not, however, cover losses caused by “[g]radual erosion,” “[l]and subsidence” or “[d]estabilization or movement of land that results from accumulation of water in subsurface land area.”⁸⁶ Often, threatened oceanfront houses are at risk due to gradual erosion, or one of the other excluded causes, and finally collapse during tides that do not exceed typical cyclical levels—in those circumstances, coverage for the loss of the house may be denied.⁸⁷

Additionally, an NFIP policy only provides insurance payout after the home is lost. Cleaning up a home after it has collapsed and broken into parts that spread over miles of beach and into the ocean is impossible to accomplish thoroughly, and trying to do so is far more expensive and riskier than pre-emptively moving or demolishing the home.⁸⁸ Furthermore, the NFIP offers

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Insurance Coverage and Rates, 44 C.F.R. § 61, App. A(1)(II)(B)(2) (2025) (emphasis added).

⁸⁶ *Id.* § App. A(1)(V)(C)(3), (5)–(6).

⁸⁷ *Cape Hatteras Threatened Oceanfront Structures*, *supra* note 1 (stating that oceanfront homes became at risk of collapsing due to coastal erosion).

⁸⁸ See, e.g., Reuben Jones, [As Rising Sea Levels Threaten Beach Homes, A Bill in D.C. Looks to Help Move Houses](#), SPECTRUM 1 NEWS (June 19, 2024) (stating that it cost one family over \$180,000 to move their home away from the ocean); see also Catherine Kozack, [Imperiled Beach Houses a Problem Fraught with Legal Perils](#), COASTAL REV. (Sept. 14, 2022) (discussing the high cost of litigating these issues and how cleanup costs off fall on communities—not property owners).

relatively low coverage for properties in expensive areas, like the North Carolina coast.⁸⁹ The NFIP covers up to \$100,000 for the contents inside a single-family home—furniture and personal belongings— and \$250,000 for the home itself, which might equate to a fraction of an oceanfront home’s fair market value.⁹⁰ Finally, the NFIP was “not designed to retain funding to cover claims for truly extreme events.”⁹¹ Instead, the NFIP was designed to borrow money from the U.S. Treasury in times of extreme disasters for unexpected or extreme weather events.⁹² As climate change worsens and natural disasters become more frequent, however, the NFIP will likely be relied on even more and become a more expensive program for ratepayers.

Previously, Congress has attempted to use legislation to encourage the removal of at-risk properties before they collapse due to flooding or erosion. In 1987, Congress passed an amendment to the NFIP known as the “Upton-Jones Amendment,” named after the bill’s sponsors, Representative Fred Upton (R-Michigan) and Representative Walter B. Jones, Sr. (D-North Carolina).⁹³ The amendment authorized payment for demolition or relocation support to NFIP policyholders who owned property that was “subject to imminent collapse or subsidence as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels,” as determined by the state or local government and FEMA.⁹⁴ If a property owner decided to demolish their at-risk property, they could receive up to 100% of the value of the property (up to policy limits) and either 10% of the value of the property or the actual demolition cost to pay for the demolition expenses, whichever is less.⁹⁵ Qualified property owners would receive 40% up front, and the remainder after they demolished the structure, including the septic system.⁹⁶ If a property owner decided to relocate

⁸⁹ See *Cost of Flood Insurance for Single-Family Homes Under NFIP’s Pricing Approach*, FED. EMERGENCY MGMT. AGENCY (showing in 2023, most insurance plans cost about \$ 0– \$ 1,000).

⁹⁰ Horn, *supra* note 79, at 1.

⁹¹ *Id.* at 2.

⁹² *Id.*

⁹³ Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 544, 101 Stat. 1815, 1940 (Feb. 5, 1988) (to be codified at 42 U.S.C. § 4013 (1988)).

⁹⁴ *Id.* § 544(a). FEMA also determines the procedures state and local governments used to determine if a house was in that condition that qualified for coverage. *Id.* § 544(c)(6)(A)-(B).

⁹⁵ *Id.* § 544(c)(1)(A).

⁹⁶ *Id.* §§ 544(c)(1)(B), (c)(2).

their property—including the septic system—they could receive up to 40% of the property’s value to move the it behind the 30- or 60-year setback line, not to exceed the actual cost of the relocation.⁹⁷

Though the Upton-Jones Amendment was meant to reduce the costs of the program by incentivizing owners to move or remove their imperiled homes before collapse, and thereby avoid the costly cleanup and related harms, the costs of the NFIP program continued to swell, and Upton-Jones was perceived as having only limited success.⁹⁸ Several shortcomings in the Amendment’s ability to incentivize cost-saving changes in behavior became apparent.⁹⁹ For example, property owners who rented out their homes were reluctant to give up their properties while they continued to generate income.¹⁰⁰ Some owners would reportedly wait out the collapse for as long as possible and file claims under the NFIP for damage incurred to their homes in the interim, before finally seeking Upton-Jones assistance when the house was on the verge of washing away.¹⁰¹ At that point, rather than choosing to accept 40% of the house’s value to relocate the structure, as Congress had intended, most owners would instead claim demolition expenses and still receive 110% of their house’s fair market value, in addition to the prior claims.¹⁰² Further, there was no provision preventing communities from redeveloping properties where homes were demolished using Upton-Jones funding, so owners could retain ownership of the real estate and buy NFIP insurance for a new structure built on the same lot where another had been demolished as long as the setback requirements were met.¹⁰³ Ultimately hundreds of claims were filed under the Upton-Jones program during its short tenure,

⁹⁷ *Id.* §§ 544(c)(1)(B), (c)(5).

⁹⁸ *See, e.g.,* Catherine Kozak, *Frustrations Mount Over Imperiled Outer Banks Houses*, COSTAL REV. (Mar. 9, 2022) (stating that the Upton-Jones Amendment was “too costly” and that there is no “interest in reviving” the Amendment due to the amount of claims it received).

⁹⁹ Chris Kidder, *Federal Flood Insurance Policy Is In Transition Stage*, VIRGINIAN-PILOT (Jan. 8, 1995) (stating that the program became insolvent after 3 major storms, that it was not popular with homeowners who needed the coverage, and that for those who do need the it, it can take a long time to receive funds).

¹⁰⁰ *Id.* (“According to local officials [in North Carolina], few homeowners were interested in giving up their oceanfront homes until nature gave them no choice.”).

¹⁰¹ *Coastal Erosion and Erosion Management: Hearing Before the Subcomm. on Pol’y Rsch. & Insurance of the H. Comm. On Banking, Fin. & Urb. Aff.*, 101st Cong. 1 (1990).

¹⁰² *Id.* at 1.

¹⁰³ Housing and Community Development Act § 544(c)(5).

ensuring that many houses were moved or demolished before they could collapse into the ocean and cause the harms described above.¹⁰⁴ Yet Congress, dissatisfied with the program, ultimately repealed the Upton-Jones Amendment in 1994 and adopted the Mitigation Assistance Program in its place.¹⁰⁵

The short history of the Upton-Jones Amendment demonstrates many of the challenges that face a voluntary buyout program: incentivizing owners to part with a structure that is at imminent risk of failing but perhaps not yet uninhabitable, setting incentives at sustainable levels, timing the sale correctly, and ensuring that at-risk sites are not rebuilt. Despite its eventual repeal, the Upton-Jones Amendment still serves as a model for creating a similar buyout and relocation program at the state level. Currently, several state-run programs are in practice, or have been proposed, at the state level that attempt to build and improve upon the Upton-Jones template of using financial incentives and voluntary buyouts to preemptively remove threatened coastal structures before they collapse and cause harm.¹⁰⁶

Additionally, the Upton-Jones story may not be over at the federal level yet. In response to the recent loss of homes along the North Carolina coast, Representative Greg Murphy introduced the Prevent Environmental Hazards Act of 2024 in June 2024, and again in May 2025.¹⁰⁷ If passed, the bill would fill the gaps left behind by the repeal of the Upton-Jones Amendment, by authorizing NFIP payouts for buildings condemned due to chronic erosion or unusual flooding.¹⁰⁸ Specifically, the bill would restore the opportunity for owners of waterfront structures that have been “condemned or deemed unsafe for habitation by a State or local authority due to imminent collapse or subsidence as a result of shoreline erosion” to seek a preemptive NFIP payout to demolish or relocate the

¹⁰⁴ Kidder, *supra* note 99.

¹⁰⁵ Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103–325, §§ 552(a), 553, 108 Stat. 2160, 2269–2270 (Sept. 23, 1994) (codified at 42 U.S.C. §§ 4013(c), 4101 et seq.) (removing subsection (c) from the National Flood Insurance Act and adding a new mitigation assistance program).

¹⁰⁶ *Infra* Subpart B.

¹⁰⁷ Preventing Environmental Hazards Act, H.R. 8637, 118th Cong. (2024); Preventing Environmental Hazards Act, H.R. 3161, 119th Cong. (2025).

¹⁰⁸ H.R. 3161 § 2(e)(1).

structure.¹⁰⁹ An owner who is willing to demolish or move an at-risk home to avert future disaster would be eligible for either 40% of the home's fair market value or \$250,000 up front, whichever is less.¹¹⁰ For a demolition, the owner would either receive the remaining 60% of the value of the home or the actual cost of demolition—after the demolition is complete, including the removal of any septic systems—whichever is less.¹¹¹ However, for a relocation, the owner would only receive costs covered based on the actual cost of relocation.¹¹² As an improvement over the original Upton-Jones Amendment, the bill includes financial disincentives to prevent owners from failing to take action for more than six months after condemnation of their property or their receipt of the 40% pre-payment; the bill also limits payouts to 40% if owners neglect to act before a collapse.¹¹³ As of the writing of this article, the bill is still pending.

ii. FEMA's Hazard Mitigation Grant Program

The Hazard Mitigation Grant Program implemented by FEMA provides funding to communities to rebuild after a federally declared disaster in order to reduce future disaster losses;¹¹⁴ these grants can include funds for voluntary buyouts of affected properties.¹¹⁵ However, since Hazard Mitigation Grant funding is only available after a presidentially declared disaster, it does not function as a way to prospectively avoid the collapse of oceanfront structures before a storm hits.¹¹⁶ Nevertheless, the program can still provide valuable insights for how a prospective voluntary buyout program could work.

The city of Rancho Palos Verdes, California provides an interesting recent case study of the Hazard Mitigation Grant voluntary property buyout program.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* §§ 2(e)(1)(A), 4(A).

¹¹¹ *Id.* § 2(e)(1)(A)(ii).

¹¹² *Id.* § 2(e)(1)(B).

¹¹³ *Id.* § 2(e)(2).

¹¹⁴ [*Hazard Mitigation Grant Program \(HMGP\)*](#), FED. EMERGENCY MGMT. AGENCY (last updated Apr. 24, 2025).

¹¹⁵ [*Property Acquisitions Under Hazard Mitigation Grant Program \(HMGP\)*](#), FED. EMERGENCY MGMT. AGENCY (Nov. 6, 2024).

¹¹⁶ FED. EMERGENCY MGMT. AGENCY, *supra* note 114; [*FEMA Grants for Home Acquisitions*](#), FED. EMERGENCY MGMT. AGENCY (Dec. 5, 2024).

Rancho Palos Verdes's program is being used for structures that are now at risk of collapsing due to the recent acceleration of a longstanding issue—the Greater Portuguese Bend Landslide Complex.¹¹⁷ While the landslide had been active and sliding at a rate of several inches per year for decades, land movement significantly increased following severe storm events in 2023 and 2024.¹¹⁸

Rancho Palos Verdes's voluntary buyout program received funding from FEMA through a Hazard Mitigation Grant to acquire at-risk properties from the winter storm that occurred from January 31 to February 9, 2024.¹¹⁹ The program assists property owners who are facing “the risk of imminent failure of land movement,” and invited homeowners to submit applications for the purchase of their “destroyed, damaged, or imminently at-risk” homes starting in November 2024.¹²⁰ The city is prioritizing applications for the sale of properties that are deemed: (1) most at-risk; (2) “that have been de-energized indefinitely;” (3) whose acquisition would support the City's stabilization efforts after the landslide; and (4) whose acquisition would add value to the Palos Verdes Nature Preserve.¹²¹ Additionally, the city reviews all applications to ensure they meet cost-effectiveness and environmental and historic preservation requirements, set by FEMA.¹²² If selected, the homeowner will receive a buyout offer for the pre-incident fair market value, based on the December 1, 2022 value.¹²³ However, selected property owners will only receive 75% of the pre-incident fair market value because federal requirements only allow FEMA funding to be used for 75% of the buyout cost.¹²⁴ The remaining 25% comes from a reduction in the home's fair market value, which is then held in escrow and used to pay demolition and site-restoration costs.¹²⁵ The fair market value and costs are determined by the city's appraiser; however, homeowners can file an appeal and hire their own

¹¹⁷ [*Voluntary Property Buyout Program*](#), RANCHO PALOS VERDES (last visited July 11, 2025).

¹¹⁸ [*Proclamation of a State of Emergency*](#), STATE OF CALIFORNIA EXEC. DEP'T (Sep. 3, 2024).

¹¹⁹ RANCHO PALO VERDES, *supra* note 117 (stating that the city received \$42 million in federal funding).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* The property owners receive the remaining balance, if any, after demolition and site restoration is complete. *Id.*

appraiser, out-of-pocket, to conduct an independent appraisal if they disagree with the city's appraisal.¹²⁶ Following the sale of the property, the structures will be demolished and the land maintained as open space.¹²⁷

Since the Rancho Palos Verdes program is still in its early stages, there is no evidence of its success, though its structure appears to create a win-win situation wherein owners of unstable houses are able to divest themselves of risky properties, likely at higher prices than they might obtain in the market, and the city both avoids the harms associated with the houses ultimately collapsing and can add to its nature preserve—supporting land stabilization efforts even further. As of May 2025, 23 properties have been approved for purchase through the program.¹²⁸

Notably, the program does not provide significant administrative support to landowners selling their property to the city, which is cited as one of the most beneficial factors of New Jersey's Blue Acres program discussed below.¹²⁹ Likewise, the Rancho Palos Verdes buyout program also does not provide assistance with relocation costs—though it may provide financial assistance for tenants if they are displaced by a property owner's decision to sell.¹³⁰ In addition, since the city's plan implements the Hazard Mitigation Grant Program's cost-sharing requirement by requiring sellers to accept a 25% reduction in their home's pre-disaster fair market value, this may affect who applies for the property buyout.¹³¹ While this provides a strong financial incentive to voluntarily sell homes that have been so badly damaged or imperiled that their fair market values have significantly decreased, it would be less likely to incentivize the sale of properties, like beachfront houses, that may continue to have high market values despite increasing risks of imminent collapse.¹³² Finally, this program is

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Infra* notes 140–152.

¹³⁰ RANCHO PALO VERDES, *supra* note 117.

¹³¹ *Id.*

¹³² See, e.g., Yursa Frazan, [*Rancho Palos Verdes Homes Continue to Slide into The Ocean, But The Destruction Could Have Been Avoided*](#), LAIST (Feb. 26, 2025) (stating that one home is listed for more than \$2 million, despite its movement due to landslides).

noteworthy as it is implemented at the local level, not the state level. This point of comparison will be helpful to determine whether voluntary buyout programs are more likely to succeed at the local level, compared to the implementation of voluntary buyout programs at the state level.

B. Existing Approaches to the Problem—State Programs

i. *New Jersey’s Blue Acres Program*

New Jersey’s voluntary buyout program, the Blue Acres Buyout Program (Blue Acres), is perhaps the most well-established state program of its kind. Blue Acres has been in place since 1995.¹³³ The program’s extensive experience with New Jersey communities and the extensive support it provides to individual participants have made the program successful in promoting resiliency in responding to, preparing for, and recovering from disasters.¹³⁴ The New Jersey Department of Environmental Protection (DEP) runs the Blue Acres program and works with local governments to “relocat[e] New Jersey families whose homes are subject to repeated flooding and acquir[e] property for use as natural flood storage, parks, and community open space.”¹³⁵ DEP achieves this objective by buying at-risk, flood-prone properties—whether oceanfront, in a floodplain, or otherwise—at fair market value from willing homeowners.¹³⁶

After a property is acquired through Blue Acres, any structure remaining on the property is demolished and the land is maintained as open space for recreation, wetlands management, wildlife habitat, flood water storage, buffers for nearby structures, or other disaster risk reduction uses.¹³⁷ For this reason, the

¹³³ KATIE SPIDALIERI ET AL., *State of New Jersey: Blue Acres Buyout Program*, in MANAGING THE RETREAT FROM RISING SEAS, GEORGETOWN CLIMATE CTR. 75, at 1(2020).

¹³⁴ *Id.* at 1–2.

¹³⁵ *Blue Acres*, N.J. DEP’T OF ENV’T PROT. (last visited July 14, 2025).

¹³⁶ SPIDALIERI ET AL., *supra* note 133, at 2–3; *Assembly Agriculture and Natural Resources Committee Statement to S. No. 2920*, 2019 Leg., 219th Sess. 3 (N.J. 2019) [hereinafter *Assembly Statement*] (stating that the Blue Acres program purchases at-risk and damaged properties to protect other open spaces).

¹³⁷ *Assembly Statement*, *supra* note 136, at 3; *Blue Acres: Information for Local Governments*, N.J. DEP’T OF ENV’T PROT. (last visited July 14, 2025).

program prioritizes buying neighborhoods and clusters of homes.¹³⁸ The program evaluates neighborhoods using objective, measurable criteria to decide where to conduct buyouts. Factors considered when determining whether a neighborhood should be purchased include: (1) whether the neighborhood has a high concentrations of homes that have experienced severe damage from a recent storm or submitted repetitive flood insurance claims, (2) whether the community is vulnerable to climate change, and (3) whether the community is disproportionately impacted by flooding.¹³⁹ However, residents within an affected neighborhood are not required to sell all together; rather, individual homeowners make the decision whether or not to sell to the state, and no homeowners are forced to sell their properties.¹⁴⁰

The program is primarily funded by the state, though the program has received significant federal funding from FEMA's Hazard Mitigation Grant Program, the U.S. Department of Housing and Urban Development's (HUD) Community Development Block Grant-Disaster Recovery program (CDBG program), and the U.S. Department of Agriculture's Natural Resources Conservation Service following disasters such as Superstorm Sandy.¹⁴¹ Due to funding coming from multiple sources, the amount of funds fluctuates, as do limitations on what they can be used for, making it difficult for interested property-owners to determine eligibility and benefits.¹⁴² To minimize the impacts of these discrepancies on property-owners, the program provides extensive administrative support—including case managers who work directly with participants and a financial team that negotiates with banks and other lenders on behalf of the homeowners.¹⁴³

¹³⁸ SPIDALIERI ET AL., *supra* note 133, at 1, 4.

¹³⁹ N.J. DEP'T OF ENV'T PROT., [BLUE ACRES HOMEOWNERS FREQUENTLY ASKED QUESTIONS](#) 1 (July 24, 2024).

¹⁴⁰ *Id.*

¹⁴¹ [3 Years Long, 3 Years Strong: New Jersey's Successful Approach to Purchasing Homes Along Sandy's Flooded Path](#), FED. EMERGENCY MGMT. AGENCY (last updated Feb. 11, 2021).

¹⁴² SPIDALIERI ET AL., *supra* note 133, at 3 (noting that different federal and state funding has different criteria).

¹⁴³ *Id.*

There is no singular event that triggers a homeowner's eligibility to apply for a buyout, however, after a natural disaster, damaged properties may be prioritized over other applications.¹⁴⁴ Eligible homeowners include those who have suffered structural damage from recent storms, are subject to repetitive flooding, or are determined to be vulnerable to climate change. Once an owner submits a buyout application, the state hires an independent appraiser to appraise the property to determine the basis of a purchase offer based on the pre-flood value of the home.¹⁴⁵ The property owner can appeal the state's appraisal offer and pay to have their own appraisal done by a third-party.¹⁴⁶ The state will then hire a third appraiser and will factor in the updated appraisals into a new offer, which cannot be negotiated.¹⁴⁷ Further, any buyback offer will be reduced based on any other benefits that a homeowner may have received for repairs to a damaged home such as insurance proceeds, and may be increased by "additional assistance or incentives" based on eligibility criteria.¹⁴⁸

Seen by some as a "national model for flood buyouts," the New Jersey Blue Acres program has bought over 1,100 at-risk properties to demolish and convert to open space that will benefit the public as of mid-2024.¹⁴⁹ This success is due in large part to the administrative and financial support the program provides to all potential sellers; case managers work directly with participants to ensure that all their questions and concerns are addressed, prior to the sale, and a financial team negotiates with banks and other lenders on behalf of the homeowners.¹⁵⁰ In addition to these case managers and financial support staff, Blue Acres also has a liaison in each municipality to ensure coordination between the state, municipalities, and communities.¹⁵¹ Lastly, Blue Acres also has a separate team that assists tenants with relocation after a rental property is sold through the program and potentially provides tenants with financial assistance to

¹⁴⁴ N.J. DEP'T OF ENV'T PROT., *supra* note 139, at 1 (stating that communities impacted by storms is one of the criteria considered by DEP).

¹⁴⁵ [Blue Acres Appraisals](#), N.J. REALTY ADVISORY GRP. LLC (last visited Jul. 2, 2025).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ N.J. DEP'T OF ENV'T PROT., *supra* note 139, at 2–3, 5.

¹⁴⁹ Press Release, N.J. Dep't of Env't Prot., [New Jersey's Approach to Flood Buyouts Earns National Attention](#) (May 16, 2024).

¹⁵⁰ SPIDALIERI ET AL., *supra* note 133, at 3.

¹⁵¹ *Id.*

relocate outside of a flood zone.¹⁵² The administrative support and individualized attention available to potential sellers ensure that their questions are answered. Given the widespread success of the program, New Jersey recently decided to expand support for the program by funding a portion of it through state corporate taxes.¹⁵³

ii. Louisiana's Restore Louisiana Program

Louisiana's voluntary buyout program, "Restore Louisiana Homeowner Buyout Program" (Restore Louisiana), aims "to reduce the risk of property damage from future disasters while strengthening community resilience through improved local drainage that facilitates natural watershed."¹⁵⁴ The program achieves this goal by "moving [homeowners] out of harms way and reduc[ing] future flood risk."¹⁵⁵ The program is administered by the Louisiana Office of Community Development, and is funded through the CDBG program and subject to that program's restraints.¹⁵⁶ Thus, funding for repairs or buyouts through the program is available only to homeowners with properties that have been damaged by certain federally-designated storms; currently eligibility is restricted to victims

¹⁵² DIV. DISASTER RECOVERY & MITIGATION, [BLUE ACRES CDBG-DR REQUIREMENTS](#) 3 (Feb. 2023) (stating that through funding from the U.S. Department of Housing and Urban Development ("HUD"), Blue Acres can provide assistance for displaced tenants).

¹⁵³ *Assembly Statement*, *supra* note 136, at 1–3.

¹⁵⁴ [Restore Louisiana Homeowner Buyout Program: Housing](#), RESTORE LA. [hereinafter *Restore Louisiana Housing*] (last visited July 14, 2025). In recent years, the relocation of the Isle de Jean Charles Biloxi-Chitimacha-Choctaw Tribe has gained national attention after the Louisiana Office of Community Development was awarded a \$48 million federal grant in 2016 to relocate virtually the entire community, which had lost 98% of its land to coastal erosion, to a new location. Since the 1830s, when they forcibly relocated from the mainland, the Tribe has resided in the small coastal town of Isle de Jean Charles. Unfortunately, a combination of sea level rise, erosion, and land subsidence are now once again displacing the Tribe. The source of that funding opportunity, a competition run by the HUD, and the complex equity concerns of modern tribal relocations, are beyond the scope of this article, but for more information on this relocation effort, see Lucy Sherriff, [This Louisiana Town Moved to Escape Climate-Linked Disaster](#), BBC (Jan. 30, 2024); Robynne Boyd, [The People of the Isle de Jean Charles Are Louisiana's First Climate Refugees—but They Won't Be the Last](#), NAT. RES. DEF. COUNCIL (Sep. 23, 2019).

¹⁵⁵ *Restore Louisiana Housing*, *supra* note 154.

¹⁵⁶ LA. OFF. OF COMM. DEV. DISASTER RECOVERY UNIT, [RESTORE LOUISIANA HOMEOWNER ASSISTANCE PROGRAM POLICY MANUAL](#) 13 (Jan. 14, 2025) [hereinafter RESTORE LOUISIANA MANUAL]. Since the program is federally funding, all buyouts are subject to federal conditions and eligibility criteria. *Id.* at 14.

of Hurricanes Laura and Delta (2020), Hurricane Ida (2021), May 2021 Severe Storms, and Hurricane Francine (2024).¹⁵⁷ Eligibility is determined by factors such as: income, age, disability, the level of damage the property has incurred, whether the property is in a high-risk flooding zone, and whether the homeowner has already completed the repairs.¹⁵⁸ Thus, this process prioritizes low- to moderate-income homeowners.¹⁵⁹ Eligible homeowners can apply for assistance to: (1) work with a program-managed contractor or hire their own contractor to repair their home, if it is not in a flood zone; (2) be reimbursed for repair work they have already completed; or (3) sell their property to the state to be torn down.¹⁶⁰

The voluntary buyout option is available only to homeowners located in areas determined to be high risk by Restore Louisiana and the federal government.¹⁶¹ Restore Louisiana does not allow funding to be used for properties that are second homes or for rebuilding homes located in a designated flood zone.¹⁶² Buyouts are awarded at the “current fair market value of the property, . . . determined at the time” Restore Louisiana appraises it.¹⁶³ After a property is purchased through this option, the structures on the property are demolished.¹⁶⁴ Further, Restore Louisiana provides financial relocation assistance, called the Safe Housing Incentive, to homeowners who move to safer areas (outside of flood zones) following the sale of their home; the maximum amount a homeowner can receive between the relocation assistance and voluntary buyout pay cannot exceed \$250,000.¹⁶⁵ Additionally, the new home purchased with this incentive does not need to be in Louisiana, it just has to be outside of federally-designated flood zones.¹⁶⁶ Any additional funding made available to a homeowner—from FEMA,

¹⁵⁷ *Id.* at 13. For those affected by Hurricane Francine, initial surveys were due by August 1, 2023, and they had until March 31, 2025 to file applications. [FAQs](#), RESTORE LA. (last visited Jul. 3, 2025).

¹⁵⁸ RESTORE LOUISIANA MANUAL, *supra* note 156, at 19.

¹⁵⁹ *Id.* at 20–25.

¹⁶⁰ *Id.* at 16–17.

¹⁶¹ *Restore Louisiana Housing*, *supra* note 154.

¹⁶² *Id.*

¹⁶³ RESTORE LOUISIANA MANUAL, *supra* note 156, at 117–18.

¹⁶⁴ *Id.* at 117.

¹⁶⁵ *Id.* at 118–19.

¹⁶⁶ *Id.* at 125.

insurance, or any other source—for the replacement or buyout of a home, will be deducted from the reimbursement and relocation payment received.¹⁶⁷ If a homeowner is determined to be eligible and is not satisfied with the award the program initially offers them, the owner can appeal the award within 60 days of receiving it—although this could potentially result in a decrease in the award amount.¹⁶⁸ Unlike New Jersey’s Blue Acres program, Restore Louisiana does not provide additional administrative support to assist homeowners in navigating the process of selling their home and finding a new place to live—only assistance for repairs is available to homeowners from the state.¹⁶⁹ Restore Louisiana began as a response to severe flooding events in 2016 and was expanded to include homeowners affected by Hurricanes Laura, Delta, and Ida, and a severe storm in 2021. The recent expansion imposed a deadline for filling out the initial survey by August 1, 2023, and submitting applications by March 31, 2025.¹⁷⁰

Restore Louisiana has many of the same features as New Jersey’s Blue Acres. Unlike Blue Acres though, Restore Louisiana bases the appraisal and offer on the value of the house at the time of the appraisal, not necessarily the pre-storm value—likely resulting in far lower offers that could disincentivize homeowners from selling.¹⁷¹ The program has not been as popular as Blue Acres and has been criticized for serving too few people—reportedly, as of October 2019, an earlier iteration of the program resulted in only 144 buyouts of the 580 eligible homeowners who initially expressed interest.¹⁷² Reasons that others chose not to follow through included: the low purchase price cap (\$250,000), the depressed valuations of the houses, the likely unreimbursed expense associated with moving and purchasing a replacement house in a non-flood-prone area, and the length of time for federal assistance to come through (with Louisiana taking longer than other states).¹⁷³ Due to these drawbacks, Louisianans have been more likely to apply for the available funds to repair their existing homes than for full buyouts—

¹⁶⁷ *Id.* at 122–23.

¹⁶⁸ *Id.* at 232.

¹⁶⁹ *Id.* at 50–51.

¹⁷⁰ *Restore Louisiana Housing*, *supra* note 154.

¹⁷¹ RESTORE LOUISIANA MANUAL, *supra* note 156, at 117.

¹⁷² Elizabeth Crisp, [*Stay or Go? Help Available for Frequently Flooded Louisianians But Hurdles Limit Participation*](#), THE ADVOCATE (Oct. 20, 2019).

¹⁷³ *Id.*; Brittany Weiss, [*Buyouts Continue Following 2016 Flood*](#), WBRZ NEWS (Jan. 30, 2020).

in 2020, about \$675 million in grant funds were paid to approximately 17,600 homeowners for repairs, in contrast to the 144 buyouts accepted.¹⁷⁴ As a result, those homeowners choosing to repair their homes, instead of selling, remain in harm's way during the next flood, and the State has lost the opportunity to obtain more land for public green space and flood resiliency—at least for the time being.

iii. Washington's Floodplains by Design

Washington State takes an innovative approach to addressing riparian flooding through a public-private partnership called “Floodplains by Design;” the program provides grants and technical support to “reduce flood risk, restore habitat, improve water quality, support agriculture, and enhance recreation.”¹⁷⁵ Though not a buyout program aimed at threatened oceanfront structures, its purpose and design to protect riparian homeowners from flood risk provide useful information. The Washington Department of Ecology administers the program with the nonprofit Bonneville Environmental Foundation through a competitive grant program to fund projects that “support integrating flood hazard reduction with ecological preservation and restoration.”¹⁷⁶ To date, funding for projects has come from a variety of federal grants, state and local government appropriations, private companies, and nonprofits.¹⁷⁷ Additionally, since 2013, the Washington State Legislature has appropriated over \$359 million to support Floodplains by Design projects, which includes funding from Washington's 2021 “Climate Commitment Act”—which established the state's Cap and Invest program.¹⁷⁸ A unique feature of the Climate Commitment Act is the requirement to consult with

¹⁷⁴ Weiss, *supra* note 173.

¹⁷⁵ [Floodplains by Design: Reducing Risk, Restoring Rivers](#), DEP'T OF ECOLOGY (last visited July 14, 2025).

¹⁷⁶ [Floodplains by Design](#), DEP'T OF ECOLOGY (last visited July 14, 2025).

¹⁷⁷ THE NATURE CONSERVANCY, [FLOODPLAINS BY DESIGN: TOWARD A NEW PARADIGM, INTEGRATED FLOODPLAIN MANAGEMENT STATUS REPORT](#) 4–6, 11 (June 2018) [hereinafter FLOODPLAINS BY DESIGN REPORT]. Specifically, these include the Washington Department of Ecology, the Environmental Protection Agency's Habitat Strategic Initiative, the National Oceanic and Atmospheric Administration, the Puget Sound Partnership, The Nature Conservancy, The Boeing Company, the National Fish and Wildlife Foundation, and The Russell Family Foundation. *Id.* at ii, 11.

¹⁷⁸ DEP'T OF ECOLOGY, *supra* note 176; Greenhouse Gas Emission—Cap and Invest Program, S.B. 5126 §§ 28, 30(2)(a)(iv), 67th Leg., 2021 Reg. Sess. (Wash. 2021) [hereinafter SB 5216 (Wash. 2021)].

Tribes; applicants seeking funding to reduce flooding risk must share information and consult on proposed projects with Tribal partners, and state agencies administering grant programs must consult with federally recognized Tribe on proposed projects.¹⁷⁹

Floodplains by Design reviews proposals to reduce flooding risks submitted by Tribes, local governments, and other entities across the state.¹⁸⁰ In some instances, these plans include property acquisitions and buyouts of homes in high flood-risk areas.¹⁸¹ However, each approved and funded plan varies, so there is no uniform guidance from the state on which properties should be prioritized in buyout programs (e.g., neighborhoods or individual homes).¹⁸² The program is implemented by the grant recipient, so the administration of each program is largely subject to the recipient entity's discretion (including the buyout price, level of administrative support, and any appeals process for property appraisals).¹⁸³ Notably, Floodplains by Design only allows voluntary sales and forbids land acquired through eminent domain or condemnations.¹⁸⁴ The program also provides financial assistance with relocation, though it does not provide specific administrative support for that process.¹⁸⁵

This program has been successful since its implementation in 2013. Floodplains by Design has removed or reduced flood risk for 12,885 homes or structures; restored or protected 176 miles of rivers; and created or improved 44 public recreation areas, among other accomplishments.¹⁸⁶ However, its success hinges on the support of its local nonprofit and corporate partners. To implement a similar program elsewhere, supportive nonprofits that could provide requisite technical experience and sufficient corporate or state funding would be necessary.

¹⁷⁹ SB 5216 § 6 (Wash 2021).

¹⁸⁰ See, e.g., DEP'T OF ECOLOGY, *supra* note 176 (showing among applications submitted for the 2025–2027 funding cycle, applications from cities, public water systems, Tribe, and Nonprofits).

¹⁸¹ *Id.*; FLOODPLAINS BY DESIGN REPORT, *supra* note 177, at A-1–A-2, A-15–A-17.

¹⁸² [Grants & Loans Guidance and Forms](#), DEP'T OF ECOLOGY (last visited July 14, 2025) (stating that each grant recipient is in charge of implementing and managing their grant).

¹⁸³ *Id.*; DEP'T OF ECOLOGY, [FLOODPLAINS BY DESIGN GRANTS FUNDING GUIDELINES 2023-25](#) 23–24 (Oct. 2021).

¹⁸⁴ *Id.* at 24.

¹⁸⁵ *Id.*

¹⁸⁶ DEP'T OF ECOLOGY, *supra* note 176.

iv. New York's Blue Buffers Program

In 2024, New York State created a voluntary buyout program called the Blue Buffers Voluntary Buyout Program (Blue Buffers).¹⁸⁷ The program is funded entirely by the “Clean Water, Clean Air, and Green Jobs Environmental Bond Act of 2022” (EBA)—which provides \$4.2 billion for projects that protect “water quality, help communities adapt to climate change, improve resiliency and create green jobs.”¹⁸⁸ Of the \$4.2 billion available in funding from EBA, up to \$250 million may be dedicated to voluntary private property buyouts.¹⁸⁹ Any state agency, municipality or nonprofit organization may use EBA funds to: (1) purchase private real property identified as at-risk to flooding from willing sellers, based upon the “pre-flood fair market value of the subject property;” (2) “demolish and remov[e] structures and/or infrastructure on the property;” and (3) “restor[e] natural resources to facilitate beneficial open space, flood mitigation, and/or shoreline stabilization.”¹⁹⁰ Only owners of property located in areas that are at risk of flooding are eligible for a buyout.¹⁹¹ Property that qualifies as “at-risk of flooding” includes: (1) property within the FEMA flood-insurance map’s 100-year floodplain, (2) property that would otherwise qualify for a FEMA post-emergency buyout, (3) property that has been identified in a government study as “suitable for the location of a flood risk management or abatement project in areas immediately proximate to” waterways, and (4) property that has been determined

¹⁸⁷ Press Release, Governor Kathy Hochul, [Governor Hochul Announces Comprehensive Resiliency Plan to Protect New Yorkers From Extreme Weather](#) (Jan. 9, 2024).

¹⁸⁸ *Clean Water, Clean Air and Green Jobs Environmental Bond Act*, STATE OF N.Y. (last visited July 14, 2025); N.Y. DEP’T ENV’T CONSERVATION, [CLEAN WATER, CLEAN AIR AND GREEN JOBS ENVIRONMENTAL BOND ACT OF 2022: ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE 2](#) (2024).

¹⁸⁹ N.Y. ENV’T CONSERV. LAW § 58-0301 (“Not more than two hundred fifty million dollars (\$250,000,000) of this amount shall be available for projects pursuant to [purchase private real property under] subdivision two of section 58-0303 of this title.”); see *New York Environmental Bond Act: Funding Overview*, STATE OF N.Y. (last visited July 14, 2025) (under “Funding Allocation” click on the pie slice labeled “Restoration & Flooding Risk Reduction”).

¹⁹⁰ N.Y. ENV’T CONSERV. LAW § 58-0303(2)(c); N.Y. HOMES & CMTY. RENEWAL, [HOUSING TRUST FUND CORP. REQUEST FOR PROPOSALS: BLUE BUFFERS VOLUNTARY FLOOD RISK PROPERTY BUYOUT PROGRAM I](#) (June 2024) [hereinafter *Housing Trust Fund RFP*].

¹⁹¹ See *Blue Buffers Information Request Form*, N.Y. HOMES & CMTY. RENEWAL (last visited July 14, 2025) (“Blue Buffers is required by law to restrict voluntary buyouts to at-risk properties . . . Only homeowners in [] identified areas will be able to apply for a buyout.”).

to “significantly exacerbate flooding in other locations.”¹⁹² Additionally, the buyout program imposes requirements and limitations on the allowed uses of acquired properties and prioritizes ecosystem function.¹⁹³ For example, the statute requires that land purchased with EBA funding must “be restored and maintained in perpetuity in a manner that, aims to increase ecosystem function, provide additional flood damage mitigation for surrounding properties, protect wildlife habitat, and wherever practicable and safe, allow for passive and/or recreational community use.”¹⁹⁴ The first round of awards to nonprofits interested in serving as administrators were anticipated to be awarded in October 2024.¹⁹⁵

Since the program is so new, it is difficult to compare its efficacy and implementation strategies to other state programs at this time. Experience with prior post-disaster buyouts foreshadow problems that may arise with the Blue Buffers program, at least as it is implemented in New York City. First, for instance, the flooding histories of properties are “notoriously elusive” and sellers are “allow[ed] to pay a [] credit to the buyer” to avoid disclosing information about prior flooding—meaning that a homeowner may encounter difficulty trying to determine the extent to which they are at risk of future flooding.¹⁹⁶ Moreover, though more than half of New York City residents live in a flood zone, the lack of available affordable housing and increasing rents and real estate prices in the city limit the options available to residents who might otherwise want to use Blue Buffers to relocate.¹⁹⁷ Additionally, those who accept buyouts to relocate may end up gentrifying other neighborhoods and displacing current residents. Despite these potential downsides in New York City, Blue Buffers shares many of the same features as New Jersey’s Blue Acres program and may in time prove to be just as successful.

¹⁹² N.Y. ENV’T CONSERV. LAW § 58-0303(2)(h); see also [Blue Buffers Q&A Information Session](#), N.Y. HOMES & CMTY. RENEWAL 2 (Jul. 10, 2024) [hereinafter *Blue Buffers Q&A*].

¹⁹³ N.Y. ENV’T CONSERV. LAW § 58-0303(2)(f).

¹⁹⁴ N.Y. ENV’T CONSERV. LAW § 58-0303(2)(f).

¹⁹⁵ See *Blue Buffers Q&A*, *supra* note 191, at 5; *Housing Trust Fund RFP*, *supra* note 190, at 6.

¹⁹⁶ Liz Donovan, [Buyouts on the Ballot: 10 Years After Sandy, New York Considers New Funding for Voluntary Relocation](#), CITY LIMITS (Oct. 24, 2022). Additionally, in 2021 alone, New York City resident spent over \$23.5 million on purchasing homes with previous flood damage.

¹⁹⁷ *Id.*

v. *California’s Sea Level Rise Revolving Loan Program*

California has been contemplating creating a voluntary buyout program for failing coastal properties for several years, but has not yet implemented one as of 2024. California State Senator Ben Allen proposed legislation first in 2021, then again in 2022, that would have authorized California’s state bank—the California Infrastructure and Economic Development Bank (I-Bank)—to establish a revolving loan account to provide low-interest loans to counties and communities to buy “vulnerable coastal propert[ies]” threatened by sea level rise from private property owners.¹⁹⁸ In theory, under the Sea Level Rise Revolving Loan Program (loan program), a participating local government would purchase private properties and then rent them out in order to recoup the purchase price and repay the loan until the property becomes uninhabitable, at which time the municipality would demolish the structure and use the land for public benefits like open space, sea level rise mitigation, and resilience.¹⁹⁹

Under the loan program, properties eligible for buyout would be limited to those that could provide: (1) an evaluation of the benefits of “future use of the property for sea level rise mitigation as natural infrastructure or for coastal public access;” (2) a plan to determine when the property is uninhabitable; and (3) “evidence that the property will be able to generate enough revenue to repay the loan.”²⁰⁰ Once an eligible property is identified, a local jurisdictions would be

¹⁹⁸ Sea Level Rise Revolving Loan Program, S.B. 83, 2021 Leg., Reg. Sess. (Cal. 2021); Sea Level Rise Revolving Loan Pilot Program, S.B. 1078, 2022 Leg., Reg. Sess. (Cal. 2022) The 2022 bill proposed to add to the Cal. Public Resources Code a definition for vulnerable coastal properties stating:

any improved land containing a building or structure, or agricultural land, identified by a local jurisdiction as vulnerable to sea level rise . . . located in a jurisdiction with a certified local coastal program that includes policies or programs, or both, to avoid, minimize, and mitigate the impacts of sea level rise, which has been developed pursuant to a comprehensive vulnerability assessment and certified by the California Coastal Commission.

S.B. 1078 § 30978(f).

¹⁹⁹ S.B. 1078 §§ 30978(b), 30979.

²⁰⁰ *Id.* § 30978(b)(1), (5)-(6).

able to apply to the I-Bank with their “vulnerable coastal property plan,” the plan would include: (1) a description of how the property meets the defined eligibility requirements, (2) a timeline for the rental process, (3) a management plan, (4) a lease agreement or plan for leasing, and (5) an explanation of how the structure will be removed when it is no longer safe to inhabit, including a “comprehensive implementation plan and funding mechanisms.”²⁰¹ Under this program, eligible property owners would have been able to receive a fair market price for the home, guaranteed by a third-party appraisal,²⁰² so they could move to a safer location. The county or community would then rent out the property “until [it] could no longer be lived in safely” to recoup the money spent on purchasing the property.²⁰³ This time period would be defined by the methodology put forth in the local jurisdiction’s funding application.²⁰⁴

The loan program passed both chambers of the California Legislature in 2021 and 2022, but Governor Gavin Newsom vetoed the bill both times, noting that it did not “comprehensively address the costly activities envisioned, likely to be carried out over decades.”²⁰⁵ Senator Allen recognized the ambiguity present in his proposal, noting that it was difficult to know how many jurisdictions would take advantage of the new tool or otherwise predict how large the loan program would be.²⁰⁶ However, the program, theoretically, would have funded itself by allowing municipalities to rent out the purchased at-risk properties in order to payback their loans. However, as written, the loan programs did not have any requirements for how long a property must remain habitable once sold, nor did they set criteria for determining when or whether a property was habitable.

The loan program suffers from an inherent logical disconnect—a property would need to be vulnerable enough to motivate a reasonable homeowner to want

²⁰¹ *Id.* § 30979(a)(1).

²⁰² *Id.* § 30979(a)(1)(f).

²⁰³ Helen Wiley, *A Q&A On California’s Proposed Revolving Loan Program for Coastal Retreat*, WHARTON SCH. (June 1, 2021).

²⁰⁴ S.B. 1078 § 30978(b)(5).

²⁰⁵ [Letter from Gavin Newsom, Governor of California, to Members of the California State Senate](#) (Oct. 7, 2021); [Letter from Gavin Newsom, Governor of California, to Members of the California State Senate](#) (Sept. 29, 2022).

²⁰⁶ Wiley, *supra* note 203.

to leave it rather than stay and enjoy their investment, yet safe and sound enough for the municipality to rent it out at a reasonable market rate for a sufficient number of years, perhaps for decades, in order to recover and repay the loan, and to keep the revolving fund funded.²⁰⁷ With the innate risk in renting out a coastal property whose seller was seeking to avoid the risk of potentially imminent damages from coastal erosion, municipalities, and the State, would have faced an increased litigation risk if injury occurred to a renter of these vulnerable properties. This discrepancy, along with the lack of guidance on how long a property must remain habitable for leasing, present an inevitable and potentially insurmountable obstacle for addressing threatened oceanfront structures through a revolving fund.

The loan program was also criticized as essentially establishing a bailout or subsidy for wealthy oceanfront homeowners whose risky housing purchases had proved to be bad investments.²⁰⁸ As one critic explained:

Sea level rise is a slow, predictable climate problem . . . research clearly shows where and to what extent sea levels will rise over the next 80 years. Owners of waterfront properties have all the information they need to project that the value of the properties will one day drop. They could sell their homes today, but they want to keep living at the beach until the waves literally crash into their living rooms. By selling to the government, they get both the lifestyle and the profits.²⁰⁹

²⁰⁷ Rosanna Xia, *How Should California Confront the Rising Sea? These Lawmakers Have Some Bold Ideas*, L.A. TIMES (Aug. 20, 2021).

²⁰⁸ Carey L. Biron, *How Rising Sea Levels Are Threatening U.S. Coastal Homes*, WORLD ECON. F. (Jul. 23, 2021) (noting that the bill “has drawn criticism . . . with some saying it would effectively subsidize some of the country’s wealthiest property owners, whose multi-million dollar beach houses and mansions dot California’s coastline.”).

²⁰⁹ Chelsea Kirk, *A Buyout Program for the Rich Passed the CA State Senate*, KNOCKLA (June 10, 2021). Interestingly, the bills’ sponsor, State Senator Allen, represents a district that includes the wealthy retirement community of Rancho Palos Verdes, California, which benefitted from the 2024 Hazard Mitigation Grant funding program described above. *Id.*; *supra* notes 117–132.

Of course, this criticism could be lobbed at many of the buyout programs discussed in this article. These equity concerns are particularly heightened in areas like North Carolina’s Outer Banks, where vacation homes with high property values (the bailout of which should arguably *not* be subsidized) intersect with high natural resource values (the protection of which is in the public interest) in some communities, while, in other communities, a not-insignificant population of year-round residents own more modest homes and earn more modest incomes.²¹⁰ Multiple factors must be taken into consideration to avoid an inequitable result, including the structuring of criteria for eligibility, limits and terms of payouts, the source of funding, and other key features of a program to avoid injustice and waste of government resources.

Ultimately, the California loan program has not become law, but could be introduced again. Additional information will be needed to answer the questions raised by the first two iterations of the bills and to determine whether the proposed California Sea Level Rise Revolving Loan Pilot Program could be effective in practice.

vi. Hawai‘i’s Managed Retreat Report

In 2019, the State of Hawai‘i Office of Planning and Sustainable Development’s Coastal Zone Management Program (CZM Program) published a report assessing the feasibility of managed retreat in Hawai‘i (hereinafter Hawai‘i Managed Retreat Report).²¹¹ The report, and the state’s ultimate decision not to adopt a state-funded managed retreat program, offers useful lessons for North Carolina.

²¹⁰ Summer Stevens, [*The State of Housing on the Outer Banks: Part One*](#), COASTLAND TIMES (July 29, 2023). *Compare* home prices and earnings in two examples of coastal communities, Harkers Island, NC (median property value \$295,500 and median earnings for men \$45,625) and Duck, NC (median property value \$705,700 and median earnings for men \$140,208). [*Harkers Island, NC*](#), DATA USA, (last visited Aug. 26, 2025).

²¹¹ OFF. OF PLANNING, COASTAL ZONE MGMT PROGRAM, [*ASSESSING THE FEASIBILITY AND IMPLICATIONS OF MANAGED RETREAT STRATEGIES FOR VULNERABLE COASTAL AREAS IN HAWAI‘I FINAL REPORT*](#) ii (Feb. 2019) [hereinafter Hawai‘i Managed Retreat Report]. The report was commissioned pursuant to the 2013 Hawai‘i Ocean Resources Management Plan. *Id.*; HAWAI‘I COASTAL ZONE MGMT. PROGRAM, [*HAWAI‘I OCEAN RES. MGMT. PLAN*](#) (Jul. 2013).

To inform the assessment and final report, the CZM Program and its consultants undertook a multi-phased project: (1) conducting background research, including a literature review, on managed retreat in other jurisdictions, (2) using models to evaluate how retreat would impact different land uses in Hawai‘i (e.g., resorts and hotels, urban areas, single family homes, and critical infrastructure), and (3) hosting a symposium with stakeholders and experts.²¹² As part of the background research, the authors first analyzed the implementation of managed retreat strategies in other states and countries, and identified key priority areas necessary for a managed retreat program—including, but not limited to: (1) community participation, (2) comprehensive planning for retreat, (3) funding, (4) preservation of open space and wetlands after retreat, and (5) incorporation of retreat into land use and shoreline management laws.²¹³ The authors then conducted a number of focus groups with residents, including single-family homeowners, and hotels to determine their main concerns.²¹⁴ Common themes across the groups include community understanding of coastal threats and potential adaptation strategies, requiring open space to be preserved once retreat occurs to buffer against future storms and coastal erosion, and concerns over how managed retreat programs would be funded.²¹⁵ In particular, single-family homeowners noted that oceanfront homes in Hawai‘i generate significant income for the state, and retreat will likely lead to a loss of that revenue.²¹⁶

After analyzing other programs and speaking with stakeholders, the Hawai‘i Managed Retreat Report concluded it was not feasible for Hawai‘i to implement a statewide managed retreat program at the time of publication.²¹⁷ State-funded voluntary buyouts at pre-disaster fair market value would be extremely expensive due to high property costs in Hawai‘i.²¹⁸ Specifically, the report noted that, “there may never be enough money for a statewide buyout

²¹² Hawai‘i Managed Retreat Report, *supra* note 211, at ii.

²¹³ *Id.* at 8–21.

²¹⁴ *Id.* at 22, 28, 31–32, 34–35.

²¹⁵ *Id.* at 21, 25, 28–29, 31–32, 35–37.

²¹⁶ *Id.* at 31–32.

²¹⁷ *Id.* at 57. Specifically, the report stated that a “more thorough, detailed understanding of retreat and it entailed is necessary” before it can be implemented in the state. *Id.*

²¹⁸ *Id.* at 52–53.

program, but it may be possible in selective cases.”²¹⁹ Additionally, there is limited available land for the State of Hawai‘i to provide that is suitable for development, including land that meets the criteria to build critical infrastructure (like roads and utilities).²²⁰ Given the extremely high cost of a managed retreat program, the Hawai‘i Managed Retreat Report recommended creating a statewide leadership committee to work with counties and individuals to create a state-wide managed retreat strategy.²²¹ For the same reasons, North Carolina will want to create a committee with representatives of responsible agencies and stakeholder groups to develop a managed retreat program tailored to the state’s needs.

C. North Carolina’s Current Approaches

North Carolina currently has a piecemeal, ad hoc approach to addressing the problem of threatened oceanfront structures. For example, property owners affected by certain federally declared natural disasters may be eligible to receive funding to rebuild. Separately, the National Park Service has had some success with addressing threatened structures before they collapse, both by encouraging owners to preemptively remove homes that are encroaching on the beaches of Cape Hatteras National Seashore to avoid the harm that would accompany their future collapse,²²² and by buying out two owners of imminently threatened homes and then demolishing them to return the beach to the National Seashore. However, none of the options available provide a holistic solution to North Carolinian coastal property owners who wish to reduce their risk before a hurricane hits or their structure collapses due to coastal erosion.

i. ReBuild NC Strategic Buyout Program

North Carolina currently offers property owners in flood-prone areas the opportunity to sell their homes at fair market value through the ReBuild NC

²¹⁹ *Id.* at 53.

²²⁰ *Id.* at 53–54.

²²¹ *Id.* at 57.

²²² Kayli Thompson, [*Outer Banks Homes Keep Falling into the Ocean. High Costs Are a Reason Why*](#), TRIANGLE BUS. J. (Oct. 23, 2024) (explaining how the cost to move an oceanfront home to a new location can exceed the value of the home).

Strategic Buyout program (buyout program).²²³ Homes purchased through this program are demolished and maintained as green space by the local government to promote flood resiliency.²²⁴ However, these buyouts are only available in areas that were affected by certain natural disasters (namely, Hurricanes Matthew (2016) and Florence (2018)) with much of the damage being caused inland, and not to coastal communities.²²⁵ Additionally, the buyout program must prioritize areas with 40% or more low-to-moderate income households.²²⁶ The buyout program is primarily federally funded, mostly from HUD’s CDBG program.²²⁷ Owners of second homes are not eligible for the buyout program, though owners of rental properties with tenants who use the house as their primary residence are.²²⁸

Eligible applicants can also receive both a Risk Reduction Incentive and Affordable Housing Incentive.²²⁹ Recipients of a Risk Reduction Incentive are eligible for up to \$10,000 to move to an area of reduced risk elsewhere in the state.²³⁰ The three Affordable Housing Incentives—(1) the Affordable Rental Incentive, (2) the Affordable Homeownership Incentive, and (3) the Matching Down Payment Incentive—support recipients who want to establish a new primary residence after abandoning their current one after receiving a buyout.²³¹ The Affordable Rental Incentive provides participants with annual income at or below 80% of the area median income (AMI) funding to relocate within their county; funding is “based on a percentage of the average Fair Market Rent by county” and on the rental size in an area with reduced flooding risk.²³² The Affordable Homeownership Initiative provides varying amounts of assistance to

²²³ *Strategic Buyout Program Manual*, N.C. OFF. OF RECOVERY & RESILIENCE 9–10 (Oct. 6, 2023) [hereinafter NCORR Strategic Buyout Program Manual]; see also *Frequently Asked Questions: ReBuild NC CDBG-DR Buyout Program*, N.C. OFF. OF RECOVERY & RESILIENCE 6–8 (last visited July 14, 2025).

²²⁴ NCORR Strategic Buyout Program Manual, *supra* note 223, at 22.

²²⁵ *Id.* at 10, 16–17.

²²⁶ *Id.* at 17.

²²⁷ *Id.* at 9.

²²⁸ *Id.* at 22.

²²⁹ *Id.* at 25–26.

²³⁰ *Id.* at 25; *Strategic Buyout Program Overview*, N.C. OFF. OF RECOVERY & RESILIENCE 24 (Oct. 3, 2021).

²³¹ See NCORR Strategic Buyout Program Manual, *supra* note 223, at 25–26.

²³² *Id.* at 26. The rental rate and rental size are determined by HUD. *Id.*

participants who make at or below 80% AMI, who are seeking to buy a new primary residence in an area of reduced risk in the same county as their previous residence.²³³ Lastly, the Matching Down Payment Incentive provides up to \$50,000 to participants who make up to 120% of the AMI who want to buy a new primary residence in an area of reduced risk within the same county as their previous home.²³⁴

While the buyout program may be helpful to many communities affected by Hurricanes Matthew and Florence, it does not address the problem of oceanfront structures that are critically threatened due to coastal erosion and sea level rise, but not hurricanes, in places like Rodanthe and other villages on Hatteras Island. Even if the buyout program funding were not limited to those two hurricanes, it would likely not be available to most homeowners in areas like Rodanthe, as assistance is limited to primary residences in areas with residents with low to moderate income. The average home price on Hatteras Island, for example, is over half a million dollars, and many of these houses are secondary residences or investment properties, rendering them ineligible.²³⁵

Additionally, systemic property rights issues can impose hurdles to successful, voluntary state buyout programs in North Carolina and elsewhere. For example, heirs' property owners who have been impacted by severe storms and flooding have historically struggled to access federal funding from agencies like HUD and FEMA because the programs distributing the funding often require free and clear title.²³⁶ In a buyout program, for example, an eligible homeowner must hold clean, insurable, and merchantable title, which includes being able to pay off

²³³ *Id.* Funding varies by county based on the average real estate value. *Id.*

²³⁴ *Id.*; [Homeownership Assistance Program](#), REBUILD NC (last visited July 14, 2025).

²³⁵ See [April 2025 MLS Statistical Report](#), OUTER BANKS ASS'N OF REALTORS 10 (Apr. 7, 2025) (showing median sale price of \$655,000 year-to-date, as of April 2025); see also [Hatteras Island Home Buyers FAQ's](#), NC 12 REALTY (last visited July 14, 2025) (stating that there are only around 4,000 full time residents in Hatteras Island and that there is "seemingly [] a shortage of full-time rental options").

²³⁶ See generally, RORY FLEMING ET AL., N.C. SEA GRANT, [SPLITTING HEIRS: THE CHALLENGES POSED BY HEIRS' PROPERTY OWNERSHIP TO COASTAL RESILIENCE PLANNING](#), (Aug. 2016) (discussing the challenges of heirs' property owners accessing disaster relief following Hurricane Katrina).

any liens against their property at or before closing.²³⁷ Thus, a homeowner without clear title must find legal assistance to help them before they can participate in the program.

Moreover, if a homeowner has an outstanding mortgage, some of the additional incentive funds they can access will be reduced by the outstanding amount of the mortgage on the property.²³⁸ Depending on the price of the property and the outstanding mortgage on a property, the buyout program may not end up assisting a homeowner's move to a safer location.

Another problem is simply unwillingness to leave. Some community members, particularly in communities that have a longstanding familial relationship with the land (e.g., those with family members buried at the local cemetery or with religious or spiritual connections to the land), may have no desire to leave or may be unwilling to do so.²³⁹ While a new state-run program may not be able to fully address a person's desire to not leave an area, it should be noted and incorporated as a factor that may impact the success of a voluntary buyout program.

ii. National Park Service Buyouts

In 2023, the National Park Service, through a pilot project, purchased two homes in Rodanthe that were structurally unsound, at risk of collapsing, and encroaching on the federally owned beach due to the westward migration of the coastline.²⁴⁰ The Park Service paid fair market value for the homes using funds from the Land and Water Conservation Fund.²⁴¹ Fair market value was determined by a third-party appraiser and the Department of Interior's Appraisal

²³⁷ NCORR Strategic Buyout Program Manual, *supra* note 223, at 31, 55.

²³⁸ *Id.* at 26–27, 33.

²³⁹ See, e.g., Catherine Kozak, *Buried in Time*, OUTER BANKS COASTAL LIFE (Sept. 21, 2016) (discussing how sea level rise is threatening centuries old cemeteries).

²⁴⁰ *Cape Hatteras Threatened Oceanfront Structures*, *supra* note 1.

²⁴¹ *Id.* The Land and Water Conservation Fund is a federal fund that “invests earnings from offshore oil and gas leasing” to acquire land and water “necessary to achieve the natural, cultural, wildlife, and recreation management objects of the National Park Service.” *Id.*

and Valuation Services Office.²⁴² After purchasing the houses, the National Park Service hired a third-party contractor to remove the homes and restore the beach for use by National Seashore visitors.²⁴³

While these buyouts were an expedient solution to address two houses whose imminent collapse was adversely affecting the National Seashore, similar buyouts would not be workable on a broad scale going forward. Purchasing multiple failing homes at pre-collapse fair market value would be prohibitively expensive and set an unworkable precedent. Additionally, the Land and Water Conservation Fund has multiple national interests to which it must direct its funds that are outside of North Carolina.²⁴⁴ A better use of the Land and Water Conservation Fund money would be to add to and improve national parks nationwide, not buy out multiple additional oceanfront homeowners. Moreover, depending on the degree to which the coastline has eroded past property lines, and the beach has migrated toward a house, the house might be fully situated on the federally owned beach, creating the untenable situation of the federal government purchasing property that it technically already owns at least in part. In sum, the National Park Service using the Land and Water Conservation Fund to buy each house that, because of natural barrier island processes, comes to be situated on the National Seashore is not a viable solution to the problem of collapsing houses on the North Carolina coast.

V. LESSONS LEARNED

*Roll on, thou deep and dark blue Ocean—roll!*²⁴⁵

The current solutions available under North Carolina state law do not sufficiently address the problem of collapsing beachfront structures for the reasons described above, but the programs developed by other states can offer valuable lessons for designing a better solution for North Carolina. If North

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ [Past Projects](#), LAND & WATER CONSERVATION FUND (last visited July 14, 2025) (showing all projects receiving funds from the program).

²⁴⁵ Lord Byron, [Canto the Fourth](#), in CHILDE HAROLD'S PILGRIMAGE (The Project Gutenberg, 2004).

Carolina were to try to create a funding program for homes at risk of imminent collapse from erosion or plagued by repetitive flooding, key features and takeaways from other state's programs that it should consider include:

1. Participation in any buyout program must be voluntary.

This is a universal feature in all the federal and state programs described herein, and it should go without saying. An assessment of the potential use of eminent domain and the equity concerns it would raise is beyond the scope of this article, as is an assessment of the potential legal claims that homeowners would likely attempt to bring against North Carolina should it try to impose involuntary buyouts of threatened oceanfront structures.²⁴⁶

2. Considerations of fairness and protecting overburdened communities must be a part of the program.

The program should consider equity issues and aim to ensure that otherwise ineligible property owners, including heirs' property owners, and tenants are not unfairly precluded from program participation through no fault of their own. Any program that is seen as primarily providing a subsidy for wealthy real estate investors will likely experience the same pushback as the California Sea Level Rise Revolving Loan Fund. The demographic makeup of each state's coastal population is different, and North Carolina has both expensive, multi-million-dollar homes and moderate- to low-income family homes on its coast. Ideally, funding that benefits second-home or investment-home owners would come entirely or primarily from a fund to which the owners contribute, like NFIP or other insurance funds, or from federal funds intended for increasing coastal resilience. Accordingly, state funds should be dedicated to primary homeowners on the coast, and those who have borne the greater burden of environmental and climate injustices.

²⁴⁶ This is not to say that situations cannot exist, however, in which the uncompensated forced demolition of an oceanfront structure may be appropriate, such as when a structure has come to be located entirely on public trust resources like the wet sand beach, when the structure constitutes a public nuisance, or otherwise creates an unreasonable hazard to public health and safety.

3. The program should incentivize homeowners to act responsibly.

Any buyout program should encourage homeowners to act in such a way that the threatened structure is removed before it can cause harm by collapsing. This can be accomplished either through providing appropriate levels of financial assistance to the homeowner to demolish or move the structure, or through a buyout program that results in a responsible government agency or nonprofit entity taking ownership of the structure and demolishing it. The program should not reward homeowners who roll the dice by delaying action.

4. Objective criteria and procedures.

Eligibility criteria, pricing guidelines, and program processes should be objective and spelled out clearly, along with any other such details, to ensure transparency and remove the opportunity for inconsistency or bias in its implementation. The program should tie payout amounts to objective, measurable, reasonable criteria, like the pre-disaster fair market value that the New Jersey Blue Acres program considers or the current fair market value that Restore Louisiana considers, and should impose a reasonable payout cap.

5. No duplication of benefits.

The program should avoid duplication of benefits by adjusting payouts to account for such benefits as flood insurance claims for structural repairs that the owner received but did not invest into the house. Benefits for the repair of oceanfront structures already determined to be at imminent risk of collapse should not be paid out if funds to support the removal or relocation of that structure are available.

6. Administrative assistance.

The program should offer the kinds of administrative assistance for the participant in dealing with, for instance, banks, mortgagors, appraisers, title clearing, etc., that the New Jersey Blue Acres program offers. The program could offer benefits like relocation financial assistance for owners—at least to low- and

moderate-income households—not merely to dislocated tenants. That kind of administrative and financial assistance may account for the difference between the popularity of New Jersey’s Blue Acres program and the comparative disuse of Restore Louisiana.

7. Disposition of the land after buyout.

A program that buys out a homeowner or pays for removal of a house should ensure that the land under and waterward of the footprint of the removed structure is returned to the public trust as open space to provide flood resiliency (as buffers, wetlands, or stormwater storage), wildlife habitat, and/or recreational space. Construction of a new structure should not be allowed there.

8. Complete removal.

The program should ensure that all sources of debris and pollution are removed with the house, including septic systems, underground fuel storage tanks, utility wiring and pipes, sandbags, fences, and other appurtenances. Moreover, program incentives should prioritize and encourage removal over relocation for most oceanfront structures in quickly eroding sections of North Carolina’s coast. Relocation is not a viable long-term option for many coastal communities, particularly those located on the narrow, unstable Outer Banks, where the number of remaining buildable lots are inherently limited. Moving inland—whether to the furthest landward portion of an oceanfront lot or to another lot located further landward—might buy a homeowner some time, but the problem could recur within a few decades. Current state development setback requirements, which are based on historic rates, will likely be insufficient to protect new coastal development in the face of accelerating sea level rise, increasing erosion rates, and intensifying storm activity.

9. Prompt processing.

The program should ensure that the application process is not overly cumbersome, applications are processed punctually, and payments are made promptly, so that owners are not forced as a practical matter to abandon the

program altogether. A person whose home has been destroyed or is on the verge of collapse may not be able to use a program that takes years to provide benefits and may instead seek out short-term solutions that do not protect them long-term.

10. Funding sources.

Funding sources should be clear, long-lasting, and dependable. Given the current scope of the problem, with numerous coastal structures already threatened or on the verge of collapse, and the likelihood that the problem will rapidly grow as sea level rise, erosion rates, and storm activity accelerate, a viable buyout program that meets the above criteria will require enormous funds. Any buyout program that seeks to address the problem holistically will require more funding than can currently be expected to come from the state's budget. Federal funding sources, including the future of FEMA generally, are likewise uncertain in the current administration. Accordingly, funding sources should be renewable or revolving to the extent feasible, like the California legislation attempted to establish.

VI. CONCLUSION

The collapsing houses, failing septic systems, and ensuing debris fields and pollution currently plaguing Cape Hatteras National Seashore at Rodanthe are surely the tip of the iceberg. North Carolina has the second longest ocean shoreline of any Eastern state, and many miles of that coastline comprise fragile, shifting barrier islands where the tides are already lapping at the first line of oceanfront homes.²⁴⁷ In the face of climate change, accelerating sea level rise, and worsening erosion rates, the environmental and public health hazards posed by houses on the brink of collapse, exposed septic tanks, and post-collapse debris will only become more common along the Outer Banks if left unaddressed. The interagency report issued in August 2024, entitled "Managing Threatened Oceanfront Structures: Ideas from an Interagency Work Group," proposed many potential solutions, the evaluation of which is beyond the scope of this article.²⁴⁸

²⁴⁷ [Facts About NC Beaches](#), VISITNC (last visited July 11, 2025); *Cape Hatteras Threatened Oceanfront Structures*, *supra* note 1.

²⁴⁸ NC Threatened Structures Workgroup Report, *supra* note 71.

A state buyout program that proactively addresses the factors listed above is only one of those proposals, but it, in combination with other proposed legal and financial reforms, could be an effective way to begin to address this growing crisis.

**WEAKENED WETLANDS, STRONGER THREATS:
BLACK COMMUNITIES IN NORTH CAROLINA POST-SACKETT V. EPA**

Jessica Hardee* and Kaylyn Bryant**

This article examines the environmental and socio-economic impacts of the U.S. Supreme Court’s 2023 decision in Sackett v. EPA, which narrowed the federal government’s authority under the Clean Water Act to regulate wetlands. Focusing on North Carolina, the article explores how this ruling, along with the state’s 2023 Farm Act, has stripped protections from millions of acres of wetlands—especially isolated and seasonal ones—by requiring a “continuous surface connection” to navigable waters for jurisdiction. It emphasizes the critical ecological functions of wetlands, including flood mitigation, water purification, and biodiversity support, and details the disproportionately harmful effects of these regulatory rollbacks on Black communities. Communities that have endured injustices and environmental racism now face bigger risks from floods, economic disaster in fishing, and larger environmental damage. The article concludes with recommendations for mitigating these harms through local government action and nonprofit initiatives, calling for more proactive wetland conservation to uphold environmental justice and community resilience.

I. INTRODUCTION

In 2023, the U.S. Supreme Court’s decision in *Sackett v. Environmental Protection Agency* reshaped the interpretation of the Clean Water Act’s (CWA) authority to regulate wetlands.¹ This ruling narrowed the scope of wetland protections, impacting a wide range of land-use activities and environmental conservation efforts. The court’s decision to diminish federal oversight of certain wetlands poses significant consequences for communities and industries that rely

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¹ *Sackett v. EPA*, 598 U.S. 651 (2023).

on healthy wetland ecosystems, particularly in coastal areas.² About 42% of all residents of North Carolina are located in 39 coastal and flood-vulnerable counties, which cover most of the coastal region of the state, main river systems, and wetlands. The Coastal Plain mega region which occupies approximately 45% of the state land also holds 95% of all remaining wetlands in North Carolina, as well as a wide scope of river systems, estuaries, and swamps. Although there are limited direct figures that combine coastal, river, and wetland-adjacent populations, on the whole, these data support the idea that almost 50% of the state population lives in the counties influenced by coastal and freshwater systems. By also adding the inland counties bordering the major rivers and the smaller wetlands, it could easily increase this percentage to 50-60 of North Carolina's population.³

Water-related places are important for their economy, culture, and everyday life. Black communities are a major part of the population in water-related places in North Carolina, with many living in low-lying and wetland-rich places. Since many Black people in North Carolina rely on wetlands, these communities are especially affected by water pollution.⁴ Black communities in North Carolina are among the most impacted groups because many depend on wetland ecosystems not only for their livelihoods—such as fishing, agriculture, and small-scale aquaculture—but also for cultural heritage connected to these

² This article was written before the Environmental Protection Agency's recent announcement that the current definition of "Waters of the United States" is going to be reviewed. For more information see Press Release, U.S. Env't Prot. Agency, [Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule](#) (Mar. 12, 2025).

³ See Michael Cline, [Updated Insight on Population in Hurricane Helene's Path](#), N.C. OFF. OF STATE BUDGET & MGMT. (Oct. 23, 2024); see also Andy R. Bobyarchick & John A. Diemer, [Coastal Plain](#), NCpedia (2025); Brad Rich, [A Disturbing Report About Wetlands](#), COASTAL REVIEW (Dec. 16, 2013).

⁴ U.S. GLOB. CHANGE RES. PROGRAM, [Southeast](#) in FIFTH NATIONAL CLIMATE ASSESSMENT (2023) (stating that "Land use decisions dating back to the post-Civil War Reconstruction era placed Black communities in lower-lying historically flood-prone areas" such as Princeville, N.C. where they are more vulnerable to flooding and other risks); see also [Exploring Black and African American Heritage](#), U.S. DEP'T INTERIOR (Feb. 1, 2023) (describing how forested wetlands in North Carolina was important for those escaping slavery prior to the Civil War).

natural landscapes. The loss or degradation of wetlands thus has profound social, economic, and environmental implications for communities.⁵

This article covers four concepts. Part 2 will explore the importance of wetlands in North Carolina for communities and the ecology of the state. Part 3 will review the legal history leading up to the Supreme Court's decision in *Sackett* and an analysis of the *Sackett* decision itself. Part 4 will also consider responses to *Sackett* through a review of the North Carolina 2023 Farm Act and the 2023 Conforming Rule. Part 5 will assess the impacts of this legal framework on wetlands in North Carolina, with particular attention to how these changes affect historically marginalized communities, including Black communities. Finally, Part 6 will offer recommendations on how to address the challenges posed by the *Sackett* ruling and the 2023 Farm Act to better protect wetlands and support the people who depend upon them.

II. WETLANDS AND THEIR SIGNIFICANCE

A. Importance of Wetlands to North Carolina's Environmental Health and Fisheries

Wetlands are the most important ecosystem of North Carolina as they provide many environmental, economic, and cultural values. Spreading over 5.7 million acres, wetlands cover about one-sixth of the state's total land area, ranging from coastal salt marshes to freshwater swamps to pocosins.⁶ Yet, wetlands are currently being destroyed.⁷ These ecosystems are an essential component of North Carolina's ecological health, sustaining wildlife, ensuring human communities are protected, and promoting the economic development of the state.⁸

⁵ Corey Davis, [Our Curious Coast: Rivers and Wetlands](#), NORTH CAROLINA STATE CLIMATE OFFICE (July 20, 2022).

⁶ Jerad D. Bales & Douglas J. Newcomb, [North Carolina Wetland Resources](#), in NATIONAL WATER SUMMARY – WETLAND RESOURCES 297-302 (1996) (highlighting the diversity of wetlands across the state).

⁷ NORTH CAROLINA COASTAL FED'N, [NORTH CAROLINA SALT MARSH ACTION PLAN](#) at 7–12 (2024) [hereinafter SALT MARSH ACTION PLAN] (explaining that wetlands in North Carolina are being destroyed by urbanization, agricultural development, and climate change, making preservation a critical priority).

⁸ *Id.*

i. *Natural Buffers Against Flooding*

Wetlands are the first line of defense against flooding, absorbing vast quantities of water during intense rainfall and storm surge events. In North Carolina, the protective function of wetlands is crucial, and routinely relied upon. For example, in the Albemarle-Pamlico Estuarine System, and other coastal regions, wetlands have the capability to protect land area against both storm surges and sea-level rise.⁹ While coastal wetlands cannot fully protect communities from storms and flooding, they can reduce the impact of storm surges, protecting fragile coastal communities.¹⁰

This protection also provides a huge economic impact to coastal communities, with some estimating coastal wetlands along the Gulf and Atlantic save communities roughly \$625 million annually in potential flood damage.¹¹ For example, the storm damage done to North Carolina by Hurricanes Florence alone exceeded \$20 billion in 2018, which would have been much larger without the natural flood protection of wetlands.¹² Preserving and restoring coastal wetlands can minimize projected storm damage in North Carolina, especially to its Outer Banks.

Inland wetlands also help protect communities around them from floods by absorbing extra water and avoiding significant damage. Wetlands in places such as the Cape Fear and Neuse River systems can temporarily store floodwater during major storms and shield the surrounding land and neighborhoods from its

⁹ ALBERMARLE-PAMLICO NAT'L ESTUARY P'SHIP, [COMPREHENSIVE CONSERVATION AND MANAGEMENT PLAN 2012–2022: COLLABORATIVE ACTIONS FOR PROTECTING AND RESTORING THE ALBERMARLE-PAMLICO ECOSYSTEM](#) 3, 9 (2012) [hereinafter ALBERMARLE-PAMLICO PLAN].

¹⁰ [Coastal Resilience Initiative](#), N.C. COASTAL FED'N (last visited July 29, 2025).

¹¹ Siddharth Narayan et al., [The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA](#), 7 SCI. REP. 9463, at 2 (2017) (measuring that coastal wetlands during Hurricane Sandy helped avoid “more than [] \$625 million in flood damages across 12 states,” with an average reductions in damages of about 10% in those regions with wetlands).

¹² STACY R. STEWART & ROBBIE BERG, NAT'L WEATHER SERV., [NATIONAL HURRICANE CENTER TROPICAL CYLONE REPORT: HURRICANE FLORENCE](#) 12 (2019); [National Climate Report September 2018](#), NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (detailing extensive storm damage caused by Hurricane Florence in North Carolina) (last visited July 29, 2025).

effects.¹³ Without these wetlands, flood risks would be compounded by high insurance rates and costs of restoration that residents already struggling with storm damage incur on their own.

ii. *Improving Water Quality*

In many cases, wetlands are considered the "kidneys of the landscape" because they assist with water purification.¹⁴ Like kidneys, wetlands help filter out toxins such as nitrogen, phosphorus, and other sediments, and keep them from reaching sensitive water systems along the coast.¹⁵ Thus, wetlands are also effective at purifying water pollution from agriculture and cities, which leads to cleaner rivers, lakes, and streams.¹⁶

Wetlands are slow and low-flowing water bodies that serve to mature water, promote sediment retention, and absorb nutrients into plant and soil structures.¹⁷ In doing so, they support plant growth without the risk of excess nutrients building up, which could lead to harmful algal blooms that create hypoxic zones, killing aquatic and fish habitats.¹⁸ Wetlands serve as natural filtration systems through uptake by plants, microbial transformation, decomposition of organic matter, and the settling and trapping of sediments.¹⁹ As water moves slowly through these wetlands, excess nutrients and pollutants settle into the soils or become sequestered in plant root systems.²⁰ In addition, wetlands possess a range of bacteria that detoxify some hazardous materials like ammonia

¹³ NORTH CAROLINA DEP'T OF ENV'T QUALITY, [DRAFT NEUSE RIVER BASIN FLOOD RESILIENCY ACTION STRATEGY](#) 28 (2024); [Lower Cape Fear River Blueprint](#), NORTH CAROLINA COASTAL FED'N. (last visited July 29, 2025).

¹⁴ [Wetlands – the River's Kidneys](#), SCI. LEARNING HUB (Mar. 19, 2014).

¹⁵ *Id.*; ALBEMARLE-PAMLICO PLAN, *supra* note 9, at 23.

¹⁶ ALBEMARLE-PAMLICO PLAN, *supra* note 9, at 29.

¹⁷ [Wetland Functions and Values: Surface and Ground Water Protection](#), VT. AGENCY NAT. RES. (last visited July 29, 2025).

¹⁸ *Id.*; [The Effects: Dead Zones and Harmful Algal Blooms](#), U.S. ENV'T PROT. AGENCY (last updated Feb. 5, 2025).

¹⁹ Jill Kostel, [Nutrient Removal in Wetlands](#), THE WETLANDS INITIATIVE (last visited July 29, 2025).

²⁰ *Id.*

by converting them into less harmful forms—such as nitrate or nitrogen gas.²¹ Wetlands also serve as nutrient sinks capturing nitrogen and phosphorus from different runoff such as fertilizer or sewage, therefore decreasing environmental contamination that may impair freshwater ecosystems.²² Such natural filtration helps improve water quality in the Cape Fear, Neuse, and Tar-Pamlico rivers, and other water bodies within North Carolina by reducing pollution and protecting wildlife and human population. Covering more than 3,000 square miles of water, the Albemarle-Pamlico estuarine system is ranked as the second largest in the continental United States.²³ The estuarine system, including its tributaries and surrounding wetlands, is essential for keeping the ecosystem strong by removing pollution, guarding against storms, and creating habitats for animals and plants.²⁴

Pocosins are a form of evergreen shrub bogs commonly found in the southeastern coastal plains of North America.²⁵ They are comprised of an acidic, nutrient-poor soil layer, primarily made up of peaty material, with dense shrubs or trees above them.²⁶ Pocosins, meaning “swamps on a hill,” are filled with rainwater and slowly release the water onto the land and in places to recharge underground aquifers.²⁷ Without distinct stream connections, their surface water helps keep the salinity and water quality of neighboring estuaries under control.²⁸ Due to their thick plants and marshes, pocosins remove contaminants from water, a process that is not always acknowledged.²⁹ Rainwater going through pocosin wetlands is naturally cleansed, as organic peat soils take away any nutrients,

²¹ *Id.*; Brian K. Miller, [Wetlands and Water Quality](#), PURDUE UNIV. EXTENSION SERV. (last visited July 29, 2025).

²² Miller, *supra* note 21; [Indicators: Phosphorus](#), U.S. ENV’T PROT. AGENCY (last updated Jan. 10, 2025).

²³ Press Release, Virginia Department of Conservation & Recreation, [Virginia, North Carolina Officials Reaffirm Partnership to Protect the Albemarle-Pamlico Watershed](#) (Sept. 23, 2020).

²⁴ ALBEMARLE-PAMLICO PLAN, *supra* note 9, at 3, 25.

²⁵ [What is a pocosin?](#), NAT’L OCEAN SERVICE (last updated June 16, 2024).

²⁶ [Pocosins](#), N.C. NAT. CULTURAL RES. (last visited July 29, 2025).

²⁷ NAT’L OCEAN SERV., *supra* note 25.

²⁸ N.C. DIV. OF MARINE FISHERIES, [WETLANDS ISSUE PAPER: FINAL DRAFT](#) (Apr. 7, 2021); N.C. COASTAL HABITAT PROTECTION PLAN STEERING COMM., [COASTAL HABITAT PROTECTION PLAN](#) (2005); Estuary Restoration and Coastal Water Conservation Legislation: [Hearing Before the S. Comm. on Env’t & Pub. Works](#), 105th Cong., 2d Sess. 1 (July 9, 1998) (S. Hrg. 105-819).

²⁹ Curtis Richardson, [Pocosins: Hydrologically Isolated or Integrated Wetlands on the Landscape?](#), 23 WETLANDS 563, 565–567 (2003).

heavy metals or sediments in the water.³⁰ Thus, pocosins are a crucial water source for rural residents in coastal plains, who have limited freshwater sources.

Pocosin wetlands serve an important purpose of safeguarding water resources, filtering out pollution and storing clean water. Moreover, many North Carolina households, primarily those in low-income areas, get their drinking water from private wells, many of which are not tested for chemicals.³¹ Wetlands maintain water quality through purifying, controlling flow, and storing groundwater, thus sustaining ecosystems and providing vulnerable communities with clean water crucial for health and well-being.

iii. *Biodiversity Hotspots*

Due to their rich biodiversity, North Carolina wetlands sustain hundreds of species, including ones only found in the Southeast.³² For example, the endangered red-cockaded woodpecker, the Carolina gopher frog, and the Venus flytrap, are only found in southeastern North Carolina and northeastern South Carolina wetlands.³³ Additionally, more than 70% of North Carolina's fish and shellfish species use coastal wetlands, including salt marshes and seagrass beds, as breeding and nursery habitats.³⁴ Species such as blue crabs, oysters, and shrimp that are of economic importance to the state generally depend on these wetlands during what is usually a brief phase of their life cycle.³⁵ For this reason, very stringent water quality and coastal development regulations are necessary to ensure the protection of these primary nursery areas. However, urban development and climate change events are destroying habitats of many species,

³⁰ NAT'L OCEAN SERVICE, *supra* note 25.

³¹ *Id.*; Emily Williams, [New UNC Study Identifies Disparities in Testing and Treating Well Water Among Low-Income, BIPOC Households in N.C.](#), UNC INST. FOR THE ENV'T (July 31, 2023).

³² [Who Lives in Our Wetlands?](#), N.C. WETLANDS (last visited July 29, 2025).

³³ [Red-Cockaded Woodpecker](#), N.C. WILDLIFE RES. COMM'N (last visited July 29, 2025); [Carolina Gopher Frog](#), N.C. WILDLIFE RES. COMM'N (last visited July 29, 2025); Simon Gonzalez, [The Venus Flytrap: A North Carolina Native](#), N.C. STATE EXTENSION (Sept. 2, 2022).

³⁴ [Crucial Wetlands at Risk](#), N.C. COASTAL FED'N (last visited July 29, 2025); For more on what species live in pocosin wetlands, see [Featured Species: Pocosin Lakes National Wildlife Refuge](#), U.S. FISH & WILDLIFE SERV. (last visited July 29, 2025).

³⁵ [Wetlands](#), N.C. ENV'T QUALITY (last visited July 29, 2025).

interrupting their natural migratory flows, and limiting access to critical breeding areas and food sources.³⁶

iv. *Economic Contributions*

Wetlands are also economically important because of the role they play in sustaining successful commercial and recreational fishing industries. The economy and life of coastal communities in North Carolina are supported by commercial fishing.³⁷ In 2020, the top 5 species commercially caught in North Carolina were: (1) hard blue crabs (13.1 million pounds); (2) shrimp (9.7 million pounds); (3) summer flounder (1.8 million pounds); (4) spiny dogfish (1.5 million pounds); and (5) striped mullet (1.3 million pounds).³⁸ At the docks, shrimp and hard blue crab species generated significant revenue, with estimated values of \$22.3 million and \$19.1 million, respectively.³⁹ Fishing also supports other job markets such as harvesting, processing, distribution, and retail.⁴⁰ For example, in 2012, while 474 harvesters went out about 6,094 times to catch shrimp, the industry supported jobs across the state.⁴¹ The growth and success of both commercial and recreational fishing requires healthy wetlands to support critical life stages of fish and shellfish populations.

The reduction of wetlands not only degrades nursery habitats essential for juvenile fish and causes population declines, but it also has dire consequences on the economic sustainability of coastal communities. With reduced stocks of fish, coastal communities will suffer economic losses in tourism and related hospitality industries. Estuarine-dependent fish and shellfish species—including menhaden,

³⁶ *Habitats*, NAT'L WILDLIFE FED'N (last visited July 29, 2025); Bella Isaacs-Thomas, [Landmark Report Details How Human Activities Can Disrupt Animal Migrations](#), PBS (Feb. 12, 2024) (discussing how human activity can impact migratory animals).

³⁷ N.C. DIV. MARINE FISHERIES, [FISH DEALER REPORT](#) (Nov. 2021) (stating that in 2021, fishers in North Carolina caught over 16.4 million pounds from January to June).

³⁸ [NC Commercial Fishermen Landed Less Seafood Last Year](#), COASTAL REV. (July 23, 2021).

³⁹ *Id.*

⁴⁰ Jane Harrison, et. al., [North Carolina's Commercial Fishing Industry: Supply Chains and Impact](#), N.C. SEA GRANT (2021) (showing on slide 15 that shrimp harvesting supported over 1,000 jobs on land and had an economic impact of over \$62 million across the state).

⁴¹ *Id.* (showing that wild caught fisheries had overall economic impacts in the millions across the state).

shrimp, flounder, oysters, and crabs—account for more than 90% of the total value of North Carolina’s commercial catch and rely on wetland habitats during one or more critical life stages, such as breeding and juvenile development.⁴² Lastly, wetland-based economic benefits do not only come from recreational and commercial fishing; other recreational and tourism activities such as birdwatching and hiking also benefit from health wetland ecosystems.⁴³

v. *Cultural and Community Significance*

The conservation of wetlands is crucial to not only minimize the harmful effects caused by climate change and environmental degradation, but also in protecting communities’ houses, livelihoods, and cultural heritage.⁴⁴ Wetlands have traditionally sustained activities such as fishing, crabbing, and foraging which are generationally inherited by many Black families who inhabit the rural coastal lands. These are not mere natural expressions alone, but they are part of the community identity and vitality and a live extension thereof.⁴⁵ Saving wetlands is consequently not solely an issue of environment policy, but a way of saving cultures, history, and belongings in sites where these people have historically struggled with displacement and neglect.⁴⁶

In the past, Black communities in North Carolina looked to wetlands for the chance to earn a living, food, and cultural identity. It is essential to include wetland protection in environmental justice strategies for Black communities, which in turn also support local economies and improve generally sustainable adaptation in communities.

⁴² [Estuary Restoration and Coastal Water Conservation Legislation: Hearing Before the S. Comm. on Environment & Public Works](#), 105th Cong., 2d Sess. 6 (July 9, 1998) (S. Hrg. 105-819).

⁴³ U.S. ENV’T PROT. AGENCY, [ECONOMIC BENEFITS OF WETLANDS](#) 2–3 (2006).

⁴⁴ [World Wetlands Day: Wetlands and Sustainable Livelihoods](#), INT’L UNION FOR CONSERVATION OF NATURE (IUCN), (Feb. 2, 2023).

⁴⁵ [North Carolina](#), COASTAL RESILIENCE (last visited Aug. 12, 2025).

⁴⁶ *Id.*

B. Importance of Wetlands to Black Communities

Degraded wetlands exacerbate challenges faced by Black and low-income communities.⁴⁷ Wetlands are essential natural buffers that minimize the impacts of flooding, sea-level rise, and hurricane damage over time.⁴⁸ Most of these communities do not have the policies or funds in place to recover from extreme weather events, and thus, have had to face long-term dislocation, intergenerational impoverishment, and degradation of community ties due to the impacts of storm events.⁴⁹

One way to address these social inequalities is through wetlands protection. Wetland conservation within underprivileged communities ensures ecological health while financially, or physically, protecting homes, livelihoods, and cultural heritage.⁵⁰ Protecting and restoring wetlands must be an essential environmental justice issue in Black and other disadvantaged communities. Wetlands conservation repairs both historical injustices and enhances naturally occurring defenses to climate change.⁵¹

C. Threats to Wetlands

North Carolina wetlands are paramount in many aspects: they are home to various forms of life, provide resources of cultural value and significance to communities, and help in revenue-generating activities.⁵² Unfortunately, they are also subjected to a lot of destruction. Most of the historic wetlands in North

⁴⁷ [Black North Carolinians](#), N.C. OFF. OF STATE BUDGET & MGMT. (last visited July 30, 2025).

⁴⁸ [Wetlands Protect us – Let’s Protect Them, Too](#), SOUTHERN ENV’T L. CTR. (Sept. 25, 2024).

⁴⁹ Heather Stephenson, [Communities Struggle to Prepare for Extreme Weather](#), TUFTS NOW (Dec. 9, 2024).

⁵⁰ *Id.*

⁵¹ See, e.g., [WRRRI’s Walnut Creek Wetland Community Partnership Recognized for Environmental and Community Impacts](#), N.C. WATER RES. RSCH. INST. (April 26, 2023), (discussing how WCWCP has worked with partners in the state to invest in wetland restoration projects in two historically Black neighborhoods).

⁵² See [Habitat Conservation Program](#), N.C. WILDLIFE RES. COMM’N (last visited July 30, 2025) (discussing how wetland degradation from increased development leads to loss of habitat for wetland dependent species, more flooding, less protection from natural disasters, and other impacts).

Carolina have been destroyed by infrastructure developments and urbanization since European settlement.⁵³ Due to these losses, critical habitats for a myriad of species have been disturbed, and natural flood control and filtration are diminished.⁵⁴ Furthermore, though these ecosystems have been used for thousands of years by Indigenous and local communities, they are now in danger of suffering cultural loss.⁵⁵ Conservation and restoration of wetlands are significant in keeping biodiversity alive while making sure there are fish for future generations, preserving the quality of water, and providing social justice for vulnerable populations.⁵⁶ For example, destructive agricultural and industrial practices continue to drain wetlands while destroying crucial environment and replacing wetlands with asphalt.⁵⁷

These stresses are worsened by climate change. Increased global temperatures can lead to extreme tides and elevated sea levels, which in turn can cause saltwater intrusion.⁵⁸ According to the 2024 North Carolina Salt Marsh Action Plan, coastal wetlands across the state are increasingly threatened by sea level rise, development pressure, and climate change.⁵⁹

⁵³ Jack Kurki-Fox et al., *The Status and Trends of Wetland Loss and Legal Protection in North Carolina*, N.C. STATE UNIV. EXTENSION (Mar. 14, 2022).

⁵⁴ Rich, *supra* note 3 (discussing impacts of wetland loss on wildlife habitat and ecosystem services).

⁵⁵ See Ryan E. Emanuel & David E. Wilkins, *Breaching Barriers: The Fight for Indigenous Participation in Water Governance*, 12 WATER 2113, at 9–25 (2020) (describing the cultural and historical importance of wetlands to Indigenous communities in North Carolina).

⁵⁶ See J. Ross & Lydia Zepeda, *Wetland Restoration, Environmental Justice and Food Security in the Lower 9th Ward*, 4 ENV'T JUST. 101 (2011).

⁵⁷ SECRETARIAT OF THE CONVENTION ON WETLANDS, *BRIEFING NOTE 13: WETLANDS AND AGRICULTURE: IMPACTS OF FARMING PRACTICES AND PATHWAYS TO SUSTAINABILITY* (2021); *Wetland Loss*, WETLANDS ALBERTA (last visited July 30, 2025).

⁵⁸ See FIFTH NATIONAL CLIMATE ASSESSMENT: VOLUME II, IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES 642–44 (2022) (discussing impacts of rising temperatures and sea level on coastal habitats); SALT MARSH ACTION PLAN, *supra* note 7, at 12.

⁵⁹ *Id.* at 7–9, 12.

III. SACKETT AND THE N.C. FARM BILL

A. Lead-up to *Sackett*: The Clean Water Act and the U.S. Supreme Court

IN 1972, Congress passed the CWA to address growing public concerns about the nation’s water quality.⁶⁰ The stated purpose of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”⁶¹ One way the CWA achieves this goal is through permitting programs for activities that may impact water quality.⁶² To achieve this purpose, the CWA has three primary permitting mechanisms.

First, Section 401 of the CWA bars any state agency from issuing a permit for a project to discharge into navigable waters without first issuing a water quality certification.⁶³ A “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.”⁶⁴ “Navigable waters” are defined as all “waters of the United States, including the territorial seas.”⁶⁵ Section 401 applies to a wide range of projects, including those that may disturb wetlands, as will be discussed below.⁶⁶

Second, Section 402 creates a permitting system for point source discharges. A “point source” is defined as:

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal

⁶⁰ See Lorraine Boissoneault, [*The Cuyahoga River Caught Fire at Least a Dozen Times, But no One Cared Until 1969*](#), SMITHSONIAN MAG. (June 19, 2019) (noting that one of the main instigators of the CWA being passed was the Cuyahoga River fire).

⁶¹ 33 U.S.C. § 1251(a).

⁶² *Id.* § 1342(a).

⁶³ *Id.* § 1341(a)–(b).

⁶⁴ *Id.* § 1362(12). A pollutant is defined at *Id.* § 1362(6).

⁶⁵ *Id.* § 1362(7).

⁶⁶ For example, Section 401 Water Quality Certifications also apply to Federal Energy Regulatory Commission licenses and to Rivers and Harbors Acts § 9–10 permits. [*Overview of CWA Section 401 Certification*](#), U.S. ENV’T PROT. AGENCY (last updated June 9, 2025).

feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.⁶⁷

To discharge lawfully from a point source into navigable waters, individuals are required to obtain a National Pollutant Discharge Elimination System (NPDES) permit.⁶⁸ NPDES permits govern discharge limits, monitoring, and reporting requirements, and are in effect for five years before renewal.⁶⁹ State environmental agencies typically oversee the NPDES program through delegation of authority from the U.S. Environmental Protection Agency (EPA).⁷⁰

Finally, Section 404 of the CWA creates a permitting framework for regulating the discharge of dredge and fill material into navigable waters, including jurisdictional wetlands.⁷¹ In order to receive a permit, Section 404 requires applicants to demonstrate that there is no practicable alternative to the proposed dredge or fill activity and that the nation's waters will not be significantly degraded by the discharge.⁷² In all but three states, the U.S. Army Corps of Engineers (Corps) oversees 404 permitting.⁷³

In the decades since Congress passed the CWA, courts throughout the country have sought to interpret the statute's meaning, particularly which waters and wetlands are protected. In particular, the Supreme Court has issued several key decisions that seek to address the scope of the CWA in relation to "waters of the United States" (WOTUS).⁷⁴

⁶⁷ 33 U.S.C. § 1362(14).

⁶⁸ *Id.* § 1342(a).

⁶⁹ *Id.*

⁷⁰ *Id.* § 1342(b). North Carolina's NPDES program is administered by the North Carolina Department of Environmental Quality. [North Carolina NPDES Permits](#), U.S. ENV'T PROT. AGENCY (last updated May 5, 2025).

⁷¹ 33 U.S.C. § 1344.

⁷² *Id.* § 1344(a).

⁷³ *Id.* § 1344(g)–(h); see [Tribal and State Section 404 Assumption Efforts](#), U.S. ENV'T PROT. AGENCY (last updated June 26, 2025) (noting that the three states not covered by Corps' efforts are Florida, Michigan, and New Jersey).

⁷⁴ *Infra* notes 121–177.

In 1985, the Supreme Court handed down one of the first cases interpreting the scope of the CWA and determined whether wetlands fell under federal jurisdiction as WOTUS. In *United States v. Riverside Bayview Homes* (*Riverside Bayview*) property owners in Michigan attempted to place fill materials on their property, which the Corps had determined contained a wetland.⁷⁵ The Corps determined that the wetland was connected to a navigable water, Lake St. Clair, because the lot was adjacent to an unnamed tributary on the other side of the road.⁷⁶ The Corps filed suit against the property owners and alleged that the owners needed to obtain a Section 404 dredge and fill permit.⁷⁷ The property owners argued that the wetlands were not WOTUS and therefore not subject to the federal 404 permitting program.⁷⁸

In a unanimous opinion, the Court found that the wetland on the property was jurisdictional, and thus, the fill activity required a permit.⁷⁹ The Court deferred to the Corps' expertise and concluded that the agency's reading of the CWA was reasonable given the "language, policies, and legislative history of the Act" and the agency's expertise in implementing the statute.⁸⁰ The Court further concluded that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act."⁸¹ As a result, the scope of federal jurisdiction was fairly broad after the *Riverside Bayview* decision.

⁷⁵ *United States v. Riverside Bayview Homes*, 474 U.S. 121, 124 (1985).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 138–139.

⁸⁰ *Id.* at 131–32. In reaching their holding, the Court in *Riverside Bayview* applied Chevron deference to the Corps' determination. Under *Chevron*, the court conducts a two-part analysis to determine whether an agency's interpretation of a statute warrants deference. First, the court determines whether the statute is silent or ambiguous to the issue at hand. If the statute is found to be ambiguous, then the court considers whether the agency's interpretation is reasonable. If the agency's interpretation is reasonable, then it receives deference. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁸¹ *Riverside Bayview*, 474 U.S. at 135.

The Supreme Court continued to revisit the scope of CWA protections for wetlands over the next 20 years. In 2001, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corp of Engineers (SWANCC)* the Court once again sought to interpret the scope of navigable waters.⁸² *SWANCC* centered on an abandoned sand and gravel pit that had become a habitat for migratory birds.⁸³ Conflict arose when the local municipalities purchased the land to convert it to dispose of non-hazardous solid waste as part of a landfill, requiring them to fill some of the ponds.⁸⁴ The municipalities' consulted with the Corps to determine if a Section 404 permit would be needed.⁸⁵ The Corps, after initially concluding that it did not have jurisdiction over the site, eventually concluded that a 404 permit was required because its jurisdiction over navigable waters extended to intrastate waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties."⁸⁶ The municipalities sued. In a 5-4 decision, the Supreme Court concluded that the Corps' interpretation of the CWA was too expansive and outside the scope of the statute as written.⁸⁷ In particular, the Court found that the scope of the CWA extends only to "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."⁸⁸ As such, the *SWANCC* decision removed section 404 federal authority from isolated waters and wetlands.

In 2006, the Supreme Court once again returned to the issue of what wetlands fall within the scope of the CWA. *Rapanos v. United States* consolidated four cases related to civil enforcement actions brought by the Corps against property owners who sought to fill wetlands to develop their lots.⁸⁹ In each case, the wetlands were connected to navigable water by ditches or drains.⁹⁰ While the property owners argued that the wetlands were not covered by the CWA, the

⁸² *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corp of Eng'r*, 531 U.S. 159 (2001).

⁸³ *Id.* at 162.

⁸⁴ *Id.* at 163.

⁸⁵ *Id.* at 164.

⁸⁶ *Id.*

⁸⁷ *Id.* at 174.

⁸⁸ *Id.* at 172.

⁸⁹ *Rapanos v. United States*, 547 U.S. 715 (2006).

⁹⁰ *Id.* at 720.

Corps argued that the wetlands were “adjacent wetlands” and thus fell under its jurisdiction.⁹¹

Rapanos was a divided case with no majority opinion. Justice Scalia wrote the plurality opinions, Justice Kennedy wrote a concurring opinion, and Justice Stevens wrote for the dissent. Justice Scalia’s opinion, joined by 3 justices, found that WOTUS only include “those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ . . . [such as those] ‘streams [,] . . . oceans, rivers, [and] lakes.’”⁹² Specifically, Scalia stated that

Therefore, *only* those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands, are “adjacent to” such waters and covered by the Act. . . Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: first, that the adjacent channel contains a “wate[r] of the United States,” (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.⁹³

In contrast, Justice Kennedy’s concurring opinion, which no other justice joined, considered wetlands to be protected by the CWA if they had a “significant nexus” with “navigable waters.”⁹⁴ Under Justice Kennedy’s significant nexus test, wetlands which “significantly affect the chemical, physical, and biological

⁹¹ *Id.* at 724.

⁹² *Id.* at 739 (international citation omitted).

⁹³ *Id.* at 742.

⁹⁴ *Id.* at 779 (Kennedy, J., concurring).

integrity of other covered waters” would be covered by the CWA.⁹⁵ On the other hand, if “wetlands’ effects on water quality are speculative or insubstantial,” Justice Kennedy asserted, then they were not jurisdictional.⁹⁶

These two tests, neither of which garnered majority support, became the two tests lower courts would utilize in determining whether wetlands were subject to federal regulation following the *Rapanos* decision, until *Sackett*.

B. *Sackett v. EPA*

The *Sackett* case is the culmination of over a decade of litigation. The case centers on a lot near Priest Lake, Idaho, owned by Michael and Chantell Sackett.⁹⁷ In preparation to build their home, the Sacketts started backfilling their property.⁹⁸ EPA sent a compliance order informing the Sacketts that the backfilling was a violation of the CWA because the Corps’ determined the lot contained a wetland that was “adjacent to . . . an unnamed tributary” that fed into a “non-navigable creek” which ended up in Priest Lake, a navigable water under the CWA.⁹⁹ Under the *Rapanos*’ significant nexus test, the EPA argued that “adjacent” jurisdictional wetlands included those wetlands that had “a significant nexus to a traditional navigable water” which could include “hydrological and ecological factors.”¹⁰⁰ The Sacketts filed suit, alleging that the EPA lacked jurisdiction because their property did not contain a WOTUS.¹⁰¹ The federal district court initially dismissed the Sackett’s suit, and the Ninth Circuit Court of Appeals affirmed.¹⁰² However, the Supreme Court remanded the case back to the district court.¹⁰³ After the district court ruled in favor of the EPA and the Ninth Circuit once again affirmed, the Supreme Court granted certiorari to consider “the proper test for determining whether wetlands are waters of the United States.”¹⁰⁴

⁹⁵ *Id.* at 780.

⁹⁶ *Id.*

⁹⁷ *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 662 (2023).

⁹⁸ *Id.*

⁹⁹ *Id.* at 662–663.

¹⁰⁰ *Id.* at 662.

¹⁰¹ *Id.* at 663.

¹⁰² *Id.*

¹⁰³ *Sackett v. Env’t Prot. Agency*, 566 U.S. 120, 131 (2012).

¹⁰⁴ *Sackett*, 598 U.S. at 663.

i. *Justice Alito's Majority Opinion*

While the justices unanimously concluded that the Sackett's property was not a jurisdictional wetland, they were split on the reasoning. Only four justices joined Justice Alito in eliminating the *Rapanos* "significant nexus" test.¹⁰⁵ While several justices authored opinions on aspects of the scope of CWA jurisdiction, Justice Alito's majority opinion narrowed federal jurisdiction of wetlands and adopted Justice Scalia's test from *Rapanos*. The majority opinion concluded that: first, for federal jurisdiction over a wetland, the adjacent body of water must constitute a WOTUS, defined as a "relatively permanent body of water connected to traditional interstate navigable waters."¹⁰⁶ Second, the wetland at issue must have a "continuous surface connection" with the established WOTUS.¹⁰⁷ Put differently, the wetland in question must be "as a practical matter indistinguishable from waters of the United States."¹⁰⁸ Adjacent wetlands without any continuous surface connection—i.e., those that are clearly separate from a WOTUS—do not satisfy the test adopted in *Sackett*. While Justice Alito did not define "continuous" for purposes of the revised test, the majority opinion lays out some parameters to the word's potential meaning.¹⁰⁹ For example, in situations where there may be "temporary interruptions in surface connection" between a wetland and WOTUS, the connection may still be considered continuous.¹¹⁰

The majority opinion offers several rationales for narrowing federal authority over wetlands. First, the opinion offers a cooperative federalism argument. Given how broadly the CWA's jurisdiction has been interpreted by the EPA and the Corps since 1985—Justice Alito describes it as "truly staggering"—states had not been afforded the primary authority to deal with water regulations.¹¹¹ As such, the majority's test sought to further balance state and federal power over water resources.

¹⁰⁵ *Id.* at 661.

¹⁰⁶ *Id.* at 654.

¹⁰⁷ *Id.* at 678.

¹⁰⁸ *Id.* at 678 (citing *Rapanos*).

¹⁰⁹ *Id.* at 677–78.

¹¹⁰ *Id.* at 678.

¹¹¹ *Id.* at 680.

The majority opinion also raises a due process concern. Violations of the CWA can carry both criminal and civil penalties.¹¹² These penalties can include years in prison and tens of thousands of dollars in fines.¹¹³ Despite the serious criminal penalties that accompany a violation of the CWA, Justice Alito argued that the EPA’s interpretation of what constitutes “waters of the United States . . . remains ‘hopelessly indeterminate.’”¹¹⁴ Justice Alito argued that the EPA’s broad interpretation does not afford proper notice to those landowners who may be in violation.¹¹⁵ In effect, Justice Alito’s new test attempts to afford greater clarity on the scope of federal jurisdiction under the CWA.

ii. Justice Kavanaugh’s Concurrence

Justice Kavanaugh concurred in the judgment but argued that the “continuous surface connection” test promoted by the majority not only went against the statutory text, but also against agency practice and prior Supreme Court precedent.¹¹⁶ Justice Kavanaugh likewise noted his concern with the test’s vague standard and real-world implications.¹¹⁷

To begin, Justice Kavanaugh argued that the language of the CWA as written afforded protection to adjacent wetlands, arguing that the plain meaning of adjacent is “lying near or close to, neighboring, or not widely separated.”¹¹⁸ This definition shows that waters do not need to be touching to be considered adjacent. Similarly, Kavanaugh argued that in the CWA, Congress used both the terms adjacent and adjoining in different contexts to mean different things.¹¹⁹ Most notably, he claimed, the CWA uses the narrower term adjoining to mean “unimpaired connection,” such as in the case of “adjoining shorelines.”¹²⁰ Given

¹¹² 33 U.S.C. § 1319.

¹¹³ *Id.*

¹¹⁴ *Sackett*, 598 U.S. at 681 (internal citations omitted).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 685 (Kavanaugh, J., concurring).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 718.

¹¹⁹ *Id.* at 719.

¹²⁰ *Id.*

the statutory language, Kavanaugh argues that there was clear legislative intent to protect adjacent wetlands, even those that do not touch a WOTUS.

Beyond the language of the statute, Kavanaugh argues that the Corps' and EPA's 50-year practice of enforcing the CWA supports the plain meaning of adjacent. Since 1977, Justice Kavanaugh argues, both agencies have defined adjacent wetlands as including "wetlands 'separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.'"¹²¹ Despite years of agency action and multiple Presidential administrations, this definition had remained the same.¹²² The consistency of this interpretation, Justice Kavanaugh argues, enforces the plain meaning of adjacent.

Next, Justice Kavanaugh moved on to the Supreme Court's 1904 decision in *United States v. St. Anthony Railroad Company* (*St. Anthony*), which dealt with the issue of adjacent versus adjoining.¹²³ In it, the Court examined a federal statute that allowed a railroad company to cut timber on public lands "adjacent" to the railroad's right of way.¹²⁴ In *St. Anthony*, the Court held that timber could be taken from "'adjacent' sections of land that were not 'contiguous to or actually touching' the right of way."¹²⁵ Justice Kavanaugh argued the court's jurisprudence in *St. Anthony*, on an almost identical issue, demonstrates how important the distinction between "adjacent" and "adjoining" is.

The final portion of Justice Kavanaugh's concurrence considers the implications of the majority's new test. Justice Kavanaugh considers how the test would negatively impact WOTUS, namely through the examples of the Mississippi River's complex levee system and the protections given to the Chesapeake Bay.¹²⁶ Justice Kavanaugh fears that the "overly narrow test" would preclude federal protections for these crucial bodies of water.¹²⁷ Furthermore, given that water does not stay in one place, this new test has the possibility of

¹²¹ *Id.* at 721 (internal citation omitted).

¹²² *Id.*

¹²³ *Id.* at 719–720.

¹²⁴ *Id.* at 719.

¹²⁵ *Id.* (emphasis omitted) (internal citation omitted).

¹²⁶ *Id.* at 726.

¹²⁷ *Id.*

causing further pollution by allowing unregulated bodies to transfer pollutants to different bodies of water.¹²⁸ Additionally, Justice Kavanaugh raises the question of real world application which may “lead to ‘potentially arbitrary results.’”¹²⁹ Of special concern is the “continuous” piece of the test: what constitutes continuous? How long can interruptions be while still falling within federal protection?¹³⁰ Finally, Justice Kavanaugh raises concern over the “connection” piece as well: can the connection between wetlands and WOTUS be man-made?¹³¹ Given these concerns, Justice Kavanaugh believed the majority should have been faithful to the statutory language that distinguishes adjacent from adjoining.

C. 2023 Conforming Rules

By redefining the scope of protected waters under the CWA, the Supreme Court's *Sackett* decision removed millions of acres of wetlands from regulation and permitting. In response to the decision, the EPA and Corps published a revised definition of WOTUS (2023 WOTUS Rule), effective January 2023, to align with the holding.¹³² Under the 2023 WOTUS Rule, waters may not be found jurisdictional solely because they were adjacent under previous definitions.¹³³ In doing so, the agencies removed the prior “significant nexus” determination from the rule.¹³⁴ In addition to changes in the definition, the agencies also removed the term “interstate wetlands” from the CWA’s interstate waters provision.¹³⁵ The Court in *Sackett* determined that the CWA was intended to only concern “open waters” of which wetlands were excluded, instead focusing on the language concerning bodies of water such as lakes and rivers.¹³⁶

¹²⁸ *Id.* at 726–27.

¹²⁹ *Id.* at 727 (quoting respondent's brief).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Revised Definition of “Waters of the United States”; Conforming, 88 Fed. Reg. 61964, 61964 (Sept. 8, 2023) [hereinafter 2023 WOTUS Rule].

¹³³ *Id.* at 91966 (“wetlands are not defined as ‘adjacent’ or jurisdictional” under the CWA just because they are “bordering, contiguous, or neighboring . . . [or] separated from other ‘waters of the United States’ by man-made dikes or barriers, natural river berms, beach dunes and the like.”).

¹³⁴ *Id.* at 61965–61966.

¹³⁵ *Id.* at 61966.

¹³⁶ *Sackett*, 598 U.S. at 663.

Furthermore, on September 27, 2023, the EPA published a final rule on Section 401 of the CWA in response to *Sackett* (2023 EPA Rule).¹³⁷ Under the 2023 EPA Rule, states are given more authority to make Section 401 determinations if the projects at issue falls within their jurisdiction. For example, states are now allowed to consider authorizing a project by looking to the “activity as a whole . . . any aspect of the project activity with the potential to affect water quality.”¹³⁸ Previously, under a 2020 rule, states had a narrower power in considering 401 certifications, as they could only look to the “discharge” of a project.¹³⁹ This new rule offers states a more flexible strategy to determine whether or not to grant 401 certifications. The 2023 EPA Rule went into effect November 27, 2023.¹⁴⁰

D. North Carolina’s 2023 Farm Act

Sackett did not just impact wetlands at the federal level. Almost every year, the North Carolina General Assembly (NCGA) passes a Farm Bill, a comprehensive bill that is focused on the agricultural industry in the state. In June 2023, the NCGA enacted the S.B. 582 North Carolina Farm Act of 2023 (“2023 Farm Act” or “the Act”), overriding Governor Roy Cooper’s veto.¹⁴¹ Among the various provisions related to agriculture, the 2023 Farm Act also revised the state’s approach to wetlands by prohibiting state agencies from enforcing protections for wetlands that are no longer covered by federal law under the new *Sackett* interpretation.¹⁴² Specifically, the Farm Act amends the state’s definition of wetlands and restricts the N.C. Department of Environmental Quality (DEQ) from requiring permits for impacts to wetlands that do not meet the federal

¹³⁷ Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66558 (Sept. 27, 2023).

¹³⁸ *Id.* at 66592 (emphasis omitted).

¹³⁹ *Id.* at 66559; The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (April 21, 2020).

¹⁴⁰ *Id.* at 66558.

¹⁴¹ N.C. Gen. Assembly., Sess. L. 2023-63, S.B. 582, § 15(a)-(e) (N.C. 2023) [hereinafter S.B. § 582]; Press Release, N.C. Off. Governor, [Governor Roy Cooper Signs Seven Bills, Vetos Two Bills and Lets One Bill Become Law](#) (June 23, 2023).

¹⁴² S.B. 582 § 15(c) (amending N.C. GEN. STAT. §§ 143-212, 143-215.1 to limit state wetlands permitting to federal jurisdictional wetlands).

“continuous surface connection” standard.¹⁴³ As a result, North Carolina’s protection of wetlands only extends to:

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section **[those waters that have been or are used for interstate or foreign commerce]**; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) **[impoundments or tributaries]** of this section and with a *continuous surface connection* to those waters.¹⁴⁴

As a result, wetlands that were previously regulated under state authority are now vulnerable to filling, draining, or development without any oversight. This policy shift endangers around 2.5 million acres of wetlands in North Carolina—an estimated 50% of the state's remaining wetland area—especially those in flood-prone and ecologically sensitive regions.¹⁴⁵ The rollback effectively leaves local ecosystems and communities exposed to higher flood risk, reduced water quality, and loss of biodiversity.¹⁴⁶ Under this new definition, wetlands that fall outside the federal definition likewise fall outside of the state’s definition. As will be discussed below, the 2023 Farm Act has the potential for wide reaching impacts on North Carolina’s environmental, economic, and cultural health.

First, isolated wetlands are no longer protected. Isolated wetlands are commonly defined as wetlands “completely surrounded by upland” often resembling depressions or sinks in the ground.¹⁴⁷ Isolated wetlands have not

¹⁴³ *Id.* §§ 15(b)–(c); Memorandum from the N.C. Dep’t of Env’t Quality, Div. of Water Res. on [Wetland and 401 Certification Updates](#) (Sept. 20, 2023) [hereinafter Wetlands Memorandum].

¹⁴⁴ 33 C.F.R. § 328.3(a)(4) [emphasis added]; S.B. 582 § 15(c) (“Wetlands classified as waters of the State are restricted to waters of the United States as defined by 33 C.F.R. § 328.3 and 40 C.F.R. § 230.3”).

¹⁴⁵ Lisa Sorg, [House, Senate override Governor’s Veto of Farm Act, Jeopardizing 2.5 Million Acres of NC Wetlands](#), N.C. NEWSLINE (June 27, 2023).

¹⁴⁶ *Id.*

¹⁴⁷ Scott G. Leibowitz, [Isolated Wetlands and Their Functions: An Ecological Perspective](#), 23:3 THE SOCIETY OF WETLAND SCIENTISTS 517, 517 (2003).

received federal protection under the CWA since the Supreme Court's *SWANCC* decision. Instead, the only protection available was under state law.¹⁴⁸ In 1996, the North Carolina Environmental Management Commission promulgated the Surface Water and Wetland Standards regulation that provided protection to wetlands falling outside the CWA's protection, such as isolated wetlands.¹⁴⁹ These protections included monitoring sedimentation and water levels and wetland stabilization.¹⁵⁰ In 2015, the NCGA significantly reduced protections for isolated wetlands by amending the definition of discharge limitations to apply only to "Basin Wetlands and Bogs," excluding all other wetland types that are not federally jurisdictional under the CWA.¹⁵¹ Finally, with the passage of the Farm Act, isolated wetlands no longer have state or federal protection because they lack the crucial "continuous surface connection" with another body of water.

The Division of Water Resources (DWR) in North Carolina is adhering to *Sackett's* narrow definition of wetlands and proposed to use the 2023 Waters of the United States (WOTUS) rule.¹⁵² In a public notice document, DWR noted that in a situation where jurisdiction is uncertain, DWR must wait for a decision from the Corps before certifying a project.¹⁵³ However, for isolated and non-jurisdictional wetlands, DWR will not require a permit so long as the property has received an Approved Jurisdictional Determination (AJD) from the Corps that shows that no WOTUS exist on the property.¹⁵⁴ These changes greatly reduce what projects require permits or certifications in North Carolina.

¹⁴⁸ See Sean M. Sullivan, [North Carolina's Wetlands Saga is Over \(for now\)](#), WILLIAMS MULLEN (Oct. 19, 2023) (noting that since the SWANNC decision, North Carolina's wetlands have been regulated through the state's 401 certification program).

¹⁴⁹ See, e.g., [EMC "Wetlands" Rulemaking Authority](#), N.C. Op. Att'ys Gen. (Mar. 21, 1995) (discussing the Environmental Management Commission's proposed rulemaking and legal implications of it); 15 N.C. ADMIN. CODE 2B.0202(64) (2022).

¹⁵⁰ 15 N.C. ADMIN. CODE 2B.0231(1)–(7) (2022).

¹⁵¹ Wetlands Memorandum, *supra* note 143.

¹⁵² Press Release, N.C. Dep't of Env't Quality, Div. of Water Res., [Reminder: NCDEQ Division of Water Resources to Hold Public Hearing on Revision of State Definition of Wetlands Rule](#) (June 13, 2025); Amy P. Wang., [Navigating Wetlands in Coastal North Carolina Real Estate Development](#), WARD AND SMITH, P.A. (Apr. 25, 2025).

¹⁵³ Wetlands Memorandum, *supra* note 143.

¹⁵⁴ *Id.*

IV. IMPACTS OF *SACKETT* AND THE NORTH CAROLINA FARM ACT ON BLACK COMMUNITIES

The impacts and contributions of the commercial fishing industry to North Carolina's Outer Banks, Pamlico Sound, and Cape Fear River regions goes far back in the state's history, economy, and cultural fabric. Black fishermen live and depend on these regions mostly because healthy wetlands serve as habitat for resource fisheries such as shrimp, crabs, oysters, and finfish.¹⁵⁵

Despite the importance wetlands serve in North Carolina, information is scant regarding *Sackett* and the 2023 Farm Act's impact on Black fishing communities. This underlies a clear area of deficiency in data. The combination of economic and environmental challenges causes wetland loss to become a significant environmental justice problem for these communities. Among the residents of Eastern North Carolina are minority groups, those with low incomes, people living in rural areas, and an elderly population, all of whom have multiple challenges to overcome.¹⁵⁶ Examining how this larger demographic will be impacted provides a better understanding of the social and economic significance of wetland protection.

A. Impacts of Flooding

Historic housing rules and redlining that kept Black communities from certain homes and neighborhoods has resulted in many of them living in flood-vulnerable areas.¹⁵⁷ The lack of federal and state protection for certain wetlands now increases the risks to these neighborhoods that relied on natural flood mitigation from wetlands.¹⁵⁸ These wetlands serve as buffers to excess stormwater coming from heavy weather events; therefore, areas and communities surrounding

¹⁵⁵ Trista Talton, *Black Carolinians in Fishing Industry Heart of New Exhibit*, COASTAL REV. (Apr. 19, 2023).

¹⁵⁶ *Environmental Justice*, NC Conservation Network (last visited Sept. 8, 2025).

¹⁵⁷ ENV'T DEF. FUND, *POLICY AGENDA TO BUILD FLOOD RESILIENCE ACROSS NORTH CAROLINA* 1 (2021) (discussing how historic redlining and discriminatory housing practices have led to elevated flood risks for Black populations in North Carolina).

¹⁵⁸ *Id.* at 2–3.

the wetlands may now be more adversely affected in terms of flooding, with fewer resources to recover after such events.¹⁵⁹

The *Sackett* decision, the ensuing 2023 EPA Rule, and the 2023 Farm Act weakened wetlands protections, allowing more development that does not require a CWA permit. The 2023 WOTUS Rule defines the scope of waters federally regulated under the CWA, limiting federal jurisdiction over wetlands to only those having a "continuous surface connection" with traditional navigable waters.¹⁶⁰ Notably, North Carolina is the only southeastern state to have adopted the 2023 WOTUS Rule, meaning that only those wetlands wholly inside their borders are vulnerable.¹⁶¹ Wetlands in critical regions such as the Neuse and Tar-Pamlico River basins—home to Wilmington, Princeville, and New Bern—perform essential functions in flood control and climate resilience against flood events.¹⁶² These areas contain numerous Black communities who are disproportionately put in danger of flooding and other environmental perils.¹⁶³ With no federal or state oversight limiting development impacts, these wetlands could be erased through construction, taking away an essential buffer against floods and increasing vulnerability for historically marginalized communities.¹⁶⁴ One of the difficulties in comprehending wetland protection in the region is the

¹⁵⁹ Jennifer Allen, [Commission Set to Further Curb State Wetlands Protections](#), COASTAL REV. (March 11, 2025); Press Release, Southern Env't L. Ctr., [North Carolina Legislature's Elimination of Wetlands Protections Increases Flood Risks and Endangers Communities and Fisheries](#), (June 8, 2023).

¹⁶⁰ [Supreme Court Adopts "Continuous Surface Connection" Test For Whether Wetlands Are Covered By The Clean Water Act](#), GIBSON DUNN (May 25, 2023); 566 U.S. at 678. It should be noted that in April 2025, EPA published guidance on the interpretation of "continuous surface connection." See [Training: 2025 Continuous Surface Connection Guidance](#), EPA (April 29, 2025).

¹⁶¹ Amy P. Wang, [Navigating Wetlands in Coastal North Carolina Real Estate Development](#), WARD & SMITH P.A. (Apr. 25, 2025); see also [Definition of "Waters of the United States": Rule Status and Litigation Update](#), U.S. ENV'T PROT. AGENCY (last visited Aug. 12, 2025) (showing a map of the states in the United States that have either adopted the 2023 WOTUS Rule or adhered to the pre-2025 regulatory regime).

¹⁶² Kathleen E. Harris & Christopher P. Haring, [Tar-Pamlico and Neuse River Basins, North Carolina, Geomorphic Summary Report](#), U.S. ARMY ENG'R RSCH. & DEV. CTR. 3–4 (June 27, 2022).

¹⁶³ *Id.*; Richard M. Mizelle, Jr., [Princeville and the Environmental Landscape of Race](#), OPEN RIVERS: RETHINKING THE MISSISSIPPI, no. 2 2016, at 19–23.

¹⁶⁴ JONAS MONAST, UNIV. N.C. POL'Y COLLABORATORY, [ENHANCING THE ROLE OF WETLANDS IN FLOOD MITIGATION THROUGH POLICY](#) 2–8 (2021).

absence of data. For example, the DEQ is working on updating wetlands maps in the state to show the impact of the Sackett decision. This information is not yet available, however.¹⁶⁵

Adding to this problem, local governments are usually unwilling or unable to enforce resilient wetland protection policies. This puts additional pressure on high flood risks in vulnerable communities, primarily affecting Black families, which, upon experiencing a disaster, are affected by a lack of economic resources and underinsuring, and are subjected to large obstacles on their way to recovery.¹⁶⁶ Additionally, homeownership is often lower in these communities, leaving renters without insurance vulnerable to unrecoverable losses.¹⁶⁷ Similarly, displacement during expensive reconstruction and redevelopment disadvantages lower income residents, who usually do not have the funds or support to secure temporary housing or achieve full recovery.¹⁶⁸ These impacts illustrate the need for urgent and equitable environmental safeguards and disaster recovery assistance specific to these communities.

B. Broader Environmental Justice Concerns

Sackett opened the floodgates to environmental deregulation, heavily impacting low-income and Black communities. Populations already under pressure from environmental degradation face even more risks from the effects of *Sackett*, deepening existing inequalities. On the national level, these communities were already disproportionately impacted by environmental challenges, including

¹⁶⁵ N.C. DEP'T ENV'T QUALITY, [METHODOLOGY TO UPDATE WETLAND MAPS & DETERMINE SACKETTS EFFECT](#) (2024).

¹⁶⁶ See Jessica Downs, [Report Links Racial, Environmental Justice](#), COASTAL REVIEW (Sept. 17, 2020) (noting that NC communities most at risk from environmental hazards also face barriers to infrastructure resilience); Lauren D. Pharr, [Troubled Waters: Flooding, Contaminants, and Heightened Risks](#), COASTWATCH (Sept. 13, 2022) (discussing disproportionate flood and pollution impacts on underserved NC communities).

¹⁶⁷ Bradley Wilson et al., [Flood Recovery Outcomes and Disaster Assistance Barriers for Vulnerable Populations](#), 3 FRONTIERS IN WATER 752307 at 3, 6–9 (2021); Mark Brennan et al., *High and Dry: Rental Markets After Flooding Disasters*, 0 URB. AFF. REV. at 4–6 (2024).

¹⁶⁸ Laurel Blatchford, [Hurricane Matthew Will Hurt African Americans Most](#), TIME (Oct. 7, 2016) (discussing the displacement of BIPOC communities in New Orleans, and other cities, after natural disasters).

extremely high exposure rates due to the dumping of many industrial pollutants and hazardous waste sites, as well as poor access to clean water and breathable air.¹⁶⁹ Due to wealthier communities' ability to oppose sitting unwanted facilities like waste treatment plants, landfills, and industrial plants in their neighborhoods—popularly coined “Not in My Backyard” (NIMBY) Syndrome—low-income and black communities are unfairly burdened by the presence of these “undesirable” facilities.¹⁷⁰ Such communities have less political power and thus, less ability to prevent such facilities from being situated near them, thus propelling more environmental challenges and harm than other wealthier communities.¹⁷¹ Through weakening federal protections for wetlands, the ruling in *Sackett* escalates these environmental injustices by diminishing the ability of these ecosystems to filter pollutants, thus further harming those communities already burdened by industrial drainage and agricultural waste. Any loss of wetland protection disproportionately impacts low-income and black populations who are dependent on these ecosystems for flood control, water purification, and environmental hazard resilience.

North Carolina, along with other states, tends to favor development proposals to the detriment of environmental justice principles.¹⁷² Under current policies and circumstances, the CWA protects fewer wetlands, which makes it more difficult for Black communities to seek legal redress for economic and environmental wrongs.¹⁷³

V. RECOMMENDATIONS

Given the threats to wetlands, fisheries, and community resiliency anticipated with the implementation of *Sackett*, the 2023 WOTUS Rule, and the

¹⁶⁹ Williams, *supra* note 31.

¹⁷⁰ Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001 (1993).

¹⁷¹ *Id.* at 1003–1006; Michael B. Gerrar, *The Victims of NIMBY*, 21 FORDHAM URB. L. J. 495, 495–96 (1994).

¹⁷² Downs, *supra* note 166.

¹⁷³ Megan Mayhew Bergman, *“They Chose Us Because We Were Rural and Poor”: When Environmental Racism and Climate Change Collide*, THE GUARDIAN (Mar. 8, 2019) (discussing the modern environmental justice movement in the south and it can be for these frontline communities to seek justice through litigation or policy changes).

2023 Farm Bill, curbing such impacts to wetlands in North Carolina is critical. This Part will consider two recommendations to do so under the current regulatory framework.

A. Local Government Policies

Following the Supreme Court’s decision in *Sackett* and the 2023 Farm Act, thousands of acres of critical habitat have been left vulnerable. Although developers must still obtain permits for wetlands that fall under federal jurisdiction, many wetlands that provide essential ecosystem services are no longer protected. This regulatory gap exacerbates environmental injustices, particularly for communities who rely on wetlands for flood protection and clean water but lack the resources to resist harmful land-use changes.

Local governments can take action to address this gap by strengthening wetland protections through zoning and permitting processes. Municipalities can adopt broader definitions of wetlands in their ordinances, require wetland assessments as part of site plan approvals, and incorporate mitigation or avoidance strategies into development reviews. By embedding wetland preservation into local planning, governments can influence land use even in areas where state and federal oversight has been rolled back. While these strategies are often politically constrained—especially in North Carolina, where legislative priorities favor development—local jurisdictions still retain authority over land use and can set higher environmental standards. Local wetland preservation efforts remain a critical component of broader strategies to maintain wetland functions and biodiversity amid increasing development pressures.¹⁷⁴

This can include requiring wetland impact assessments during permitting, offering incentives to developers who avoid or mitigate harm to wetlands, and providing access to grants or partnerships for long-term stewardship. Funding for

¹⁷⁴ [*Wetlands Protection and Restoration*](#), U.S. ENV’T PROT. AGENCY (last updated Aug. 14, 2025).

such programs can be raised through stormwater utility fees, environmental impact fees, or adjustments to property taxes.¹⁷⁵

In addition, the U.S. Department of Agriculture's Wetlands Reserve Easements (WRE) program operates in North Carolina to assist private and tribal landowners in protecting, restoring, and enhancing wetlands that have been previously degraded.¹⁷⁶ This program is part of the broader Agricultural Conservation Easement Program (ACEP), which conserves wetlands and agricultural lands through voluntary legal agreements wherein landowners can sell their land to protect and restore existing wetlands.¹⁷⁷ Collectively, these efforts offer a viable path for local governments and conservation groups to mitigate wetland loss—particularly in the face of shrinking federal and state protections—by leveraging willing landowners and nonprofit partnerships.

B. Non-profit Initiatives

Mitigation efforts can also be achieved by non-profits and land conservancy groups through public outreach and land acquisition initiatives. This strategy avoids many of the barriers involved in mitigation efforts at both state and local levels of government, such as political pressures and slow implementation timelines. Nonprofits like local riverkeeper groups could increase public awareness on the importance of wetlands within the broad ecosystem, including functions such as flood control, biodiversity hotspots, and recreation that wetlands provide.¹⁷⁸

Conservation easements and land grants are also significant tools for protecting wetlands. These mechanisms have been instrumental in conserving vast

¹⁷⁵ See U.S. ENV'T PROT. AGENCY, [FUNDING STORMWATER AND WATERSHED CONSERVATION PROJECTS](#) 1–2 (2009) (recommending stormwater utilities and fee-based systems to fund green infrastructure); U.S. ENV'T. PROT. AGENCY, [MUNICIPAL HANDBOOK: INCENTIVE MECHANISMS FOR GREEN INFRASTRUCTURE](#) 1–3 (2008) (describing fee discounts, expedited permitting, grants, and rebates as local incentives to encourage wetlands protection); U.S. ENV'T. PROT. AGENCY, [CLEAN WATER STATE REVOLVING FUND GUIDEBOOK](#) 4 (2025) (listing stormwater utility fees, environmental impact fees, and tax-based revenues as funding sources for wetland conservation).

¹⁷⁶ [Wetland Reserve Easements–North Carolina](#), DEP'T OF AGRIC. (last visited July 28, 2025).

¹⁷⁷ [Agricultural Conservation Easement Program](#), U.S. DEP'T OF AGRIC. (last visited July 28, 2025).

¹⁷⁸ See, e.g., [CAPE FEAR RIVER WATCH](#) (last visited Aug. 12, 2025).

areas of ecologically valuable land. For example, The Nature Conservancy (TNC) in North Carolina has helped protect over 740,000 acres statewide, including wetlands and other critical habitats.¹⁷⁹

VI. CONCLUSION

The Supreme Court's verdict in *Sackett* created a ripple effect over wetland protection across the country in quite an unexpected way. Along with a growing trend towards constricting federal oversight, *Sackett* narrowed the definition of protected wetlands under the CWA to only those with a continuous surface connection to navigable waters. However, the decision does not prevent states from enacting tighter regulations. Indeed, *Sackett* has placed states in a position to step up and fill that regulatory gap—which North Carolina has failed to do. Instead, the NCGA has made wetlands protections weaker by passing the 2023 Farm Act, which removed state-level protections for isolated wetlands.¹⁸⁰ By pulling back environmental protections, actions like the 2023 Farm Bill lead to the destruction of natural resources throughout the nation and places the burden of this pollution—including flooding, dirty water, and lost wildlife—on those living in areas with less means to react.¹⁸¹ According to studies, many communities facing environmental hazards lack proper infrastructure and enough money to protect themselves, and are often underserved by efforts to preserve the environment.¹⁸² Studies find that low income and Black communities are likely to face flooding, water pollution, and similar stressors, and have less ability to deal with these issues than others.¹⁸³ Weakening environmental oversight allows these problems to worsen by placing the burden of regulating and helping vulnerable communities on local governments.

¹⁷⁹ [Preserving Our Lands](#), THE NATURE CONSERVANCY (Feb. 12, 2025); *see also* Sydney Bezanson, [Saving North Carolina's Peatlands](#), THE NATURE CONSERVANCY (Nov. 4, 2024) (discussing the conservancy's work to protect peatlands in North Carolina).

¹⁸⁰ *Id.*; [Legislature Overrides Veto of Bill Cutting Wetland Regulation](#), COASTAL REV. (June 27, 2023).

¹⁸¹ Michael Copley et al., [EPA Announces Dozens of Environmental Regulations it Plants to Target](#), NPR (Mar. 12, 2025).

¹⁸² [The Unequal Impacts of Flooding](#), HEADWATERS ECON. (Oct. 2, 2023).

¹⁸³ Thomas Frank, [Flooding Disproportionately Harms Black Neighborhoods](#), SCI. AM. (June 2, 2020).

To communities along the southeastern coast of North Carolina, the implications of reduced federal and state wetland protection have disproportionate and far-reaching consequences, specifically to Black fishers and other disenfranchised populations. These wetlands historically have been the foundation for the state's commercial fishing heritage and currently serve very critical roles in flood mitigation, water filtration, and habitat protection; however, they are now under increasing attack from deregulation and development pressures. Wetland protection therefore should be a critical element of equitable climate adaptation, coastal resilience, and overdue justice for North Carolina's most vulnerable communities.

CONSERVATION EASEMENTS AS TOOLS FOR HEIRS' PROPERTY OWNERS

Emily Mahon*

This Article explores how conservation easements can support families who own heirs' property, a common but unstable form of land co-ownership. Heirs' property is vulnerable to involuntary land loss resulting from tax foreclosure and partition sales. This land loss undermines generational wealth-building and threatens cultural ties to land. Conservation easements, a type of land servitude, offer financial benefits, deter predatory investors, and can help ensure that land is used in accordance with the owners' long-term goals. While conservation easements are not a catch-all solution to the underlying problems accompanying heirs' property ownership, they are one valuable tool within a broader framework of policy reforms and strategic land planning.

I. INTRODUCTION

Heirs' property is a common and unstable form of family land co-ownership, typically created when land passes to multiple family members through intestate succession.¹ Families face difficulties with financing, improving, and protecting their land, but may share a goal of maintaining joint ownership across generations.² This Article explores how conservation easements, a type of land servitude, can support this goal by preserving culture and heritage, providing financial and tax benefits, deterring predatory investors, and incentivizing sustainable land use.

This Article references North Carolina law at some points in order to provide examples from a state with a large amount of heirs' property.³ North Carolina has not adopted the Uniform Partition of Heirs' Property Act, a model

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¹ *Introduction to HEIRS' PROPERTY AND THE UNIFORM PARTITION OF HEIRS PROPERTY ACT: CHALLENGES, SOLUTIONS, AND HISTORIC REFORM* xix, xix-xxi (Thomas W. Mitchell & Erica Levine Powers, eds., 2022) [hereinafter *Introduction to CHALLENGES, SOLUTIONS, AND REFORM*].

² Janice F. Dyer & Conner Bailey, *A Place to Call Home: Cultural Understandings of Heir Property Among Rural African Americans*, 73 RURAL SOCIOLOGY 317, 320 (2008).

³ THE Hous. ASSISTANCE COUNCIL, [A METHODOLOGICAL APPROACH TO ESTIMATE RESIDENTIAL HEIRS' PROPERTY IN THE UNITED STATES](#) 21 (2024) [hereinafter HOUS. COUNCIL].

law designed to reduce involuntary land loss by reforming the legal partition process.⁴ Therefore, strategic tools to help families navigate land co-ownership could be particularly valuable in North Carolina.

Part I provides an overview of heirs' property, involuntary land loss, and challenges with accessing the benefits of this land. Part II explains how culture based in land co-ownership relates to heirs' property ownership, emphasizing tools that can support families, including policy reform, assistance from organizations, and land management instruments. Part III explores how conservation easements can support family landowners.

II. OVERVIEW OF HEIRS' PROPERTY

Heirs' property refers to land co-owned by multiple family members as tenants in common, usually due to intestate succession.⁵ It is generally characterized by legal uncertainty over ownership.⁶ Under a tenancy in common, each co-tenant holds an undivided interest and a right to possess the entire property.⁷ If a co-tenant in common dies with a will, their devisees inherit their interest.⁸ If a co-tenant dies without a will, their heirs inherit the interest through intestate succession.⁹

Because tenancy in common allows each co-owner's interest to pass to their devisees or heirs, the total number of owners can increase significantly over

⁴ UNIF. L. COMM'N, UNIFORM PARTITION OF HEIRS PROPERTY ACT 1 (Prefatory Note) (2010) [hereinafter UNIFORM ACT].

⁵ *Id.* at Prefatory Note, § 2(5).

⁶ *Id.*; see also Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners* in HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 67-68 (Cassandra J. Gaither et. al., eds., 2019) [hereinafter HEIRS' PROPERTY AND LAND FRACTIONATION] 67-68.

⁷ Mitchell, *supra* note 6, at 67; *Tenancy in Common*, BLACK'S LAW DICTIONARY (9TH ED. 2009).

⁸ *Id.*; N.C. GEN. STAT. § 41-81.

⁹ *Id.*

generations.¹⁰ This can cause fragmented and legally uncertain ownership, making it difficult to finance, insure, or develop these properties (i.e., heirs' property).¹¹

Heirs' property is common in the United States, particularly in the Southeast and Appalachian regions, and among Native American and Black communities.¹² Nationwide, its estimated total value is \$32 billion.¹³ In North Carolina, heirs' property is widespread, especially along the coast, with an estimated value of \$5.5 billion, making up nearly 2% of all properties in the state.¹⁴

A. Heirs' Property and Land Loss

Heirs' property is a highly unstable and insecure form of land ownership, and its owners (i.e., heirs) are vulnerable to involuntary land loss.¹⁵ This involuntary land loss disproportionately affects Black-owned property.¹⁶ Over the past century, Black-owned land ownership has declined by roughly 90%.¹⁷ One estimate values the Black-owned land lost between 1920 and 1997 at \$326 billion, with much of it being heirs' property.¹⁸ Primary causes of the involuntary heirs' property land loss include tax foreclosure sales and partition actions.¹⁹

¹⁰ Faith River James, *Inequity In Equity: The Tragedy of Tenancy in Common For Heirs' Property Owners Facing Partition In Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 65, 66 (2019).

¹¹ *Id.*; Thomas W. Mitchell, *The Uniform Partition of Heirs Property Act: Advancing Social and Racial Justice Through Historic Property Law Reform*, in HEIRS' PROPERTY AND THE UNIFORM PARTITION OF HEIRS PROPERTY ACT (Thomas W. Mitchell & Erica Levine Powers eds., 2022).

¹² Ryan Thomson & Conner Bailey, *Identifying Heirs' Property: Extent and Value Across the South and Appalachia*, 38 J. RURAL SOC. SCIS. 29, 30 (2023); Cassandra Johnson Gaither & Stanley J. Zarnoch, *Unearthing 'Dead Capital': Heirs' Property Prediction in Two U.S. Southern Counties*, 67 LAND USE POL'Y 367, 371 (2017).

¹³ HOUS. COUNCIL, *supra* note 3, at 5.

¹⁴ *Id.*; Kurt Smith et al., [Heirs' Property in North Carolina: What is It and Why Should I Care?](#), NC STATE EXTENSION (Mar. 24, 2025) .

¹⁵ *Introduction to CHALLENGES, SOLUTIONS, AND REFORM*, *supra* note 1, at XIX.

¹⁶ Lizzie Presser, [Kicked off the Land: Why So Many Black Families are Losing Their Property](#), LAND TRUST ALLIANCE RES. CTR. (Aug. 23, 2023).

¹⁷ Dania V. Francis et. al., *Black Land Loss: 1920–1997*, 112 AEA PAPERS AND PROC. 38 (2022).

¹⁸ *Id.*

¹⁹ *Introduction to CHALLENGES, SOLUTIONS, AND REFORM*, *supra* note 1.

Tax foreclosure sales occur when unpaid property taxes create a lien, allowing the local government to auction the land.²⁰ Unpaid property taxes on heirs' property are common, partly because heirs may not receive notice if they are not recorded as owners.²¹ Counties do not have an incentive to sell the properties for an amount higher than the tax debt because property owners are entitled to any proceeds exceeding the debt.²² In North Carolina, counties can set the minimum bid amount as low as the amount owed.²³ As a result, the properties are typically auctioned off at well below fair market value.²⁴ Thus, heirs lose their equity and ability to negotiate the sale of their land.²⁵

Local governments can similarly auction heirs' property to recover unpaid municipal fees, including utility bills, waste disposal charges, and stormwater management fees.²⁶ Government tax relief programs often require proof of title, which many heirs cannot provide, and heirs may lack the liquid assets to reclaim their property during auctions.²⁷ As a result, heirs frequently lose their land and generational wealth.²⁸

Partition actions occur when a co-tenant of a property asks a court to split a property into individual interests.²⁹ Disagreements among heirs about using, managing, or selling the land may make it difficult for any of them to benefit from their ownership, leading them to file for partition.³⁰ To address these challenges,

²⁰ Andrea Bopp Stark & Odette Williamson, NAT'L CONSUMER L. CTR., [*Property Tax Foreclosures on Heirs Property: The Devastating Consequences And Recommendations for Prevention*](#) 2–3 (2023).

²¹ *Id.* at 2.

²² *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023).

²³ N.C. GEN. STAT. § 105-376; *Duplin County v. Ezzell*, 223 N.C. 531 (1943).

²⁴ John Rao, NAT'L CONSUMER LAW CENTER, [THE OTHER FORECLOSURE CRISIS: PROPERTY TAX LIEN SALES](#) 28 (2012).

²⁵ Bopp Stark & Williamson, *supra* note 20, at 5.

²⁶ Rao *supra* note 24, at 4; N.C. GEN. STAT. § 160A-314(a)(1)–(2), (4), (f).

²⁷ Heather K. Way, CTR. OF EXCELLENCE FOR HOUS. AND CMTY. DEV. POL'Y RSCH, [THE INTERSECTION OF RESIDENTIAL HEIRS' PROPERTY AND PROPERTY TAX FORECLOSURE](#) 16 (Nov. 2024).

²⁸ *Id.* at 10.

²⁹ UNIFORM ACT, *supra* note 4, at § 2(6); N.C. GEN. STAT. § 46A-21.

³⁰ B. James Deaton and Jamie Baxter, *Towards a Better Understanding of the Experience of Heirs on Heirs' Property* in [HEIRS' PROPERTY AND LAND FRACTIONATION](#), *supra* note 6, at 44, 45-47;

courts may either physically divide the land into sub-parcels, or more commonly, order the entire property to be sold with profits split among the heirs.³¹

While partition actions can provide a necessary and practical solution when heirs disagree, partition also creates an opportunity for exploitation. Any co-tenant, no matter how small their interest, has the right to initiate a partition.³² Some real estate investors exploit this by “fishing” for heirs who are willing to sell their interest.³³ If an investor purchases a heir’s small share, they can file for partition and acquire the entire property at auction, often for below market value.³⁴ As investors accumulate and develop these properties, gentrification can occur, raising the nearby property taxes and increasing the likelihood that neighbors will also face land loss through tax sales.³⁵ Partition actions can displace individuals from family land and disrupt communities, often without meaningful recourse.³⁶

Land loss also threatens cultural identities. For example, the Gullah Geechee people are descendants of Africans enslaved in the coastal regions of North Carolina, South Carolina, Florida, and Georgia.³⁷ After slavery, the group settled in once-undesirable Lowcountry marsh areas, where they established deep cultural roots and a close-knit communities.³⁸ As a result of this history, the Gullah Geechee regard land as their “most valuable cultural asset.”³⁹

Maresh Tiwari et. al., *Partition Actions on Forestland Owned as Heir Property at the Determinants of Court Decisions*, 160 *FOREST POL. AND ECONS.* 2 (2025).

³¹ UNIFORM ACT *supra* note 4, at § 2(7); Phyllis Craig-Taylor, *Options for Countering the Faustian Bargain in the Judicial Partition of Heirs’ Property and the Enduring Phenomena of Investor-Speculator “Fishing,”* in [HEIRS’ PROPERTY AND LAND FRACTIONATION](#), *supra* note 6, at 83–84.

³² UNIFORM ACT, *supra* note 4, at Prefatory Note.

³³ Craig-Taylor, *supra* note 31.

³⁴ *Id.* at 83.

³⁵ Mike Maciag, *Gentrification in America Report*, GOVERNING (Jan. 29, 2015).

³⁶ See, e.g., Anna Bradley-Smith, *Court Allows Partition Sale of Bed-Stuy Home in Family for 75 Years*, BROWNSTONER (Jul. 18, 2024).

³⁷ Jordan K. Boxley, *Who Are The Gullah Geechee?*, TELFAIR MUSEUMS (Jul. 26, 2023).

³⁸ *Id.*

³⁹ Emory Campbell, *Gullah Food & Culture*, GULLAH FARMERS COOP. ASS’N (last visited July 3, 2025); Faith Rivers, *The Public Trust Debate: Implications For Heirs’ Property Along The Gullah Coast*, 15 *SOUTHEASTERN ENV’T. L.J.* 147, 158–165 (2006).

Today, many historic Gullah Geechee areas, including Hilton Head and St. Helena islands, are now popular tourist destinations.⁴⁰ The Gullah Geechee own significant amounts of heirs' property, but they are experiencing rapid land loss due to investors and commercial development.⁴¹ As investors acquire ancestral lands and redevelop them into resorts and golf courses, rising property taxes contribute to increased tax sales, causing additional land loss.⁴² Meanwhile, the Gullah-Geechee are denied fair market value compensation for their dispossession—compensation that, even if received, could never truly replace what has been lost.⁴³

B. Heirs' Property and Land Use

Often, heirs' property is underutilized, and heirs do not reap all of the land's potential economic or natural benefits.⁴⁴ Families may lack consensus as to how to use the land, which can prevent certain economic opportunities like leasing the property for timber or mineral rights.⁴⁵ Insecure ownership also disincentivizes heirs from investing in their land because if the land is lost in a tax sale or partition action, they will lose the money and time spent on improvements.⁴⁶ Thus, heirs' properties commonly deteriorate, becoming unproductive "dead capital" and contributing to neighborhood blight.⁴⁷

⁴⁰ Justin Glawe, *Inside a Controversial Auction Of Gullah-Geechee Homes: This Land Needs To Be Protected*, THE GUARDIAN (Nov. 3, 2023).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Rob Doudrick, *Heirs' Property: Implications for Natural Resource Management*, in [HEIRS' PROPERTY AND LAND FRACTIONATION](#), *supra* note 6, at v.

⁴⁵ Janice Frew Dyer, *Heir Property: Legal And Cultural Dimensions Of Collective Landownership In Alabama's Black Belt* 9 (May 10, 2007) (Master's thesis) (on file with Auburn University).

⁴⁶ Tristeen Bownes & Robert Zabawa, *The Impact of Heirs' Property at the Community Level: The Case Study of the Prairie Farms Resettlement Community in Macon County, AL*, in [HEIRS' PROPERTY AND LAND FRACTIONATION](#), *supra* note 6, at 29, 31-32.

⁴⁷ Cassandra Johnson Gaither & Stanley J. Zarnoch, *Unearthing 'Dead Capital': Heirs' Property Prediction in Two U.S. Southern Counties*, 67 LAND USE POL'Y 367, 368 (2017); MUNICIPAL ASSOCIATION OF SOUTH CAROLINA, [How Cities Can Help Heirs' Property Owners](#).

Heirs are disproportionately low-income and may lack funds needed for upkeep or investments in the land.⁴⁸ Generally, creditors will not accept heirs' property as collateral, limiting the heirs' access to mortgages, business loans, or construction loans.⁴⁹ Access to credit is a key determinant for financial mobility because it enables individuals to pursue education, invest in their careers, and build generational wealth.⁵⁰ Wealth disparities in areas with significant amounts of heirs' property are exacerbated because heirs generally cannot leverage this land.⁵¹

Many heirs do not have ownership documents like deeds or tax records because ownership is unclear.⁵² Thus, heirs are often ineligible for government programs that require proof of ownership.⁵³ For example, the Weatherization Assistance Program for Low-Income Families provides funds for home improvements like insulation and air conditioning, but to be eligible an applicant's name must be recorded on the property tax card.⁵⁴

Similarly, government aid to repair damage from natural disasters often requires proof of ownership.⁵⁵ In 2024, the North Carolina Office of Recovery and Resiliency (NCORR) settled a lawsuit in which Legal Aid alleged that NCORR's proof of ownership requirements disproportionately denied aid to Black heirs' property owners affected by Hurricanes Matthew and Florence.⁵⁶

⁴⁸ Conner Bailey et al., *Heirs' Property and Persistent Poverty among African Americans in the Southeastern United States*, in [HEIRS' PROPERTY AND LAND FRACTIONATION](#), *supra* note 6, at 9, 11.

⁴⁹ Francine Miller, *Heirs' Property: Understanding the Legal Issues in North Carolina*, CTR. FOR AGRIC. & FOOD SYS. 2 (2023).

⁵⁰ FED. RESERVE BANK OF NEW YORK, [UNEQUAL ACCESS TO CREDIT: THE HIDDEN IMPACT OF CREDIT CONSTRAINTS](#) 2 (2019).

⁵¹ *Id.*

⁵² Kendall B. Bargeman, *The Heirs' Property Dilemma: How Stronger Federal Policies Can Help Narrow the Racial Wealth Gap*, 27 N.C. BANKING INST. 320, 320-322 (2023).

⁵³ *Id.*

⁵⁴ N.C. DEP'T OF ENV'T. QUALITY, [Find Your Service Provider](#) (last visited July 3, 2025); PIEDMONT TRIAD REGIONAL COUNCIL, [What is the Weatherization Program?](#) (last visited July 3, 2025).

⁵⁵ Sue Sturgis, [Recent Disasters Reveal Racial Discrimination in FEMA Aid Process](#), FACING SOUTH (Sept. 24, 2018).

⁵⁶ U.S. DEP'T OF HOUS. & URB. DEV., [TITLE VII CONCILIATION AGREEMENT/ TITLE VI & SECTION 109 VOLUNTARY COMPLIANCE AGREEMENT](#) (2024) (No. 04-23-4426-8).

NCORR voluntarily relaxed ownership requirements, allowing heirs to verify residency with alternate documents.⁵⁷ While NCORR created what has been called the “most flexible policy in the nation” following Matthew and Florence, the policy’s long-term impacts are uncertain because NCORR was created specifically to respond to those two hurricanes.⁵⁸

III. HEIRS’ PROPERTY AND FAMILY LAND OWNERSHIP

Addressing systemic issues related to heirs’ property requires a comprehensive approach that centers families’ goals. Some heirs’ property is created intentionally to meet the goal of family land co-ownership, which can reflect cultural values and provide a sense of identity, sanctuary, or connection to heritage.⁵⁹ Bailey and Dyer find that heirs’ property and land co-ownership “is supportive of certain cultural values and meets the needs of a sub-set of rural people in ways that other forms of property ownership cannot.”⁶⁰

Landowners who value family co-ownership can benefit from tools that prioritize stability, cultural preservation, and productive and sustainable land use. This includes policy reform, assistance from organizations, and land management instruments.

Policy reform is essential to make heirs’ property ownership more secure and equitable. The Uniform Partition of Heirs’ Property Act (UPHPA), enacted in 23 states but not North Carolina, is a model law that improves fairness in the partition process.⁶¹ It adds protections such as notice, an independent appraisal of the property, and a right of first refusal.⁶² While broad adoption of the UPHPA would be a significant improvement, a comprehensive approach to heirs’ property requires addressing other systemic challenges.

⁵⁷ *Id.*

⁵⁸ REBUILD NC, [About Us](#) (last visited July 3, 2025).

⁵⁹ Janice F. Dyer & Conner Bailey, *A Place to Call Home: Cultural Understandings of Heir Property Among Rural African Americans*, 73 *Rural Sociology* 317, 320 (2008).

⁶⁰ *Id.* at 317.

⁶¹ NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS, [UNIFORM PARTITION OF HEIRS PROPERTY ACT](#) (2010).

⁶² *Id.*

Formal tools and instruments can stabilize ownership and prevent partition. One such tool is limited liability companies, which can outline ownership shares, designate tax obligations, and create decision-making processes, creating more long-term stability than a tenancy in common.⁶³ Also, family land trusts can stabilize co-ownership by designating a trustee to determine how land is controlled and used for profit.⁶⁴

Several organizations offer support to families as they navigate systemic and legal challenges associated with heirs' property ownership. The Center for Heirs' Property Preservation in South Carolina offers title clearing, estate planning, family mediation, and forestry assistance services.⁶⁵ The Georgia Heirs Property Law Center similarly provides title and estate planning, representation in partition actions, forestry assistance services, and assistance following natural disasters.⁶⁶

The Heirs Property Project through N.C. State and N.C. A&T offers one-on-one support to current and inspiring farmers.⁶⁷ The Land Loss Prevention Project in Durham, North Carolina provides legal and technical assistance to prevent land loss and environmental degradation, including foreclosure defense, help with incorporation and tax-exempt status, and educational programs.⁶⁸ The Black Family Land Trust, Inc. in North Carolina, a conservation land trust dedicated to protecting the assets of historically underserved landowners through its comprehensive program, educates families about conservation tools including easements.⁶⁹ Each of these organizations also offers numerous other valuable initiatives.

⁶³ Caitlin Henderson, *Heirs Property in Georgia: Common Issues, Current State of the Law, and Further Solutions*, 55 GA. L. REV. 875, 899-900 (2021).

⁶⁴ Phyllis C. Taite, *Remediating Injustices Black Land Loss: Taking the Next Step to Protect Heirs' Property*, 10 BELMONT L. REV. 301, 320-323 (2023).

⁶⁵ *Id.*; [Homepage](#), CTR. FOR HEIRS' PROP. PRESERVATION (last visited July 15, 2025).

⁶⁶ [Services](#), GEORGIA HEIRS PROP. L. CTR. (last visited July 15, 2025).

⁶⁷ [Heirs Property Program](#), N.C. AGRIC. AND TECH. STATE UNIV. (last visited July 15, 2025).

⁶⁸ [Services](#), LAND LOSS PREVENTION PROJ. (last visited July 15, 2025).

⁶⁹ [Our Work](#), BLACK FAMILY LAND TRUST, INC. (last visited July 15, 2025).

The following section discusses how conservation easements can benefit families who want to own property together, a goal that often coexists with heirs' property ownership.

IV. CONSERVATION EASEMENTS

A conservation easement is a type of land servitude in which a land owner grants a land trust or government agency, known as the holder, the right to limit certain types of development.⁷⁰ Conservation easements can protect land for wildlife conservation, recreation, agriculture, forestry, and other purposes.⁷¹ Conservation easements usually run with the land, meaning they remain enforceable even if the land is inherited or sold.⁷² Holders own only the nonpossessory right to enforce the terms of the easement, although some terms provide that holders can monitor the property periodically to ensure compliance.⁷³ Landowners continue to own, use, and control their land in accordance with the easement terms.

Conservation easements can be a useful tool during the land-planning process, particularly when used alongside other instruments such as LLCs or family trusts. The easements can provide financial benefits for heirs' property owners who have cleared title, while also preserving family co-ownership and the cultural value of the land for future generations.⁷⁴ However, conservation easements do not solve underlying problems of fractional ownership and partition. All co-tenants in common must agree to place a conservation easement on heirs'

⁷⁰ Nancy A. McLaughlin, *Enforcing Conservation Easements: The Through Line*, 34 GEORGETOWN ENV'T L. REV. 167, 171 (2022); N.C. GEN. STAT. § 121-35.

⁷¹ N.C. GEN. STAT. § 121-35.

⁷² Paul Mitchell, *Protecting the Future Forever: Why Perpetual Conservation Easements Outperform Term Easements*, UNIV. OF GA. SCH. OF LAW LAND USE CLINIC DIGITAL COMMONS 10 (2006).

⁷³ *Id.*

⁷⁴ FARMLAND INFO. CTR., [GUIDE TO ACEP-ALE FOR HEIRS' PROPERTY LANDOWNERS](#) 1-2 (2024) [hereinafter ACEP GUIDE].

property, so heirs would still need to identify all co-owners and reach a consensus before placing the easement.⁷⁵

This article focuses on how conservation easements can benefit families who want to own property together by preserving culture and heritage, providing financial and tax benefits, deterring predatory investors to an extent, and incentivizing sustainable land management.

A. Preserving Culture and Heritage

Conservation easements can preserve cultural meaning tied to land, whether that meaning is rooted in the tradition of a single family or the broader heritage of a community. Land co-ownership can be part of a family's identity, a dynamic that often coexists with heirs' property but is threatened by insecure ownership.⁷⁶

The Gullah Geechee have a long-standing tradition of family land ownership and view land as a cultural asset.⁷⁷ This tradition is threatened by land loss and high rates of heirs' property ownership, as coastal ancestral lands are lost and redeveloped into tourist and commercial destinations.⁷⁸

Some Gullah Geechee families have benefited from conservation easements to preserve their traditions. For example, the Gullah Farmer's Cooperative (Cooperative), located on the Sea Islands of South Carolina, is covered by a 5000-acre easement which protects the use of the land for traditional agrarian practices.⁷⁹ The easement protects the land as a cultural and economic asset for families who live and farm on land within the Cooperative.⁸⁰ Several of

⁷⁵ *Southern Inv. Co. v. Postal Telegraph-Cable Co.*, 156 N.C. 259,260 (1911) ("Servitudes and easements upon lands cannot be granted by a tenant in common without the consent of his cotenants.").

⁷⁶ Janice F. Dyer & Conner Bailey, *A Place to Call Home: Cultural Understandings of Heir Property Among Rural African Americans*, 73 RURAL SOCIOLOGY 317, 320 (2008).

⁷⁷ Campbell, *supra* note 39.

⁷⁸ Glawe, *supra* note 40.

⁷⁹ [*Preserving the roots of the Lowcountry: A legacy of land and tradition*](#), OPEN LAND TRUST (last visited July 15, 2025).

⁸⁰ *Id.*

the Cooperative's members are also incorporated as LLCs, a more formal and stable arrangement than heirs' property.⁸¹ This demonstrates how conservation easements, especially when paired with other tools, can support family co-ownership and cultural preservation.

Other communities have similarly used conservation easements to protect culturally significant land. While not specific to heirs' property, the Saint Kateri Conservation Center protects land with cultural value to the Catholic faith.⁸² A 28-acre easement in Pūehuehu, Hawaii preserves sweet-potato farms, a key part of the local economy and culture.⁸³

Individual families can also have a connection to co-ownership and land, including through multigenerational businesses, cherished memories, or geographic features like family cemeteries, that they may want to protect from future development. The USDA's Agricultural Conservation Easement Program (ACEP) protects active farms and ranches to support sustainable agriculture and facilitates the participation of heirs' property owners in the program.⁸⁴

B. Providing Financial and Tax Benefits

Tax foreclosure sales are a primary cause of involuntary land loss, forcing heirs to lose equity when properties are auctioned off below their market value.⁸⁵ Conservation easements can reduce this risk because development restrictions decrease the land's assessed market value. As a result of the lower assessed value, property taxes decrease.⁸⁶

Landowners who anticipate selling their property in the future should be aware that an easement may reduce resale value, a potential consideration when negotiating easement terms with the holder. Conservation easements may be more

⁸¹ [*Marshview Farm, LLC*](#), CERTIFIED SOUTH CAROLINA (last visited July 15, 2025).

⁸² [*Catholic Land Trust*](#), SAINT KATERI CONSERVATION CTR. (last visited July 15, 2025).

⁸³ [*Pūehuehu, Island Harvest, Kohala*](#), HAWAII LAND TRUST (last visited July 15, 2025).

⁸⁴ 16 U.S.C. § 3865; ACEP GUIDE, *supra* note 74.

⁸⁵ *Introduction to CHALLENGES, SOLUTIONS, AND REFORM*, *supra* note 1; Rao, *supra* note 24; Bopp Stark & Williamson, *supra* note 20.

⁸⁶ N.C. GEN. STAT. § 105-277.3.

appealing to families who intend to keep land in a co-ownership structure for future generations. However, depending on a family's ability to pay taxes, even those considering resale may benefit from an easement. Unlike when land is auctioned involuntarily, if land with a conservation easement is eventually sold, its owners retain their equity and bargaining power. For some, the lower taxes and reduced foreclosure risk may outweigh concerns about resale value.

Conservation easements also provide other tax benefits. Donated conservation easements may qualify for federal income tax deductions if they preserve land for recreation, education, historic sites, or natural habitats.⁸⁷ Easements can also reduce federal estate taxes by up to 40% of the restricted property value, offering an additional way for heirs to preserve intergenerational wealth.⁸⁸

While landowners may donate conservation easements to receive tax incentives, they may also receive compensation in exchange for placing the easement. For example, USDA's ACEP compensates landowners with the value of the easements on farmland and wetlands.⁸⁹ Heirs' property owners can participate in this program by providing documents to substantiate that they control the land, allowing families without LLCs, trusts, or traditional ownership documentation to receive compensation.⁹⁰

The compensation from USDA's ACEP could benefit heirs' property owners immensely since they could use these funds to maintain or invest in their land. If an heir wants to sell their interest, the other heirs could agree to use this compensation to buy his or her interest.⁹¹ Landowners may need to decide between upfront compensation or long-term tax incentives because certain tax benefits are contingent on at least a percentage of the easement being donated.

⁸⁷ Internal Revenue Code, 26 U.S.C. § 170(h) (2021).

⁸⁸ *Id.* § 2031(c) (2021).

⁸⁹ 16 U.S.C. § 3865.

⁹⁰ U.S. DEP'T OF AGRIC., [GUIDANCE FOR HEIRS' PROPERTY OPERATORS TO PARTICIPATE IN FARM SERVICE AGENCY \(FSA\) PROGRAMS](#) 1-2 (2022).

⁹¹ ACEP GUIDE, *supra* note 74.

C. Deterring Predatory Investors

Predatory or opportunistic real estate investors and developers can exploit the partition process by “fishing” for heirs who are willing to sell their interest, allowing them to file for partition and acquire the land through an auction.⁹² For example, heirs’ property complications involving Freeman beach in North Carolina led to partition sales and involuntary land loss. As a result, much of this historically Black-owned land was acquired by developers and used for commercial tourism.⁹³ Conservation easements may deter this sort of land speculation because they impose restrictions on development, making the land less attractive to investors seeking to commercially develop or build on the land.

The potential to deter predatory investors through the use of conservative easements is noteworthy, particularly for areas experiencing intense growth and development pressures. However, while conservative easements may dissuade investors interested in coastal tourism properties, investors interested in a property’s natural, recreational, or agricultural value may be undeterred. Thus, this benefit is not guaranteed, depending on the location of the property, goals of the investor, and terms of the easement.

Further, conservation easements will not necessarily restrict a co-tenant’s right to partition a property altogether. Some conservation easements restrict physical subdivision of land (i.e., dividing it into separate parcels among multiple owners), but this would still allow partition by sale. North Carolina case law suggests that cotenants can waive their right to partition land through contracts, but the exact applicability or enforceability of this in terms of conservation easements is unclear.⁹⁴

⁹² Craig-Taylor, *supra* note 31; Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 505-512 (2001).

⁹³ Mikayla Mangle, *When the Legal System Was Designed to Work Against You, How Can It Ever Work For You? Rethinking Heirs’ Property Reform*, 17 CHARLESTON L. REV. 541, 542-543 (2023).

⁹⁴ *Chadwick v. Blades*, 210 N.C. 609, 612 (1936) (“Statutes declaring that joint tenants or tenants in common shall have a right to partition were never intended to interfere with contract between such tenants modifying or limiting this otherwise incidental right, or to render it incompetent for parties to make such contracts, either at the time of the creation of the tenancy or afterwards.”)

D. Incentivizing Sustainable Land Use

As used in this article, sustainable land use refers to land management that meets a landowner's current needs without compromising the ability of future generations to benefit from the land.⁹⁵ This involves using land economically while maintaining its long-term viability. For example, a landowner may start a timber business to meet economic needs. To do so sustainably, they need access to capital to plant trees and knowledge to maintain the land and harvest the trees at a rate that allows for regrowth and continued profit.

Heirs' properties are often not used sustainably, instead being underutilized and undermaintained, partly because heirs are disproportionately low-income and face barriers to accessing loans, aid, grants, and technical assistance.⁹⁶ Conservation easements can incentivize sustainable land use by opening the door to programs designed to support land protection, including grants, loans, or cost-share assistance programs related to conservation and restoration.

Relevant programs include the USDA's ACEP for maintaining soil health and increasing crop yields,⁹⁷ Wetlands Reserve component of the ACEP for financing flood control and water quality technology, and Healthy Forests Reserve Program for reforestation and controlling invasive species.⁹⁸ While the ACEP has issued guidance to help heirs' property owners participate, it could be useful for other conservation programs to provide more clarity and outreach to help families who own heirs' property navigate participation.⁹⁹ In addition to conservation programs, the easement holder may also provide ongoing support to

⁹⁵ WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, [OUR COMMON FUTURE](#) (1987).

⁹⁶ Gaither & Zarnoch, *supra* note 12; Miller *supra* note 49.

⁹⁷ 16 U.S.C. § 3865b; 7 C.F.R. § 1467.4; 7 C.F.R. § 625.4; N.C. GEN. STAT. § 139-7.1; [Federal & State Conservation Assistance Programs](#), LAND CONSERVATION ASSISTANCE NETWORK (last visited July 15, 2025).

⁹⁸ N.C. GEN. STAT. § 139-7.1; LAND CONSERVATION ASSISTANCE NETWORK, *supra* note 97.

⁹⁹ 16 U.S.C. § 3865; ACEP GUIDE *supra* note 74.

the property owners to ensure land is managed in accordance with the easement terms.¹⁰⁰

Even with these programs, heirs' property owners need more specific support for sustainable land use. More programs aimed at sustainable use of heirs' property, such as the forestry services provided by the Center for Heirs' Property Preservation and Georgia Heirs Property Law Center, could make a crucial difference for families.¹⁰¹

Even as conservation programs and non-profit organizations make efforts to include heirs' property owners, legal uncertainty discourages heirs from engaging in sustainable land use. Without clear ownership rights, heirs lack assurance that investing in and improving their land will benefit them in the long term. Research demonstrates that insecure land ownership leads to disinvestment and land degradation, while secure ownership promotes sustainable and productive land use.¹⁰² Deterring predatory investors and reducing property taxes may offer some additional stability, but this has limits. Encouraging sustainable land use requires access to resources and a legal system that motivates people to use them, so policy reform and access to tools that secure ownership in the long term are also crucial to incentivize sustainable land use and prevent involuntary land loss.

V. CONCLUSION

In sum, families who own heirs' property face challenges because their ownership is unstable, making it difficult for them to benefit from their land ownership. Some families who own heirs' property have a goal of family land co-ownership, and conservation easements are one tool that can benefit families with this goal. Conservation easements can preserve culture and heritage, provide financial and tax benefits, deter some predatory investors, and incentivize

¹⁰⁰ [Working with Landowners](#), LAND TRUST ALLIANCE RESOURCE CENTER (last visited July 15, 2025).

¹⁰¹ [Our Work](#), CTR. FOR HEIRS' PROP. PRESERVATION (last visited July 15, 2025).

¹⁰² UCHENDU EUGENE CHIGBU, ET AL., UNITED NATIONS CONVENTION TO COMBAT DESERTIFICATION, GLOBAL LAND OUTLOOK WORKING PAPER, [STRENGTHENING TENURE AND RESOURCE RIGHTS FOR LAND RESTORATION](#) (2022).

sustainable land use. Families can consider conservation easements as a tool during the land planning and decision-making process.

**SAND WARS:
LEGAL AND POLICY CHALLENGES IN ALLOCATING BEACH-QUALITY SAND
RESOURCES**

Todd S. Roessler*
Madison Kate Williams**

As coastal erosion accelerates due to rising sea levels and more frequent and destructive storms, the demand for sand used in beach renourishment projects has surged. This has led to competition for beach-quality sand, a finite resource, resulting in what some have called “Sand Wars.” This article explores the legal frameworks and policy challenges surrounding the allocation of sand resources in North Carolina and federal waters, examining the roles of state and federal agencies, the limitations of existing regulatory systems, and recommendations for more effective management of these critical resources.

I. INTRODUCTION

Coastal erosion is a growing concern for communities across the United States. Rising sea levels and more frequent and intense storms are eroding beaches and threatening oceanfront structures and infrastructure. To address this issue, many states, including North Carolina, have turned to beach renourishment projects—periodic efforts to replenish eroded beaches with sand from offshore, nearshore, or upland sources.¹ However, the increasing demand for beach-quality sand has outpaced the availability of this finite resource, leading to competition among coastal communities and highlighting weaknesses in existing legal and regulatory frameworks.

This article examines the legal and policy structures that govern the allocation of sand resources, focusing on federal and North Carolina law, and offers recommendations for improving the management of these resources. It also

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¹ See [Beach Nourishment](#), NAT’L PARK SERV. (last visited July 22, 2025).

addresses the broader implications of “Sand Wars” and the need for a comprehensive, sustainable approach to sand resource management.

II. THE ROLE OF BEACH RENOURISHMENT IN ADDRESSING COASTAL EROSION

Under natural conditions, beaches migrate landward in response to rising sea levels and storms. However, human development along coastlines disrupts this natural process, causing beaches to narrow and erode. Historically, “hardened” structures, such as seawalls and groins, were used to maintain an unmoving, static shoreline, but many states, including North Carolina, now restrict these structures on the oceanfront due to their perceived—and at times documented—negative impacts to coastal processes and adjacent properties.² Instead, beach renourishment has become the primary method for mitigating oceanfront erosion.

Beach renourishment involves the periodic placement of sand to widen beaches and sometimes includes adding sand to enhance or create dunes. Beach-quality sand is commonly sourced from navigation channels and nearshore or offshore shoals and transported to the beach via hydraulic dredging. However, the sand placed during renourishment is “sacrificial,” requiring maintenance every few years as it erodes.

Renourishment projects can be costly and resource intensive.³ Project sizes may vary in the amount of sand placed ranging from 100,000 to an excess of 1,000,000 cubic yards. The cost of these projects can range from \$1 million to over \$50 million, depending on factors such as the size of the project, proximity to sand sources, sand type, and environmental and regulatory requirements. Beach renourishment has grown exponentially, with the first large-scale implementation

² Unless an exception applies, North Carolina law prohibits the construction of permanent erosion control structures (such as seawalls, bulkheads, revetments, and groins) along the oceanfront shoreline. N.C. GEN. STAT. § 113A-115.1(b).

³ Despite the high costs of beach renourishment, studies have shown that the costs to maintain beaches is a small fraction of the tourism revenue and other socioeconomic benefits generated by beach renourishment. Nicole Elko et al., *A century of U.S. beach renourishment*, OCEAN & COASTAL MGMT. 199 (2021).

at Coney Island, New York in 1923.⁴ North Carolina has followed national trends of regularly utilizing beach renourishment, with nearly every coastal community relying on beach renourishment.⁵

III. FEDERAL FRAMEWORK FOR ALLOCATING SAND RESOURCES

The federal government plays a significant role in managing offshore sand resources through the Outer Continental Shelf (OCS) Lands Act.⁶ Under Section 8(k) of the Act, the Bureau of Ocean Energy Management (BOEM) within the Department of the Interior is authorized to issue non-competitive leases for the use of OCS sand, gravel, and shell resources for coastal restoration and beach renourishment projects.⁷ In North Carolina, federal waters are defined as those located three or more nautical miles offshore.⁸

BOEM evaluates lease requests based on a set of criteria, including the project's public benefit, technical feasibility, environmental impact, and alignment with federal and state regulations.⁹ The process requires extensive documentation and environmental and regulatory review under the National Environmental Policy Act (NEPA),¹⁰ the Endangered Species Act (ESA),¹¹ the Marine Mammal Protection Act (MMPA),¹² the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA),¹³ the National Historic Preservation Act (NHPA),¹⁴ and the Coastal Zone Management Act (CZMA).¹⁵ BOEM does not charge a fee

⁴ *Id.*, at 5.

⁵ See Ian Conery et al., *Marine Geology and Sand Resources of the Southern North Carolina Inner Shelf*, MARINE GEORESOURCES & GEOTECHNOLOGY 1084 (2021).

⁶ 43 U.S.C. §§ 1331, *et seq.*

⁷ *Id.* §§ 1334(a), 1337(k).

⁸ 42 U.S.C. § 1312.

⁹ *Id.* § 1337(k)(2); 30 C.F.R. Part 583.

¹⁰ 42 U.S.C. §§ 4321 *et seq.*

¹¹ 16 U.S.C. §§ 1531 *et seq.*

¹² *Id.* §§ 1361 *et seq.*

¹³ *Id.* §§ 1801 *et seq.*

¹⁴ 54 U.S.C. §§ 300101 *et seq.*

¹⁵ 16 U.S.C. §§ 1451 *et seq.*

to federal, state, or local agencies for OCS sand¹⁶ and the leasing process can take 12 to 18 months or longer.¹⁷

BOEM negotiates non-competitive leases for the use of OCS sand, gravel, and shell resources for coastal restoration and beach renourishment projects on a “first-come, first-serve” basis, balancing need and availability to the maximum extent possible. BOEM considers each request individually, weighing the public interest and other relevant factors.¹⁸ This evaluation includes, among other factors, the project purpose, the potential environmental impacts, the proposed design and feasibility of the project, and the needs and concerns of other stakeholders (such as the U.S. Army Corps of Engineers (the “Corps”), state agencies, and other local governments).¹⁹ BOEM has entered into leases for several multiple-user borrow areas, which require extensive coordination and borrow area use planning to optimize limited resources and reduce dredging inefficiencies

The duration of a BOEM lease for offshore sand varies and is controlled by the lease terms and regulatory requirements. Depending on the project’s scope and schedule, leases are typically issued for three to five years. Agreements can be amended under limited circumstances if additional time is required for construction.²⁰

If a lessee does not extract the full quantity of sand authorized, the remaining resource does not remain exclusively reserved for the original lessee beyond the lease term. To access additional material after the lease expires, the party must submit a new request, which BOEM will evaluate under current environmental and regulatory standards. This ensures that the use of offshore sand resources remains adaptive to new information about environmental impacts, coastal needs, and stakeholder input. There is no guarantee of future access to

¹⁶ 43 U.S.C. § 1337(k)(2)(B).

¹⁷ [*Non-Energy Marine Minerals Legal Framework*](#), BUREAU OF OCEAN ENERGY MGMT. (last visited August 10, 2025).

¹⁸ See 30 C.F.R. § 583.130 (“Any use of OCS sand, gravel, and/or shell resources in an agreement will be negotiated on a case-by-case basis.”).

¹⁹ See 30 C.F.R. § 583.305.

²⁰ 30 C.F.R. § 583.345.

unextracted sand without reapplying and BOEM entering into a new lease agreement.

To date, BOEM has executed 71 leases, allocating nearly 200 million cubic yards of sand to restore 500 miles of coastline.²¹ In North Carolina, recent requests include 15 million cubic yards of sand by the Town of Surf City and 2.4 million cubic yards by the Town of Oak Island.²²

IV. NORTH CAROLINA’S FRAMEWORK FOR ALLOCATING SAND RESOURCES

In North Carolina, sand lying beneath state waters is classified as state property.²³ The state, through the Department of Environmental Quality (NCDEQ), has the authority to sell, lease, or otherwise dispose of these resources.²⁴ Because sand is classified as a mineral and the definition of “waters of the State” includes the Atlantic Ocean within three miles of North Carolina’s coastline, an enforceable legal right to extract sand from state-owned submerged lands requires obtaining an easement from NCDEQ.²⁵ Furthermore, any grant of rights by NCDEQ to remove sand must also receive authorization from the North Carolina Department of Administration (DOA) and the Governor and Council of State.²⁶

Although several agency approvals are required—including easement acquisition from NCDEQ, authorization from the DOA and Governor and Council

²¹ [Current Statistics on Leases](#), BUREAU OF OCEAN ENERGY MGMT. (last visited July 16, 2025).

²² *Id.*

²³ N.C. GEN. STAT. § 146-64(6) (“‘State lands’ means all land and interests therein, title to which is vested in the State of North Carolina, or in any State agency, or in the State to the use of any agency, and specifically includes all vacant and unappropriated lands, swamplands, submerged lands, lands acquired by the State by virtue of being sold for taxes, escheated lands, and acquired lands.”). “Submerged lands” are “State lands, which lie beneath ... the Atlantic Ocean to a distance of three geographical miles seaward from the coastline of this State.” *Id.* § 146-64(7).

²⁴ *Id.* § 146-8.

²⁵ JOSEPH J. KALO ET AL., N.C. COASTAL RES. L., PLAN. & POL’Y CTR., [DEVELOPING A MANAGEMENT STRATEGY FOR NORTH CAROLINA’S COASTAL OCEAN: REPORT OF THE OCEAN POLICY STEERING COMMITTEE](#) (Apr. 2009).

²⁶ N.C. GEN. STAT. § 146-8.

of State, and Coastal Area Management Act (CAMA) permitting by the North Carolina Division of Coastal Management (DCM)—North Carolina does not have a single, formalized regulatory process specifically dedicated to granting legal rights to remove sand for beach renourishment projects. Under CAMA, applicants proposing a beach nourishment project must identify a “beach-compatible” sand source similar to the beach where it will be placed. If all other regulatory conditions are satisfied, a CAMA permit can be issued.²⁷ Although DOA reviews all proposed beach nourishment projects during the CAMA major permitting process, no separate easement or license for sand removal has been required, and the issuance of the CAMA permit is considered sufficient authorization. The CAMA permit establishes a maximum quantity of sand that the applicant is allowed to remove from the designated source for their project. According to DCM, sand from the same source may also be used by other applicants for separate projects, provided the source contains enough sand to meet the demands of all approved projects.²⁸

There have been instances where this “first come, first served” approach has created challenges in North Carolina. For example, in 2012, DCM issued CAMA permits to the Towns of Holden Beach and Oak Island authorizing sand from the same borrow area. The towns were able to reach a sand allocation agreement; however, this instance underscores the need for a structured system to manage access to limited sand resources.

²⁷ *Id.* Beach renourishment must meet the general rules for development in the Ocean Hazard AEC as well as the following standards: (i) sand used for beach nourishment must be similar in quality and grain size to sand in the area being nourished; (ii) sand may not be taken from sensitive natural areas or areas where it will cause more than a minimal environmental effect; (iii) to minimize adverse impacts to nesting sea turtles, no work may occur within the period of May 1 through Nov. 15 without prior approval from DCM, in coordination with the N.C. Wildlife Resources Commission, U.S. Fish and Wildlife Service, and U.S. Army Corps of Engineers; (iv) the project should maintain a slope similar to normal conditions; (v) renourishment projects may be subject to the North Carolina Environmental Policy Act (NCEPA), which requires a NCEPA review.

²⁸ Kalo et al., *supra* note 25.

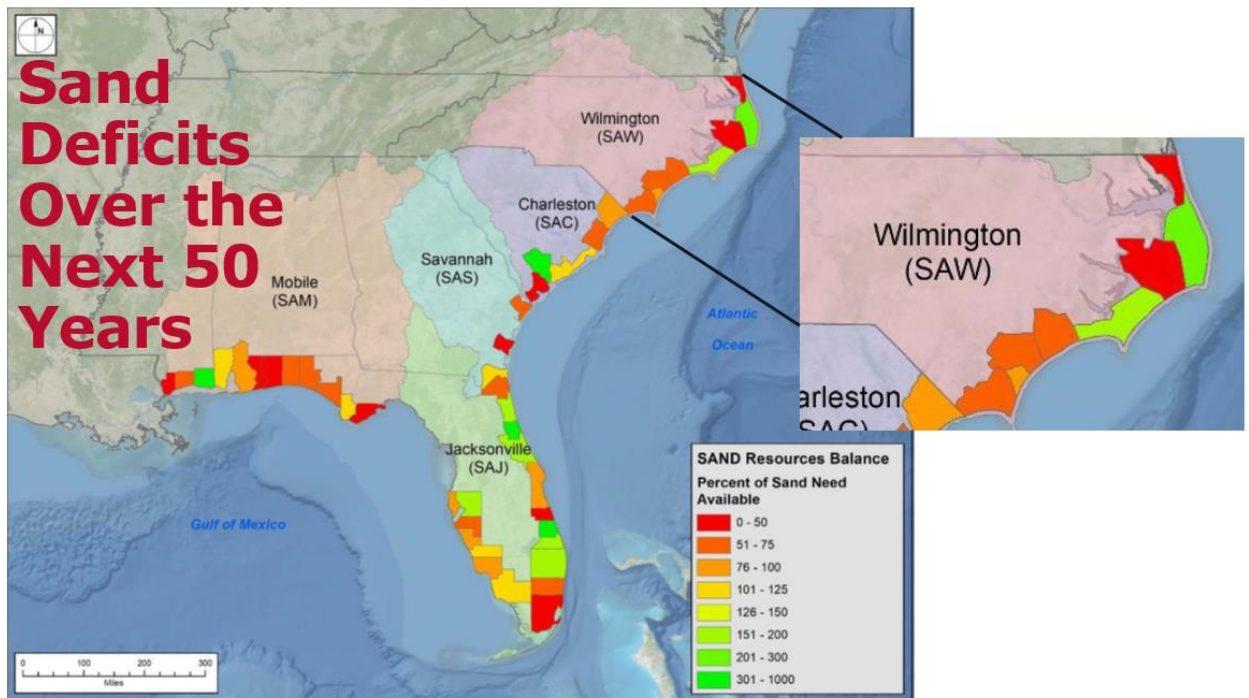
V. SAND: A LIMITED RESOURCE

A fundamental issue in both federal and state frameworks is that, until recently, sand was not managed as a finite or high-demand resource; management practices have lagged behind the increasing recognition of its scarcity and growing competition for access. In reality, beach-quality sand is finite, and its availability varies significantly along the North Carolina coast.²⁹ While areas like Bogue Banks are considered “sand-rich,” regions such as Brunswick County are “sand-poor,” with limited borrow areas to support ongoing renourishment needs.³⁰ The Corps has identified areas along the North Carolina coast that are likely to experience “sand deficits” over the next 50 years. These areas include the Outer Banks and southern coastline, where existing need is already high.³¹

²⁹ Conery et al., *supra* note 5; U.S. ARMY CORPS OF ENG’RS, S. ATL. DIV., *South Atlantic Coastal Study: Sand Availability and Needs Determination* (2020).

³⁰ U.S. ARMY CORPS OF ENG’RS, S. ATL. DIV., *South Atlantic Coastal Study: Sand Availability and Needs Determination* (2021).

³¹ *Id.*



South Atlantic Coastal Study: Sand Availability and Needs Determination, SAD 2020.

Figure 1. Sand deficits over the next 50 years. U.S. ARMY CORPS OF ENG'RS, S. ATL. DIV., *South Atlantic Coastal Study: Sand Availability and Needs Determination* (2020).

VI. RECOMMENDATIONS FOR SUSTAINABLE SAND RESOURCE MANAGEMENT

Sand resource management should be part of a broader management policy of NC in order to adapt to a limited sand supply, climate change, and sea level rise. To address limited sand supply and regulatory gaps, the following recommendations should be considered.

1. Develop a Comprehensive Statewide and Federal Sand Management Strategy.

A coordinated, science-based management policy is needed at both the state and federal levels. North Carolina should develop a comprehensive coastal sand management program, modeled after existing frameworks for other finite resources, such as water. This program should include:

- A centralized database of sand resources in state water, including withdrawals;
- Clear criteria for prioritizing sand allocation among competing uses (*e.g.*, technical feasibility, the needs and concerns of other stakeholders, public safety, infrastructure protection, ecological benefits, recreational benefits);
- Establish dedicated positions or offices (such as a State Sand Manager), modeled after successful county-level initiatives, to oversee planning, allocation, and stakeholder engagement;
- Regular review of sand resource availability, with integration into coastal development and hazard mitigation planning; and
- Coordination with federal agencies (*i.e.*, BOEM and the Corps) to ensure data sharing, joint planning, and harmonization of state and federal efforts.

At the federal level, BOEM and the Corps should:

- Continue to improve national sand inventory efforts and conduct a cost-benefit analysis of resource surveys versus applied project expenditures, focusing on strategic data gaps;
- Develop federal guidance for sand allocation that supports state-level planning and addresses inter-state competition for offshore sand; and
- Fund research into sand scarcity, alternatives to beach nourishment, and economic tipping points for project feasibility.

2. Apply Lessons from Other Finite Resource Management Frameworks.

DCM should conduct a cross-sectoral review to examine how North Carolina (and other states) manage sand and other high-demand, finite resources—such as groundwater or public trust waters. Key questions include:

- What legal and regulatory mechanisms facilitate equitable allocation and sustainable management?

- How are competing demands resolved (*i.e.*, permitting, public interest, prioritization criteria)?
- How can these principles inform sand management policy and statutes?

This review should culminate in proposed statutory or regulatory amendments that adapt proven approaches to the context of sand resource governance.

3. Establish a Formalized, Transparent Regulatory Framework for Sand Removal.

North Carolina should codify a clear, standardized regulatory process for granting rights to remove sand for beach nourishment and related projects. This framework should:

- Clearly delineate the roles and responsibilities of NCDEQ, DOA, the Governor and Council of State, and DCM;
- Establish standardized application, review, and authorization procedures, including timelines and public notice requirements;
- Provide for amendments and adaptive management as project needs and environmental conditions change, including provisions for emergency access and modification of terms to account for storms and other events creating emergency needs;
- Establish a system that prioritizes the needs of competing beach communities; and
- Ensure transparency, predictability, and accountability for all stakeholders.

4. Assess Sand Resource Depletion and Project Feasibility.

State and federal agencies, in partnership with academic institutions, should fund and conduct research to:

- Quantify current and projected sand availability within state and federal waters;

- Establish timelines for when accessible sand resources may become depleted under various demand scenarios;
- Identify the financial thresholds at which beach renourishment becomes economically infeasible, incorporating both direct costs and societal benefits; and
- Model the consequences of sand depletion, including impacts on coastal resilience, property, infrastructure, and ecosystems.

5. Develop a Prioritization and Allocation System Based on Quantified Need.

DCM should develop a data-driven allocation framework to determine which projects or communities receive priority for sand resources, now and in the future. This system should:

- Develop and integrate quantitative assessments of need (*i.e.*, erosion rates, population protection, infrastructure at risk, recreation benefits, distance from resources);
- Account for future uncertainties and the challenges of forecasting demand; and
- Provide mechanisms for public input, periodic review, and adaptive reallocation as circumstances evolve.

6. Optimize Beneficial Use of Navigation Channel Sand.

North Carolina should prohibit the permanent removal of beach-quality sand from nearshore zones. For example, sand dredged as part of navigation projects should be placed on eroding beaches rather than disposed of offshore. North Carolina should coordinate with the National Oceanic and Atmospheric Administration (NOAA) to incorporate relevant statutes or regulations into its enforceable Coastal Management Program, ensuring federal consistency under the CZMA, to require the Corps to place dredged beach-quality sand on ocean beaches or in the active nearshore zone.

7. Comprehensively Manage Inlet Tidal Delta Sand Sources.

Inlet tidal deltas are increasingly being targeted as sand sources due to their proximity and cost-effectiveness. However, excessive mining of these areas can destabilize inlets and adjacent barrier islands. Increased inlet instability caused by sand mining may necessitate expanding inlet hazard areas—a designated Area of Environmental Concern—which could increase the number of at-risk properties and communities. Additional studies are needed to inform policies that balance sand extraction with the ecological health of inlet systems.

VII. CONCLUSION

The growing demand for beach-quality sand underscores the need for a comprehensive approach to sand resource management. Both federal and state frameworks must evolve to address resource limitations, prioritize competing interests, and ensure the sustainable use of this critical public resource. By adopting proactive policies and establishing clear legal rights to sand resources, North Carolina can better prepare for the challenges of coastal erosion, climate change, and sea level rise. To avoid or minimize communities competing for a limited resource, North Carolina should establish a legal framework that encourages collaboration and long-term planning to protect our coastal communities.

GOING WITH THE WIND: THE FUTURE OF OFFSHORE WIND

Kaitlin Beckom*

This article explores the environmental impacts of offshore wind development under current regulations and practices, arguing the need for more robust measures to ensure environmentally responsible offshore wind development. Focusing mostly on recent offshore wind developments on the east coast of the United States, this article presents a combined scientific and legal analysis of current offshore wind regulations and practices. The article discusses current trends in the technology of offshore wind, the political influence that has been seen in the wind industry, and cases that are being brought against BOEM highlighting holes in the regulatory practices currently in place. Ultimately the article focuses on methods of responsible offshore wind development such as requiring the best available technology, increased community involvement and accountability, and ensured compliance.

I. INTRODUCTION

With the United States' population continuing to rise, commercial electricity usage increasing, and data centers becoming more common, energy demand has increased.¹ In tandem, the energy sector is affecting climate change at an astronomical rate. Fossil fuels such as coal, oil, and natural gas account for over 75 percent of greenhouse gas emissions.² Additionally, with the growing demand for energy, increased mining and drilling destroy land, soil, and other natural resources, furthering the effects of climate change. To combat climate

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¹ Nida Çakır Melek & Alex Gallin, [Powering Up: The Surging Demand for Electricity](#), FED. RSRV. BANK OF KAN. CITY (Sept. 25, 2024).

² [Causes and Effects of Climate Change](#), UNITED NATIONS (last visited Aug. 19, 2025).

change, the focus has shifted to finding new, more sustainable energy sources, including solar, onshore wind, offshore wind, and hydropower.

Our current energy infrastructure and production may be insufficient to meet future needs, both in terms of the environment and required electricity generation. Many states have implemented climate plans that move from carbon-intensive energy production to more renewable sources. The move to renewable energy is not a new concept. Still, it is becoming increasingly evident in its necessity due to the immense benefits to the environment and to meet the energy demand of the growing population. Deploying offshore wind is necessary to meet climate goals. By placing wind turbines in the ocean, offshore wind farms allow unobstructed access to high-velocity winds. Offshore wind has higher efficiency energy production (kWh per unit) than both onshore wind³ and solar power.⁴ Offshore wind projects have faced many challenges, such as public scrutiny and permit and funding freezes. However, this renewable energy source, if developed responsibly, could provide affordable, clean energy to coastal communities.

On the federal level, the Bureau of Ocean Energy Management (BOEM) regulates offshore wind energy. BOEM plays a significant role in almost all aspects of the offshore wind leasing and development process.⁵ In addition to BOEM, offshore wind is influenced by political parties as they move in and out of the executive office. State agencies balance the influence of the federal government by setting clean energy goals and incentivizing offshore wind projects.⁶ Despite the existing regulatory framework for offshore wind currently in existence, the environment is a factor not focused on enough.

This article argues that while offshore wind is promoted as a green energy solution and offers enormous benefits to reducing carbon while meeting growing

³ *Onshore vs Offshore Wind Energy: What's the Difference?*, NATIONALGRID (last visited Aug. 20, 2025).

⁴ *Solar Energy Vs Wind Energy: Cost, Efficiency, Applicability, And Environmental Impact*, NRG CLEAN POWER (Jan. 2, 2025).

⁵ See ADAM VANN, CONG. RSCH. SERV., R40175, WIND ENERGY DEVELOPMENT: LEGAL FRAMEWORK SUMMARY (2023).

⁶ See *States Power Offshore Wind Forward Amid Federal Retreat*, NAT'L CAUCUS OF ENV'T LEGISLATORS (Apr. 15, 2025).

energy needs, the current regulatory approach does not sufficiently ensure that the development of offshore wind considers both short-term and long-term impacts to the environment, and additional regulations are necessary. This article will analyze offshore wind scientifically and legally, focusing mostly on development along the Atlantic Coast of the United States. Part II will describe the scientific and technical background of offshore wind and the growing energy productivity of these turbines. Part III will show the relationship between federal agencies, the executive branch, and state actors responsible for offshore wind projects. Part IV addresses misconceptions of offshore wind, exemplifying the benefits and why offshore wind is necessary to meet policy goals. Part V focuses on the laws that play a role in offshore wind and recent offshore wind cases challenging those laws. Part VI will address the methods for responsible offshore wind development and implementation measures to ensure legal and environmental compliance. Ultimately, further environmental regulation and considerations are necessary to address current regulatory flaws, ensuring that the energy market can become greener in an environmentally responsible manner.

II. WHAT IS OFFSHORE WIND?

A. The History of Offshore Wind

Throughout the 1980s, onshore wind power grew rapidly across Europe and the United States. Due to its technological complexity and prohibitive costs at the time, offshore wind remained largely experimental. It was not until 1990, when the world's first offshore wind turbine was successfully commissioned in Sweden, that offshore wind became a viable option as a renewable energy source. That Swedish offshore wind turbine "was built as a test plant 'in order to examine the influence of birds, fish and fishing, shipping, public opinion, maintenance and the effects on foundations from wind and ice.'"⁷ Shortly after, in 1991, the Vindeby Offshore Wind Farm, the world's first commercial wind farm, was commissioned off the coast of Lolland, Denmark.⁸ The early 2000s saw advancement in wind turbine technology, leading to the world's largest offshore

⁷ *Offshore Wind Turbines*, UNIV. OF STRATHCLYDE (last visited Aug. 20, 2025).

⁸ *Vindeby Offshore Wind Farm*, TETHYS (last visited May 21, 2025).

wind farm in 2013, located in the UK.⁹ The Block Island Wind Farm was the first commercial offshore wind farm in the United States, commissioned in 2016 off the coast of Rhode Island.¹⁰ Since 2016, several other projects have been proposed and completed along the U.S. East Coast, aiming to contribute to the nation's renewable energy goals.¹¹

B. The Science Behind Offshore Wind

Offshore wind energy is a renewable energy that has gained attention in recent years. Like onshore wind energy, offshore wind energy is produced when wind blows and turns the turbine blades, which connect to a rotor that then rotates to generate electricity.¹² Many of these turbines are located on the U.S. Outer Continental Shelf (OCS)¹³, submerged lands under federal jurisdiction that begin three nautical miles (nm) from the U.S. coastline, extending seaward to 200nm.¹⁴ Typically, these projects are located around 25 nm to 37 nm,¹⁵ giving the wind farms an unobstructed wind path and greater wind strength. Projects are limited by ocean depth; offshore wind projects with fixed foundations are not often located in waters exceeding 196 feet in depth.¹⁶ This is due to ocean topography and financial limitations. As you move further out to the deep sea, the ground's topography becomes less flat, with ridges making it harder to secure the fixed turbine to the seabed.¹⁷ Likewise, the greater the ocean depth, the more complex and thus costly it is to erect a wind turbine.¹⁸ A solution that has previously been

⁹ [About the London Array](#), LONDON ARRAY (last visited Aug. 20, 2025).

¹⁰ Aidan Ackerman et al., [Block Island Wind Farm](#), LANDSCAPE PERFORMANCE SERIES (2019).

¹¹ [Lease and Grant Information](#), BUREAU OF OCEAN ENERGY MGMT. (last visited Aug. 20, 2025); [Offshore Renewable Activities – Activities by Name](#), BUREAU OF OCEAN ENERGY MGMT., (last visited Aug. 20, 2025).

¹² [How Electricity Is Generated](#), OFFSHORE WIND MD. (last visited Aug. 20, 2025).

¹³ [Lease and Grant Information](#), *supra* note 11; [Offshore Renewable Activities – Activities by Name](#), *supra* note 11.

¹⁴ [Outer Continental Shelf](#), BUREAU OF OCEAN ENERGY MGMT. (last visited Aug. 20, 2025).

¹⁵ [Data Show Big Gains for Offshore Wind](#), NAT'L RENEWABLE ENERGY LAB'Y (Oct. 8, 2020) (calculations adjusted).

¹⁶ [Everything You'd Like to Know About Offshore Wind Farm Construction](#), IBERDROLA (last visited Aug. 20, 2025).

¹⁷ [Ocean Floor Features](#), NOAA (last visited Aug. 20, 2025); Frank Smith, [Why Wind Turbines Can't Go Further Out](#), THE SANDPAPER (Aug. 17, 2022).

¹⁸ *Id.*

discussed is the development of floating turbines. Unlike traditional offshore wind turbines, floating turbines are mounted to a buoy-like system with cables anchoring it to the sea floor; however, these turbines maintain a similar windmill-like appearance as traditional turbines above the surface.¹⁹ This allows for the turbines to be placed in deeper waters, as deep as 1,000 meters, creating more acreage for offshore wind farms to be placed.²⁰ Additionally, geological challenges are less of an issue because the turbine does not need to be anchored to the sea floor in the same manner.²¹

Because offshore wind turbines are in the ocean, they need to be built sturdier and larger than traditional onshore wind turbines. Offshore wind turbines can range from about 550 feet tall to upwards of about 850 feet—compared to the Statue of Liberty at 305 feet tall.²² These large turbines are not the only structures required for offshore wind energy generation; substations and cables are needed to get the energy from the turbines to the shore for consumers to utilize. Substations are often found in the leased area of the wind farms in the ocean, but they can also be located onshore.²³ These substations then “receive power from wind turbine facilities via electric cables and act as a collector to transport the electricity to the export cable and to onshore substations.”²⁴ Offshore wind is more efficient than onshore wind because the turbines run at 35 to 50 percent capacity, compared to the onshore capacity of 25 to 35 percent.²⁵ With current technology, just one spin of an offshore wind turbine blade can provide power to an average household for over two days.²⁶ Current wind farms have an expected life cycle of 20 to 30

¹⁹ [Top 10 Things You Didn't Know About Offshore Wind Energy](#), U.S. DEP'T OF ENERGY (Aug. 21, 2024).

²⁰ Rebecca Loomis & Dr. Francine Kershaw, [Floating Offshore Wind Brings Challenges and Opportunities](#), NRDC (May 19, 2021).

²¹ Nathan Rebuck et.al., [Floating Offshore Wind: Overcoming Seafloor Challenges](#), INTEGRAL (Jan. 6, 2024).

²² [Offshore Wind 101](#), N.Y. STATE ENERGY RSCH. AND DEV. AUTH. (last visited Aug. 20, 2025).

²³ See [Offshore Wind - Substations \(Proposed or Installed\)](#), ARCGIS HUB (last updated Aug. 5, 2025).

²⁴ *Id.*

²⁵ [Wind Turbines and Energy Production](#), BUS. NOR. (last updated Nov. 13, 2024).

²⁶ Alina Gonzalez, [Wind on the Water: Five Benefits of Offshore Wind Energy](#), CTR. PROGRESSIVE REFORM (June 15, 2021).

years;²⁷ however blades, gearboxes, and other smaller hardware may need to be replaced or repaired earlier. At the end of a wind turbine's life, the structure typically is removed, but occasionally offshore wind turbines can be refurbished, with parts getting replaced but the original structure remaining.²⁸

III. WHY IS OFFSHORE WIND ENERGY IMPORTANT?

A. Common Misconceptions

Science counters the widespread myths regarding the devastating effects of offshore wind.²⁹ One of the most common fears in public perceptions of offshore wind projects is that the wind turbines will disrupt the pristine view for beachgoers and homeowners. This common issue referred to as the Not in My Back Yard (NIMBY) mentality has led to local opposition to offshore wind projects. While offshore wind turbines are large, due to their placement being far out, the turbines are often barely visible due to the curvature of the Earth's horizon line.³⁰ For example, the Coastal Virginia Offshore Wind Project has turbines 27 to 42 miles off the coast that are often not visible.³¹ There are exceptions—if a wind project is closer to shore or if the day is clear and cloud-free, but on average, people can only see about 3 miles out when standing on the beach.³²

A similar concern is that wind farms could impact tourism and property values, especially if the farm is located close enough to shore so that turbines are

²⁷ Simon Warder & Matthew Piggott, *The Future of offshore wind power production: Wake and climate impacts*, 380 APPLIED ENERGY 124956 (2015); *see also* Eva Topham & David McMillan, *Sustainable Decommissioning of an Offshore Wind Farm*, 102 RENEWABLE ENERGY 470, 471, 479 (2017).

²⁸ Topham & McMillan, *supra* note 27, at 471.

²⁹ Sam Wojcicki, [Responsible Offshore Wind Development is a Clear Win for Birds, the U.S. Economy, and Our Climate](#), NAT'L AUDUBON SOC'Y (Jan. 17, 2025).

³⁰ *See Project I*, ATLANTIC SHORES OFFSHORE WIND (last visited Aug. 20, 2025) (exemplifying how the curvature of the earth reduces visibility of wind turbines from the shoreline).

³¹ Margaret Berei, [What Can North Carolina Learn from Virginia's Investments in Offshore Wind?](#), NC SUSTAINABLE ENERGY ASS'N (July 22, 2024).

³² *See* Nikki Withers, [How Far Away is the Horizon?](#), BBC SCI. FOCUS (last visited Aug. 20, 2025).

visible. The concern is valid; however, evidence suggests that the impact is minimal to none. In fact, studies suggest offshore wind may benefit tourism and the housing market. Offshore wind farms have seen an increase in tourism, with a market opening up for offshore wind boat tours, viewing platforms, or even virtual tours online.³³ A study of rentals on Block Island indicated that during each peak-tourism month of July and August following the construction of the Block Island Wind farm. “The BIWF caused a seven-night increase in the number of nights reserved, a nineteen percentage point increase in occupancy rates, and a \$3,490 increase in revenue for AirBnb properties in Block Island relative to properties in control group cities.”³⁴

Likewise, a study by the Lawrence Berkeley National Laboratory and the University of Connecticut found no evidence that proximity to offshore wind projects impacted led to decline of home property values.³⁵

Another concern that has raised attention is that offshore wind projects kill whales. However, reports and studies by the Marine Mammal Commission³⁶ and the National Oceanic and Atmospheric Administration (NOAA)³⁷ indicate no correlation between the number of deaths among whales and offshore wind projects. Similarly, many people believe that offshore wind projects will cause more fatalities for bird species. While there are deaths related to bird collisions with turbines, the estimated deaths are small, especially compared to other sources of human-caused bird mortalities.³⁸ A report by the Audubon Society, a nonprofit that seeks to protect birds, found that rather than harming birds, if done

³³ PANKAJ LAL ET AL., THE POTENTIAL OF OFFSHORE WIND ENERGY TOURISM IN OCEAN CITY, NEW JERSEY 1–2 (2021).

³⁴ Andrew Carr-Harris & Corey Lang, *Sustainability and Tourism: The Effect of the United States’ First Offshore Wind Farm on the Vacation Rental Market*, RES. AND ENERGY ECON. 51, 64 (2019).

³⁵ CAROL ATKINSON-PALOMBO & BEN HOEN, LAWRENCE BERKELEY NAT’L LAB’Y, [RELATIONSHIP BETWEEN WIND TURBINES AND RESIDENTIAL PROPERTY VALUES IN MASSACHUSETTS](#) 14 (2014).

³⁶ See [Update on Strandings of Large Whales Along the East Coast](#), MARINE MAMMAL COMM’N (Feb. 21, 2023).

³⁷ [Frequent Questions – Offshore Wind and Whales](#), NOAA FISHERIES (last updated Mar. 14, 2024).

³⁸ See Jack Clarke, [Concern About Killer Offshore Wind Turbines is for the Birds](#), ECORI NEWS (Nov. 14, 2018).

responsibly, offshore wind has immense benefits for birds.³⁹ For example, the report found that replacing the use of fossil fuels with offshore wind will help protect the deteriorating habitats for birds due to climate change.⁴⁰

B. Benefits of Offshore Wind

Despite the spread of misinformation, the benefits of offshore wind are significant and promising. The U.S. Department of Energy has suggested that the total potential power from offshore wind in U.S. federal waters can produce over three times the annual electricity consumption in the U.S.⁴¹ This is important because as land becomes developed and space for additional infrastructure shrinks, offshore wind offers vast potential to meet the energy demands without the constriction of land. The large size of offshore wind turbines and the stronger ocean winds allow for more consistent and abundant production compared to onshore wind farms.⁴² “[A] turbine in a 15-mph wind can generate twice as much energy as a turbine in a 12-mph wind.”⁴³ In addition to the abundant production, the consistent ocean wind allows for higher reliability in power generation, which is not a guarantee with other methods of renewable sources.⁴⁴

The most crucial benefit of offshore wind, and why it is vital to our growing energy demand, is that it reduces carbon dioxide emissions. “According to the International Energy Agency (IEA), each gigawatt-hour (GWh) of energy produced by offshore wind power can avoid the emission of around 500 tonnes of CO₂, depending on the fossil source

³⁹ See Wojcicki, *supra* note 29.

⁴⁰ NATHANIEL SEAVY ET AL., NAT’L AUDUBON SOC’Y, [DEVELOPING THE OFFSHORE WIND THAT BIRDS NEED](#) 5 (2025).

⁴¹ See *Offshore Wind Research and Development*, U.S. DEP’T OF ENERGY, [2t](#) (last visited Mar. 3, 2025); OCEAN CONSERVANCY, [PROTECTING THE OCEAN AND SUPPORTING COMMUNITIES THROUGH RESPONSIBLE OFFSHORE WIND](#) 4 (2024).

⁴² See [What are the advantages and disadvantages of offshore wind farms?](#), AM. GEOSCIENCES INST. (last visited Sep. 2, 2025).

⁴³ [What are the Advantages and Disadvantages of Offshore Wind Farms?](#), AM. GEOSCIENCES INST. (last visited Aug. 20, 2025).

⁴⁴ [Advantages of Offshore Wind](#), ØRSTED (last visited Aug. 20, 2025).

replaced.”⁴⁵ 32 states have released climate action plans, with 24 states and the District of Columbia including specific targets for greenhouse gas emissions reduction.⁴⁶ For example, North Carolina’s Clean Energy Plan calls for reducing greenhouse gas emissions in the electric power sector by “70% below 2005 levels by 2030 and attain[ing] carbon neutrality by 2050.”⁴⁷ Duke Energy, the primary electric power company in North Carolina, has adopted a plan that includes offshore wind development to help them attain this goal.⁴⁸ Similarly, Maine has set the goal of carbon neutrality by 2045 and “reduce gross [... greenhouse gas] emissions by 45 percent from 1990 levels by 2030 and 80 percent by 2050.”⁴⁹ A 2024 report by the Maine Department of Environmental Protection found that the state is on track to reach this goal and has an offshore wind initiative to encourage the development of projects to help meet the target.⁵⁰ With the influence of states aiming to reduce greenhouse gas emissions, the need for renewables, such as offshore wind energy, is inevitable.

C. Economic Impact

The process of offshore wind development is often criticized as being costly and not worth the investment, especially because companies are starting from scratch with the green infrastructure.⁵¹ The unsubsidized cost of offshore wind is estimated to be over \$120/MWh, making it one of the highest-cost energy resources.⁵² However, because of regulation, there are subsidies and tax incentives that drastically reduce the cost of offshore wind,⁵³ over 20 companies have

⁴⁵ Davide Ciravolo, *Environmental Benefits of Offshore Wind Energy*, BLUE LIFE HUB (Nov. 9, 2024).

⁴⁶ *State Climate Policy Maps*, CTR. FOR CLIMATE AND ENERGY SOLS. (last visited Aug. 22, 2025).

⁴⁷ *Clean Energy Plan*, N.C. DEP’T OF ENV’T QUALITY (last visited Aug. 22, 2025).

⁴⁸ See Cassie Gavin, *NCSEA Statement on Duke Energy’s Carbon Plan Supplemental Planning Analysis*, NC SUSTAINABLE ENERGY ASS’N (Feb. 5, 2024).

⁴⁹ *Maine Remains on Track to Fulfill Goals According to the Greenhouse Gas Emissions Report*, ME. DEP’T OF ENV’T PROT. (June 10, 2024).

⁵⁰ *Id.*; See *Offshore Wind*, GOVERNOR’S ENERGY OFF. (last visited Aug. 25, 2025).

⁵¹ Travis Fisher, *Unpacking the High Cost of Offshore Wind Policy*, CATO INST. (Jan. 10, 2024); *Economics and Incentives for Wind*, WINDEXCHANGE (last visited Aug. 25, 2025).

⁵² Fisher, *supra* note 51.

⁵³ U.S. DEP’T OF ENERGY, *ADVANCING THE GROWTH OF THE U.S. WIND INDUSTRY: FEDERAL INCENTIVES, FUNDING, AND PARTNERSHIP OPPORTUNITIES* (Apr. 2023).

obtained leases to develop wind farms.⁵⁴ Additionally, as time goes on, the U.S. Energy Information Administration “estimates that the costs for offshore wind installed in 2040 will be about one-third less, with levelized costs between \$74.47/MWh and \$105.39/MWh, with an average price of \$85.53/MWh.”⁵⁵

Offshore wind also offers economic benefits. The highest energy demand is found in coastal communities, resulting in some of the highest wholesale electricity prices.⁵⁶ Unlike many solar projects located in the arid west, away from population centers, in rural areas, offshore wind will allow energy generation to be close to consumers.⁵⁷ The long-term financial benefits of offshore wind are high: “[t]he average acre from an offshore wind lease sale brings in nearly 12,500 percent more revenue for taxpayers than 1 acre of oil.”⁵⁸ In some cases, offshore wind energy could lower consumers' electricity costs, making it 28% cheaper than gas.⁵⁹ In addition to consumer benefits, energy companies could be saving money. “Developing 127 gigawatts offshore wind energy capacity over 20 years would provide energy at a cost of about \$36 billion less than the production of economically recoverable new offshore oil and natural gas on the Atlantic coast.”⁶⁰ Opportunity for offshore wind jobs is also immense. A fully operating domestic offshore wind farm can create up to 49,000 manufacturing and supply chain jobs.⁶¹

⁵⁴ [Leasing and Grant Information](#), BUREAU OF OCEAN ENERGY MGMT. (last visited Aug. 25, 2025).

⁵⁵ Jonathan A. Lesser, [Out to Sea: The Dismal Economics of Offshore Wind](#), MANHATTAN INST. (Aug. 25, 2020).

⁵⁶ See [Offshore Wind Power Facts](#), AM. CLEAN POWER (last visited Aug. 25, 2025).

⁵⁷ See Betty Resnick & Arica Hamilton, [Solar Energy Expansion and its Impacts on Rural Communities](#), MARKET INTEL (Aug 8, 2024); see also [Solar Explained](#), U.S. ENERGY INFO. ADMIN. (last updated July 12, 2024).

⁵⁸ Michael Freeman, [Offshore Wind Can Lower Energy Prices and Beat Out Oil and Gas](#), CTR. AM. PROGRESS (Sep. 23, 2022).

⁵⁹ *Id.*

⁶⁰ [Offshore Wind Report: Key Findings](#), OCEANA (last visited Aug. 25, 2025).

⁶¹ See JEREMY STEFEK ET AL., NAT’L RENEWABLE ENERGY LAB’Y, [U.S. OFFSHORE WIND WORKFORCE ASSESSMENT](#) 8 (2022).

IV. WHAT IS THE INFLUENCE OF FEDERAL AND STATE GOVERNMENTS ON OFFSHORE WIND?

A. The Bureau of Ocean Energy Management

BOEM was established in 2010 under the Department of the Interior Secretarial Order 3299.⁶² This order created three new agencies from the former Mineral Management Service, which was responsible for managing oil, gas, and mineral resources.⁶³ The split occurred after the Deepwater Horizon oil spill, which suggested potential conflict of interest between regulatory missions of the umbrella agency.⁶⁴ After splitting, BOEM became responsible for managing “development of U.S. Outer Continental Shelf (OCS) energy, mineral, and geological resources in an environmentally and economically responsible way.”⁶⁵ The agency acquired its regulatory authority under the Energy Policy Act of 2005, which is “an amendment to OCS Lands Act, grants BOEM lead management authority for marine renewable energy projects on Federal offshore lands, and other projects that make alternative use of existing oil and natural gas platforms.”⁶⁶ With this Congressional delegation of power, BOEM regulates almost every aspect of offshore wind energy: planning, leasing of areas, site assessments by lessee, and construction and operations.⁶⁷ In 2024, BOEM and the Bureau of Safety and Environmental Enforcement (BSEE) finalized the Renewable Energy Modernization Proposed Rule: “The final rule increases certainty and reduces the costs associated with the deployment of offshore wind projects by modernizing regulations, streamlining overly complex processes and removing unnecessary ones, clarifying ambiguous regulatory provisions, and enhancing compliance requirements.”⁶⁸ Additionally, specifically for renewable energy programs like offshore wind, BOEM must comply with 30 CFR 585,

⁶² [Ocean Energy Management Bureau](#), FED. REG. (last visited Aug. 25, 2025).

⁶³ *Id.*

⁶⁴ See [Salazar Divides MMS's Three Conflicting Missions](#), U.S. DEP'T OF INTERIOR (May 19, 2010).

⁶⁵ [About BOEM](#), BUREAU OF OCEAN ENERGY MGMT., (last visited Aug. 25, 2025).

⁶⁶ [BOEM Governing Statutes](#), BUREAU OF OCEAN ENERGY MGMT. (last visited Aug. 25, 2025).

⁶⁷ [Regulatory Framework and Guidelines](#), BUREAU OF OCEAN ENERGY MGMT. (last visited Aug. 25, 2025).

⁶⁸ *Id.*

which outlines procedures and responsibilities to follow in developing energy on the OCS.⁶⁹

Offshore wind projects are not completed overnight, as it can take up to 11 years for project completion.⁷⁰ The first step is the planning and analysis stage, which lasts about two years and identifies potential sites and environmental reviews by federal, state, tribes, and other agencies.⁷¹ Next, BOEM leases the site. Leases can be issued for submerged land through a competitive process, such as an auction, or a non-competitive process, such as an applicant requesting a non-competitive lease.⁷² The leasing stage can take one to two years.⁷³ However, it is essential to note that obtaining a lease does not give developers permission to build or construct anything—BOEM must first approve proposals and plans before any construction can begin.⁷⁴

Once the lease is granted, the lessee conducts a site assessment plan, which details the lessee's proposal for the construction.⁷⁵ At the site assessment phase, the lessee conducts surveys and studies to determine the site characterization, including plans and environmental impacts.⁷⁶ This is the longest part of the developmental process, taking up to five years to complete.⁷⁷ Finally, the construction and operation of the project occur within about two years.⁷⁸ During this phase, "BOEM conducts environmental and technical reviews of the [... Construction and Operations Plan] and decides whether to approve, approve

⁶⁹ 30 C.F.R. § 585 (2025).

⁷⁰ *Regulatory Framework and Guidelines*, *supra* note 67 (About 2 years is estimated for planning and analysis, 1 to 2 years for leasing process, up to 5 years for the site assessment, and about 2 years for construction which totals to approximately 11 years).

⁷¹ *Id.*; BUREAU OCEAN ENERGY MGMT., FACT SHEET: WIND ENERGY COMMERCIAL LEASING PROCESS (May 2021).

⁷² FACT SHEET: WIND ENERGY COMMERCIAL LEASING PROCESS, *supra* note 71.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*; *Regulatory Framework and Guidelines*, *supra* note 67.

⁷⁸ FACT SHEET: WIND ENERGY COMMERCIAL LEASING PROCESS, *supra* note 71; *Regulatory Framework and Guidelines*, *supra* note 67.

with modification, or disapprove the COP.”⁷⁹ The process seems long, but these steps and requirements are implemented to ensure development is completed in a “safe and environmentally sound manner.”⁸⁰

B. State Agencies

States are also key stakeholders and partners in developing offshore wind projects. State governments sometimes act as motivator for offshore wind projects—they pass laws requiring greenhouse gas emissions reductions and policies requiring offshore wind to be an energy source.⁸¹ For example, ten states currently have laws requiring offshore wind development.⁸² North Carolina recently had their “carbon plan” approved by its Utilities Commission, which required the state to reduce carbon levels, and the plan included offshore wind development to help them meet that goal.⁸³ In addition to developing offshore wind, states have jurisdiction over the area from the coastline up to three nautical miles out.⁸⁴ Transportation boats, cables, and substations will likely have to cross this zone and abide by state laws and permits.⁸⁵ Furthermore, states have the option to sign contracts with wind developers to directly purchase power or mandate that state utilities obtain a certain percentage of their energy from offshore wind projects.⁸⁶ With this, states set standards to ensure the projects are cost-effective, offer the best value to ratepayers, support local economic development, use local ports, and hire local workers.⁸⁷ States can also invest in infrastructure to encourage offshore wind development. For example, proposed legislation in California (A.B.472) “would require the state to assess funding needs and opportunities for developing port infrastructure that can aid offshore

⁷⁹ FACT SHEET: WIND ENERGY COMMERCIAL LEASING PROCESS, *supra* note 71; *Regulatory Framework and Guidelines*, *supra* note 67.

⁸⁰ 30 C.F.R. § 585.101 (2025).

⁸¹ [The Federal Government's Role Ensuring Responsible Development](#), OFFSHORE WIND MD. (last visited Aug. 25, 2025).

⁸² *Id.*

⁸³ [North Carolina's Carbon Plan](#), NC SUSTAINABLE ENERGY ASS'N (last visited Aug. 25, 2025).

⁸⁴ 43 U.S.C. § 1301 (1953).

⁸⁵ *See i.e.*, [Offshore Wind Development – Jurisdiction](#), NC DEP'T OF ENV'T QUALITY (last visited Aug. 25, 2025).

⁸⁶ *The Federal Government's Role Ensuring Responsible Development*, *supra* note 81.

⁸⁷ *Id.*

wind energy development in the coming years.”⁸⁸ Even amongst federal turmoil in offshore wind energy development, states remain a proponent of cheaper and greener energy to meet their states’ needs.

C. Impact of The Executive Branch and Political Parties

Offshore wind also involves other aspects of the executive branch, as it must balance the competing demands between the environment, the military, and economics. For example, NOAA works with BOEM to share research on proposed sites and environmental aspects of project development.⁸⁹ Similarly, the Department of Defense (DOD), through its Clearinghouse—a program that looks at potential impacts of energy projects and other developments on the military—works with BOEM as well. “The Clearinghouse leads DOD interactions with BOEM for offshore energy compatibility and coordinates at every stage of planning, permitting, and development throughout the Atlantic... The efforts of the Clearinghouse, BOEM, and states create plans that support offshore energy development while safeguarding military missions.”⁹⁰ BOEM also works closely with the National Aeronautics and Space Administration (NASA) to map the best potential locations for future wind projects and to ensure that activities could co-exist with wind energy development.⁹¹

Recently, the offshore wind community has seen the force and impact that the presidential administrations can have on the longevity and success of offshore wind regulation, as BOEM is an executive agency. The difference between the Biden administration and the 2025 Trump administration is a perfect example of this influence. Under the Biden administration, a push for renewables, including offshore wind, was seen in the 2022 Inflation Reduction Act.⁹² The 2022 Inflation Reduction Act provided a 30% tax credit for developers who start constructing

⁸⁸ *States Power Offshore Wind Forward Amid Federal Retreat*, *supra* note 6.

⁸⁹ *Offshore Wind Energy*, NOAA Fisheries (last visited Aug. 25, 2025).

⁹⁰ *Offshore Energy*, DEP’T OF DEF. (last visited Aug. 25, 2025).

⁹¹ See *BOEM Finalizes Wind Energy Areas in the Central Atlantic*, BUREAU OF OCEAN ENERGY MGMT. (July 31, 2023).

⁹² CORRIE E. CLARK ET AL., CONG. RSCH. SERV., IN11980, [OFFSHORE WIND PROVISIONS IN THE INFLATION REDUCTION ACT 2](#) (2024).

offshore wind projects before 2026.⁹³ The Biden administration also set “goals to deploy 30 gigawatts (GW) of offshore wind energy capacity by 2030 and 15 GW of floating offshore wind energy capacity by 2035.”⁹⁴ Likewise, the administration had approved over 15 gigawatts of offshore wind by September of 2024, showing great strides in reaching the offshore wind energy goal set.⁹⁵ Of the executive administrations, the Biden administration was perhaps the most progressive in terms of promoting offshore wind and renewable energy.

There has been a complete change in how the Biden administration approached offshore wind compared to the current Trump administration. In his first month back in office, President Trump called for a temporary pause on leasing, approvals, permits, or loans for offshore wind projects by BOEM.⁹⁶ Likewise, President Trump ordered a pause on Inflation Reduction Act funding, which was providing funding to offshore and other renewable energy initiatives.⁹⁷ In response, 18 attorney generals filed a lawsuit to block the President’s actions.⁹⁸ The recent tax breaks, subsidies, and other regulatory tools has caused even anti-wind proponents to become concerned. The Thomas Jefferson Institute for Public Policy, a think tank that has previously opposed offshore wind, has acknowledged offshore wind’s potential compared to other renewables and the need for the completion of the Virginia Wind Farm.⁹⁹

The wind project will not have a great capacity factor and may often be idle, but when running, it will produce substantial

⁹³ *Id.*

⁹⁴ [*Biden-Harris Administration Advances Offshore Wind Energy Leasing in Guam*](#), BUREAU OF OCEAN ENERGY MGMT. (Jan. 3, 2025).

⁹⁵ [*Biden-Harris Administration Marks Major Milestones for Offshore Wind, Approves Tenth Project*](#), U.S. DEP’T OF THE INTERIOR (Sept. 05, 2024).

⁹⁶ LAURA COMAY, CONG. RSCH. SERV., IN12509, [*STATUS OF U.S. OFFSHORE WIND LEASING AND PERMITTING: PRESIDENT TRUMP’S JANUARY 2025 WIND LEASING MEMORANDUM*](#) (2025); Kristina Zagame, [*Trump Initially Ordered a Pause on IRA Funding – What Does it Mean for Solar?*](#), ENERGYSAGE (Feb. 7, 2025).

⁹⁷ *Id.*

⁹⁸ Nate Raymond, [*Democratic-led States Sue to Block Trump’s Halting of Wind Projects*](#), REUTERS (May 5, 2025, 2:26 PM).

⁹⁹ Stephen D. Haner, [*Trump Official Asked to Stop Dominion Wind Construction: Why the Thomas Jefferson Institute Didn’t Join the Request*](#), THOMAS JEFFERSON INST. FOR PUB. POL’Y (Feb. 12, 2025).

electricity. It will be far superior to solar panels. Kill it, and Virginia needs that much more power from some other new or leased generation, again at a major cost to ratepayers.¹⁰⁰

In April 2025, President Trump ordered construction to halt for the Empire Wind 1 project off the coast of Long Island.¹⁰¹ This was due to alleged concerns over the Biden Administration rushing through approvals of offshore wind without sufficient consideration of the project's impacts.¹⁰² The Trump administration finally lifted this stop-work order almost a month later.¹⁰³ However, the green light to continue with the project, which was 30% complete, came at the price of negotiating the revival of a potential natural gas pipeline.¹⁰⁴ While this is not ideal, it echoes the idea that the immense cost of stopping of offshore wind projects in the development phase could help save them from being cancelled.

Additionally, under the Trump administration, essential environmental laws, such as the National Environmental Protection Act (NEPA), and their power to hold energy companies and developers accountable for their environmental impacts may decline. The Trump Administration put forth an interim final rule that would rescind all the Council on Environmental Quality's (CEQ) NEPA regulations.¹⁰⁵ While this may not immediately affect offshore wind, as BOEM is currently prohibited from leasing sites, making NEPA unnecessary, this rule would have impacts once offshore wind sites can be leased. For one, it would limit NEPA considerations to those "reasonably foreseeable impacts."¹⁰⁶ The problem with this is that the ocean is still a mystery, so limiting the scope of impacts would potentially allow environmental problems to be ignored. The

¹⁰⁰ *Id.*

¹⁰¹ Lauren Dalban, [Trump Halts Construction of Big Wind Farm Off New York Coast](#), THE GUARDIAN (Apr. 18, 2025).

¹⁰² *Id.*

¹⁰³ Nichola Groom & Nora Buli, [US Lifts Ban on New York Offshore Wind Project After Natgas Pipe Compromise](#), REUTERS (May 20, 2025, 12:17 PM).

¹⁰⁴ *Id.*

¹⁰⁵ Rafe Petersen et al., [Seismic Changes in Federal Environmental Reviews: CEQ to Rescind NEPA Regulations](#), HOLLAND & KNIGHT (Feb. 25, 2025).

¹⁰⁶ *Id.*

Trump administration has also altered the government's position on the Migratory Bird Treaty Act (MBTA), repealing the opinion by the Biden administration, which stated the MBTA prohibited incidental and intentional takings; now limiting the prohibition to intentional takings only.¹⁰⁷ This would drastically limit the consideration given to bird species when developing offshore wind facilities, putting birds at greater risk of harm. The proposed changes and effects would reduce environmental oversight and introduce uncertainties that could cause major environmental harm. Based on recent lawsuits, the proposed changes are likely to be challenged by those who seek to increase environmental protections.¹⁰⁸

These recent actions show how influential the administration can be on the progress of the green energy transition. Trump's pause on new or renewed approvals for offshore wind development may impact multiple active offshore wind projects being executed.¹⁰⁹ Current projections suggest that in the long run these actions will not affect the overall trajectory of renewable energy development.¹¹⁰ It is clear that offshore wind energy is essential to many states and projects in development will not go down without a fight, hopefully deterring the Trump administration from further destabilizing the offshore wind industry.

V. LAWSUITS INVOLVING OFFSHORE WIND PROJECTS

As offshore wind development has increased, lawsuits opposing the projects have followed. Many lawsuits challenging offshore wind projects focus on the environmental integrity of the projects. Plaintiffs often consist of fishing groups, environmental organizations, and local communities arguing for further protection of marine ecosystems and animals.¹¹¹ Likewise, critics point to

¹⁰⁷ E. Carter Clements & Eric J. Murdock, *The Pendulum Swings Back (Again) on Prohibition of Incidental Take Under the Migratory Bird Treaty Act*, HUNTON (Apr. 16, 2025).

¹⁰⁸ See *supra* note 98.

¹⁰⁹ See *Lease and Grant Information*, *supra* note 11.

¹¹⁰ Kira Taylor, *What Trump's Return Means for America's Energy Transition*, FORESIGHT (Mar. 28, 2025); Benjamin Storrow et al., *Shift to Clean Energy Will Persist Under Trump, New Analyses Say*, SCI. AM. (Apr. 16, 2025).

¹¹¹ See *infra* notes 113 to 120.

shortcomings by BOEM and developers in complying with environmental laws, including NEPA and ESA.¹¹²

For example, in *Nantucket Residents Against Turbines v. United States Bureau of Ocean Energy Management*, plaintiffs challenged the adequacy of the 2021 Biological Opinion and the Final Environmental Impact Statement for the Vineyard Wind Project located off the coast of Massachusetts.¹¹³ Here, a nonprofit corporation challenged the permits and approval for the Vineyard Wind Project in Massachusetts.¹¹⁴ The plaintiffs sued BOEM, alleging that the agency had violated the ESA and NEPA.¹¹⁵ However, the Vineyard Wind Project case has moved through courts, finding that BOEM did not violate NEPA nor ESA.¹¹⁶

Similarly, cases in New Jersey and Maryland were filed in opposition to the environmental impacts that are perceived by the specified offshore wind projects. In *Mayor & City Council of Ocean City v. U.S. Dep't of the Interior*, plaintiffs, including the Mayor, six fishers, and local businesses, challenge agency approval of the COP for an offshore wind project in Maryland, claiming that the government failed to adequately analyze the environmental impacts, especially regarding endangered species in the area, and the potential effects on local businesses.¹¹⁷ A second lawsuit against the Maryland Offshore Wind Project was also brought but for different reasons. A historically conservative think tank claims that the electric cables being built under Delaware-controlled waters and wetlands pose a harm to Delaware's natural resources, and there was insufficient public input and compliance with the state's Coastal Zoning Act, ultimately posing a greater harm to Delaware than benefit.¹¹⁸

¹¹² *Id.*

¹¹³ *Nantucket Residents Against Turbines v. United States Bureau of Ocean Energy Mgmt.*, 675 F. Supp. 3d 28 (D. Mass. 2023), *aff'd, sub nom. Oliver v. U.S. Bureau of Ocean and Energy Mgmt.* (In re *Nantucket Residents*), 100 F.4th 1 (1st Cir. 2024).

¹¹⁴ *Id.* at 43–44.

¹¹⁵ *Id.* at 35.

¹¹⁶ *Id.* at 64; *Oliver v. U.S. Bureau of Ocean and Energy Mgmt.* (In re *Nantucket Residents*), 100 F.4th 1 (1st Cir. 2024).

¹¹⁷ *Mayor and City Council of Ocean City, MD v. U.S. Dep't of Interior*, SAG-24-3111, 1 (D. Ct. MD July 2, 2025) (mem opinion).

¹¹⁸ See Charles Miller, [*Delaware Think Tank Challenges Offshore Wind Project*](#), NAT'L SEA GRANT L. CTR. (Feb. 26, 2025).

The New Jersey case, *County of Cape May v. United States*, was dismissed without prejudice as the county and other plaintiffs argued that BOEM had failed to analyze the emissions and climate change in their Final Environmental Impact Statement, required under NEPA, only focusing on “partial, project-specific climate impacts in the nearby geographic area but attempts to quantify only emissions offsets from the Project, with limited qualitative descriptions of emissions generated from construction.”¹¹⁹ Even if the courts find that there has been no violation of these laws, as seen in a handful of cases that have been decided upon,¹²⁰ to ensure compliance with the law and to reduce the likelihood of being taken to court, BOEM and the energy corporations should work to implement methods in their research and development process that go above the base level requirements of law. Lawsuits continue to be brought, focusing on the shortcomings of current environmental practices by BOEM and developers. To combat the onslaught of cases, there need to be additional and/or stricter methods to address these concerns.

VI. METHODS TO ADDRESS ENVIRONMENTAL AND LEGAL COMPLIANCE CONCERNS

Concerns over the environmental impact of wind development are understandable given the importance of the ocean. The ocean is essential to maintaining life on Earth, and disruption to the marine ecosystem could result in long-term damage and unforeseen impacts. Fossil fuels are a significant cause of harm to the marine ecosystem, and moving towards renewable energy can mitigate these negative impacts. Burning fossil fuels releases carbon dioxide that is absorbed by the ocean, increasing its average acidity.¹²¹ For this and many other reasons, BOEM and states need to ensure responsible offshore wind development, and to do this, they need to go beyond the law's bare minimum requirements.

¹¹⁹ Complaint at 40, *Cnty. of Cape May v. United States*, No. 1:23-cv-21201 (D.N.J. 2023).

¹²⁰ See Benjamin Storrow, [4 Lawsuits Threaten Vineyard Wind](#), E&E NEWS (Mar. 29, 2023, 6:54 AM); see *Mayor & City Council of Ocean City v. U.S. Dep't of the Interior*, No. 1:24-cv-03111 (D. Md. 2024); see *Cnty. of Cape May v. United States*, No. 1:23-cv-21201 (D.N.J. 2023).

¹²¹ See NAT. RES. DEF. COUNCIL, [OCEAN ACIDIFICATION: THE OTHER CO₂ PROBLEM](#) (2009).

This is not to suggest that current practices are ineffective, but rather there are additional steps that could strengthen existing safeguards and practices to further protect the environment. BOEM already requires several baseline environmental practices, including consideration of the biodiversity of a leased area and Marine Protected Areas, environmental assessments and impact statements required under NEPA, and consultation with NOAA Fisheries, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service (NMFS) under the ESA and the Magnuson-Stevens Fishery Conservation and Management Act.¹²² Additionally, BOEM has requirements that look at archaeological resources and other historic properties, water quality, and endangered species and their habitats.¹²³ While BOEM and NOAA, along with state agencies, are taking preventive actions as required by law, some mitigation practices are not required; rather they are encouraged or recommended, and applied on a project-by-project basis.¹²⁴ Additionally, procedural requirements, such as NEPA, leave open room for developers to list possible mitigation measures or alternatives without incorporating them. With the protection of the marine environment and ecology being a high priority for many, an increase in substantive requirements for developers and agencies to follow are needed. The following paragraphs will outline some of the best methods to ensure responsible offshore wind development.

A. Protection of Flora and Fauna

One of the concerns expressed by opponents of offshore wind is that construction harms animals, such as whales and birds. One way offshore wind development can mitigate negative impacts on wildlife is to avoid construction near areas critical to wildlife during times such as breeding or migration.¹²⁵ Currently, there is no legal blanket requirement to halt construction. BOEM considers each project on a project-by-project base when considering

¹²² *Environmental Consultations for Offshore Renewable Energy Projects on the Atlantic Outer Continental Shelf*, BUREAU OF OCEAN ENERGY MGMT. (last visited Aug. 22, 2025).

¹²³ *See id.*

¹²⁴ U.S. GOV'T ACCOUNTABILITY OFF., GAO-25-106998, ACTIONS NEEDED TO ADDRESS GAPS IN INTERIOR'S OVERSIGHT OF DEVELOPMENT (2025).

¹²⁵ *See Wojcicki, supra* note 29.

Environmental Impact Statements (EIS) under NEPA, looking at critical habitats and the potential impacts on wildlife.¹²⁶ However, it has been noted that there is still much unknown about the impacts, such as those on bird migration in the U.S.¹²⁷ Often BOEM will favor alternative mitigation techniques rather than shutdown a project, to ensure that there is no substantial delay in construction or permitting.¹²⁸ While a complete shutdown, even temporary, may not be ideal for developers, it would reduce the displacement of the animals that often are the subject of suits brought against BOEM, even when current EIS provide for mitigation plans.¹²⁹ In fact, Dominion must stop all pile driving of foundations on the Coastal Virginia Offshore Wind project during the 6-month right whale migratory season.¹³⁰

Additionally, during the construction and operation of offshore wind farms, boats and ships are necessary to bring people to substations and transport people and materials to the actual farm location. Speed restrictions for offshore wind vessels should be adopted to reduce the chances of collisions with whales or other marine animals.¹³¹ For example, the South Fork Wind Project in New York put forth an agreement with the Natural Resources Defense Council, National Wildlife Federation, and Conservation Law Foundation to limit vessels to a 10-knot speed limit to protect right whales throughout the lifetime of the project.¹³² Offshore wind projects could consider different routes when laying transmission cables to avoid important seagrass beds, coral reef environments, or nurseries.

¹²⁶ See GAO, *supra* note 124, at 19-23.

¹²⁷ *Id.* at 22.

¹²⁸ See e.g., [Proposed Mitigations for Offshore Wind Energy Development](#), BUREAU OF OCEAN ENERGY MGMT., (last visited Aug. 22, 2025); see also, [BOEM's NEPA Screening Criteria for Offshore Wind Projects Are a Big Step Toward Permitting Certainty](#), THE POWER LINE (July 19, 2022).

¹²⁹ See *Mayor & City Council of Ocean City v. U.S. Dep't of the Interior*, No. 1:24-cv-03111 (D. Md. 2024); see *Cnty. of Cape May v. United States*, No. 1:23-cv-21201 (D.N.J. 2023).

¹³⁰ [Timeline](#), Dominion Energy Coastal Virginia Offshore Wind (last visited Aug. 22, 2025); Dr. Francine Kershaw, [Landmark Offshore Wind Agreement Protects Right Whales](#), NAT. RES. DEF. COUNCIL (Jan. 23, 2019).

¹³¹ Alison Chase, [Responsible Offshore Wind Requires Smart Vessel Speeds](#), NAT. RES. DEF. COUNCIL (Aug. 4, 2022).

¹³² *Id.*

This has been seen in a handful of EISs for offshore wind projects such as the Vineyard Wind Project¹³³ and Beacon Wind Project.¹³⁴

Taking precautionary measures like the ones mentioned above will not only ensure the safety of these animals but will also help regain public trust.

B. Marine Spatial Planning

A critical step in protecting marine life is establishing a unified system or standardized approach to Marine Spatial Planning (MSP). MSP is a process that compiles data from different ocean users and applies the information gathered to show how the ocean is used.¹³⁵ Currently, data collection methods vary widely across states and federal agencies, leading to issues such as data loss during transfer, outdated datasets, and inconsistencies that hinder effective decision-making. According to the Department of Energy's 2022 Offshore Wind Energy Strategies Report, the "current geographic and time coverage of offshore measurements is insufficient to provide needed certainty."¹³⁶ One unified data collection system would allow for real-time updates, as information is obtained, ensuring everyone has access to the most current and accurate information.¹³⁷ If a single system is not possible, then BOEM must at least adopt standardized data collection and input protocols to improve the efficiency of sharing between jurisdictions and reducing duplicate or conflicting information.

Additionally, to have effective MSP, there must be greater communication and engagement with those utilizing the ocean, including commercial fishermen, marine biologists, shipping companies, and local community members.¹³⁸

¹³³ See [Frequently Asked Questions](#), VINEYARD WIND (last visited Aug. 22, 2025).

¹³⁴ See AECOM, [CONSTRUCTION AND OPERATION PLAN VOLUME 1: PROJECT DESCRIPTION](#) 2-27 (2023).

¹³⁵ See [Marine Spatial Planning](#), THE NATURE CONSERVANCY (last visited Mar. 4, 2025).

¹³⁶ NATE MCKENZIE & MONICA MAHER, U.S. DEP'T OF ENERGY, [OFFSHORE WIND ENERGY STRATEGIES](#) 16 (2022).

¹³⁷ See James Morris, [Workshop Highlights Data Needs for Marine Spatial Planning in Federal Waters off Virginia, North Carolina, and South Carolina](#), NAT'L CTRS. FOR COASTAL OCEAN SCI. (Sept. 5, 2024).

¹³⁸ See Alicia Said & Brice Trouillet, *Bringing 'Deep Knowledge' of Fisheries into Marine Spatial Planning*, 19 MAR. STUD. 347, 350 (2020).

Likewise, NGOs, such as the Nature Conservancy,¹³⁹ who are passionate about the environment and already conduct MSP, will be able to contribute to the collective data set, creating a more wholistic and accurate picture of the ocean's biodiversity, weather conditions, and topography. This could allow for better site planning and construction to reduce marine impact.

While MSP is typically used to determine appropriate sites for offshore wind projects, its potential extends to post-construction monitoring.¹⁴⁰ Updating MSP technology would allow developers and agencies to monitor how fisheries fluctuate, sediment changes and moves, and ecological health are faring after large wind farms are installed. Tracking changes over time can create adaptive management plans and encourage regulators and developers to refine mitigation measures if needed. This practice is beginning to be seen in the offshore wind field, such as with the United Kingdom's Marine Management Organization who has worked to standardize post-consent monitoring for offshore wind farms, allowing the data collected to be compared more easily across projects after development.¹⁴¹ Having updated MSP tools would make this task easier and more efficient.

C. Best Available Technologies

Offshore wind projects must also implement the best available technology practices to ensure the development is done responsibly. Offshore wind is a new and rapidly changing energy field, and we continue to learn more about what works and what does not as more projects emerge. One example of a best practice to minimize environmental impact is through artificial reef construction. Studies from Europe have shown that turbines with monopile foundations surrounded by rocks are more likely to attract fish than monopile foundations surrounded by sandbags or jacket foundations. Following the example of established offshore

¹³⁹ *Marine Spatial Planning*, *supra* note 135.

¹⁴⁰ M. Martín-Betancor et al., *Evaluation of Maritime Spatial Planning for Offshore Wind Energy in the Canary Islands: A Comparative Analysis*, 161 MARINE POL'Y 1 (2024).

¹⁴¹ Philippa Blyth, [Standardisation of Post-Consent Monitoring of Offshore Wind Farms](#), GOV.UK (Apr. 25, 2025).

wind farms, having a monopile foundation surrounded by rocks or sandbags,¹⁴² should become a standard best practice. Continued technological advancements are essential in this field. For example, grid technology advancements, such as advanced storage systems and transmission infrastructure, will allow offshore wind farms to integrate more effectively into the energy grid.¹⁴³ Additionally, technological advances to create floating wind turbines are already being discussed. A floating wind turbine will decrease the cost of infrastructure and increase energy generation capacity.¹⁴⁴ It will also allow for minimal environmental disruption because there would be no need for a foundation that disrupts the seafloor and surrounding habitats.¹⁴⁵

An additional opportunity to implement best available technology would be to ensure that wind turbines have monitoring devices. These monitoring devices would be installed with the wind turbine and send signals indicating the movement of bird or marine animal populations. This will not only inform BOEM of when migration is happening but could allow the turbine operator to temporarily shut down the turbine to ensure the safe passage of these animals.¹⁴⁶ Likewise, requiring “double bubble curtains” during turbine installation should be a standardized practice, as seen in the Vineyard Wind and South Fork Wind projects. Double bubble curtains use hoses around the construction area to produce bubbles, mitigating the sounds during construction.¹⁴⁷ The goal is to minimize the sound for marine life including animals communicating via sound frequencies such as whales, making them less likely to be harmed or displaced.¹⁴⁸

¹⁴² See *id.*

¹⁴³ See [Offshore Wind Advanced Technology Demonstration](#), U.S. DEP’T OF ENERGY (last visited Aug. 22, 2025).

¹⁴⁴ *Id.*

¹⁴⁵ While floating turbines are environmentally friendly, their cost often knocks them out of consideration, so until further technological advancements make development cheaper, this will not be a viable solution.

¹⁴⁶ See e.g., Andrew Lee, [Dutch shut down offshore wind turbines to save birds in ‘international first’](#), RECHARGE (May 16, 2023) (the Netherlands shut down wind turbines to help migrating birds after notice of a massive bird migration.).

¹⁴⁷ See Heather Richards, [Blowing Bubbles: Offshore Wind’s New Strategy to Save Whales](#), E&E NEWS (Dec. 13, 2023, 1:24 PM).

¹⁴⁸ *Id.*

D. Community Consideration

Developers should also consider local communities because responsible development involves more than protecting the environment—it also affects people’s lives in the area. Social implications include but are not limited to: (1) job loss and displacement; (2) equitable distribution concerns; and (3) social acceptance. For example, while offshore wind can create jobs it can also disrupt others. Fishermen located near the Vineyard Wind Project feared loss of jobs due to the turbines being located on prime fishing grounds, resulting in the project developer agreeing to pay to compensate for future losses.¹⁴⁹ Another example of a social implication arose with the Block Island Wind Project, showing the benefit of community consideration. Deepwater Wind, the developer, hired a community liaison to ensure that the community felt included, resulting in greater acceptance and trust of the project, allowing it to avoid pushbacks and legal disputes.¹⁵⁰

There needs to be more collaboration with developers and the local community through Community Benefit Agreements (CBAs), which are legally binding contracts between the community and developers to shape how a development contributes to the community.¹⁵¹ This will “help ensure coastal communities benefit from nearby offshore wind projects, with Congress taking steps to incentivize CBAs during the leasing process formally.”¹⁵² Examples of benefits in CBAs can be giving priority to local residents who seek a job opportunity on the project, paying for necessary port infrastructure improvements, creating training programs or partnerships with local institutions, or even having monthly public forums to share updates and receive input about the project. Vineyard Wind has a CBA with Martha’s Vineyard that outlines agreements between the offshore wind farm and key local stakeholders, such as seasonal visitors, residents, local officials, fisheries, and tribal communities.¹⁵³ Agreements

¹⁴⁹ [*Fishermen Fear Encroachment from Offshore Wind Projects*](#), ASSOCIATED PRESS NEWS (May 23, 2021, 2:54 PM).

¹⁵⁰ Nick Battista, [*Lessons Learned on Offshore Wind*](#), ISLAND INST. (Apr. 7, 2015).

¹⁵¹ See [*Community Benefits Agreements Database*](#), SABIN CTR. FOR CLIMATE CHANGE L. (last visited Aug. 22, 2025).

¹⁵² Wojcicki, *supra* note 29.

¹⁵³ [*THIRD AMENDED AND RESTATED COMMUNITY BENEFITS AGREEMENT \(VINEYARD WIND 1\)*](#) (2022).

include, but not limited to, creating a Visitor's Center for the wind farm, advertising, conducting community engagement and outreach, and communicating benefits of the wind farm to mitigate and address local opposition.¹⁵⁴

Additionally, developers should introduce compensation. For example, North Carolina has joined ten other East Coast states, including Maine, Rhode Island, and New York,¹⁵⁵ in their work to establish a regional financial compensation program that collaborates with commercial fishermen to cover economic losses resulting from Atlantic offshore wind development.¹⁵⁶ The process is described as that of an insurance claim where "[t]he regional fund administrator would hold the money, they would accept the claims and evaluate the claims for eligibility and appropriateness and then make a payment to the fisherman based on that claim."¹⁵⁷ This method of "insurance claim" has been used by other offshore wind development companies, such as South Fork Wind, which provides fishers for compensation if they were harmed by the construction, operation, and decommissioning of the wind farm.¹⁵⁸ Eligible individuals file a claim and are awarded financial compensation through the fund. While the "insurance claim" method is an ideal choice, the issue arises with funding, as the fisheries mitigation project does not have set funding. One method of funding for these types of initiatives could be through developers. For example, Vineyard Wind created a fisheries compensation program funded by the company that developed and constructed the offshore wind farm.¹⁵⁹ The compensation program opened an application for eligible fishermen and the Vineyard Wind developer portioned funds for Massachusetts, Rhode Island, and other states to be distributed to these fishermen.¹⁶⁰ Furthermore, developer contributions could be

¹⁵⁴ *Id.*

¹⁵⁵ [Fisheries Mitigation Project](#), SPECIAL INITIATIVE ON OFFSHORE WIND (last visited Aug. 22, 2025).

¹⁵⁶ See Trista Talton, [NC Joins Pact to Cover Offshore Wind-Related Fisheries Losses](#), COASTAL REV. (June 14, 2023).

¹⁵⁷ *Id.* (quoting Kris Ohleth).

¹⁵⁸ [Rhode Island Fisheries Direct Compensation Program](#), SOUTH FORK WIND (last visited Aug. 22, 2025).

¹⁵⁹ [Frequently Asked Questions](#), VINEYARD WIND 1 FISHERIES COMPENSATION FUNDS (last visited Aug. 22, 2025).

¹⁶⁰ *Id.*

required as part of the lease agreements with BOEM or in mandated CBAs, ensuring that there is some method of compensation for any harm that could occur. If not by developers, federal agencies can also provide funds for those experiencing economic and property loss. For example, The Fishermen's Contingency Fund was established by NOAA and provides compensation to those who have lost income due to reduced fish catch as a result of oil and gas obstructions on the OCS.¹⁶¹ The fund is primarily funded from fees collected from offshore oil and gas interests on the OCS.¹⁶² The funding for an offshore wind fund could come from fees collected during inspections or from taxes the energy company has to pay. Additionally, grants from federal agencies could be available for those impacted by the offshore wind development.

E. Compliance and Implementation Requirements

There needs to be a method to ensure developers and energy companies comply with these responsible development practices. The most effective enforcement would be to enshrine responsible development practices into federal law, so the requirements apply to all projects under federal jurisdiction. The federal regulations need to outline specific steps to develop responsibly, creating a list of requirements like 30 C.F.R. § 585.102, which outlines the responsibilities of BOEM.¹⁶³ States and BOEM must work with environmental organizations and technical experts to implement and regularly update environmental protection strategies and regulations to ensure developers follow best practices in reducing environmental harm.¹⁶⁴

Another method to ensure responsible development is to have BOEM require the use of best available technology and environmental protection in their lease agreements and permits. Currently, under the COP requirements in 30 C.F.R. § 585, BOEM can require developers to demonstrate the uses of best available and safest technologies.¹⁶⁵ BOEM lease agreements would lay out steps the developer

¹⁶¹ [*Fishermen's Contingency Fund Program*](#), NOAA (last updated Mar. 20, 2025).

¹⁶² *Id.*

¹⁶³ 30 C.F.R. § 585.102.

¹⁶⁴ *Id.* § 585.105.

¹⁶⁵ *Id.* § 585.621.

must follow to lease the designated area, such as contributing research to the MSP. Both federal and state agencies need to work in tandem with environmental organizations to create plans, which could be included in the offshore wind development permits, “to use best available species protection practices, test new technology, provide data, and adapt to changing circumstances as more is learned about offshore wind construction and operation and species contact,” similar to the Vineyard Wind’s developer who worked voluntarily with environmental groups.¹⁶⁶ Similarly, when BOEM approves a COP, it can require that the developers address each of these topics.¹⁶⁷ The caveat is that best practices need to go beyond the initial approval. Best practices should be included in the COP for future post-monitoring of the development site by the developer. The lifespan of offshore wind farms can be up to thirty or more years, and BOEM should approve COPs that give a detailed post-monitoring approach to ensure long-term environmental compliance.

While not legally binding, having offshore wind industry associations, such as the American Clean Power Association¹⁶⁸ and the National Ocean Industries Association,¹⁶⁹ adopt standards of best practice that incorporate the above suggestions could be very influential. Industry associations are influential because they represent the interests of businesses and stakeholders within a specific sector, in this case offshore wind and renewable energy. These associations help shape public policy by lobbying government agencies and lawmakers, providing research into their position, and promoting best practices within the industry. Also, these associations can guide developers on compliance and market trends and help the industry succeed.

¹⁶⁶ MICHAEL O’BOYLE ET. AL., [POLICY PRIORITIES TO ENSURE OFFSHORE WIND PLAYS A CENTRAL ROLE IN OUT NET-ZERO FUTURE A 2035 3.0 COMPANION REPORT](#), ENERGY INNOVATION (2023).

¹⁶⁷ Under 30 C.F.R. §585.628, BOEM has the authority to grant or deny a COP.

¹⁶⁸ [Home Page](#), AM. CLEAN POWER (last visited Aug. 22, 2025).

¹⁶⁹ [Welcome to NOIA](#), NAT’L OCEAN INDUS. ASS’N (last visited Mar. 3, 2025).

VII. CONCLUSION

The climate is changing at a pace that will reach levels of harm that will be difficult to remedy.¹⁷⁰ One of the best ways to ensure the longevity and stability of the climate will be to reduce the use of fossil fuels to lower our greenhouse gas emissions. In addition to the changing environment, we face the issue of growing populations and rising demand for energy. As many states have suggested in their climate plans, the solution is to move toward renewable energy. Offshore wind development will be essential for sufficient renewable energy to match growing electricity needs. The mass scale and complexity of offshore wind infrastructure bring environmental concerns that should not be ignored. Current trends of the Trump administration impede offshore wind development. While these actions are likely not going to stop the development of renewable energy, the administration's actions affecting offshore wind development have been very disruptive and contribute to a negative perception of offshore wind, as it can lead the public to believe the practice is unstable or environmentally unfriendly. As seen in the increasing number of cases brought against BOEM, members of the public have concerns about offshore wind development.¹⁷¹

Responsible offshore wind development may look different for everyone, but clear communication and transparency are key throughout the process. This is a continuing requirement, not a one-step task. Technologies and best practice strategies should continuously be updated. MSP should be updated with information as soon as possible and include data from everyone involved, such as commercial fishers. Policy needs to evolve to reflect a growing knowledge base and ensure compliance by all. Offshore wind is essential to meet increasing energy demand, and it needs to be done responsibly; because the end goal of the shift to renewable energy is to reduce the rate of climate change and make the planet healthier for future generations. BOEM and state agencies need to take additional steps and go beyond the minimum prescribed by law to ensure the implementation of responsible development practices. Their goal should be to

¹⁷⁰ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, [CLIMATE CHANGE 2023: SYNTHESIS REPORT](#) 24 (2023).

¹⁷¹ See *Mayor & City Council of Ocean City v. U.S. Dep't of the Interior*, No. 1:24-cv-03111 (D. Md. 2024); see *Cnty. of Cape May v. United States*, No. 1:23-cv-21201 (D.N.J. 2023).

collaborate with the communities that offshore wind projects will impact. Solutions such as continuous communication with fishermen, scientists, and government officials in mapping the ocean to get a fuller picture of where marine life thrives and supporting innovative technology to make wind turbines minimally invasive, will be essential. These also need to be implemented through some method of enforcement, such as federal law, BOEM contracts, or through industry association best practices.

ARE WE CLOSING IN ON INCLUDING COASTAL HAZARDS ON THE NORTH CAROLINA REAL ESTATE DISCLOSURE FORM?

Christine Goebel* & Elise Coby**

This article evaluates the prospects for adding coastal hazard disclosures to North Carolina's Residential Property Disclosure Form. While recent rulemaking successfully incorporated flood-related disclosures, similar efforts to address coastal risks such as erosion, sea level rise, and storm impacts have stalled. The authors trace past legislative attempts, assess the significance of the 2023 petition that secured new flood disclosure requirements, and compare North Carolina's framework with more comprehensive approaches in Texas and Florida. They argue that a petition for rulemaking could provide a viable path forward, offering buyers essential risk information while aligning disclosure practices with growing climate-related threats to coastal property.

I. INTRODUCTION

Real estate disclosure laws are a common tool used by states to ensure that potential buyers of property have transparency about possible issues with a property and allow buyers to trust that they are making informed decisions in purchasing a property. While coastal property is already particularly vulnerable to storms and beach erosion, impacts from climate change and sea level rise are increasing potential impacts that can threaten coastal property and undercut its value. Such impacts could be the subject of a coastal hazards real estate disclosure.

In North Carolina, a residential property seller is required to provide the North Carolina Real Estate Disclosure Form (Disclosure Form) to a potential buyer at the time of contract. The Disclosure Form is a valuable tool for informing potential buyers about possible risks associated with a particular property. These disclosures protect both buyers and sellers. For buyers, they provide essential knowledge to make informed decisions, potentially affecting property value and insurance costs. For sellers, complying with disclosure requirements helps mitigate liability and fosters transparency in transactions.

Amending the Disclosure Form law to add notice of coastal hazards is an approach attempted without success in the mid-2000's. However, amending the disclosure form rule to add information about coastal hazards through a petition for rulemaking now could be a successful approach.

II. WHAT IS A REAL ESTATE DISCLOSURE FORM?

A Real Estate Disclosure Form is a legal document that communicates known details of a property's condition to a prospective buyer. The seller provides this form to the buyer at the time the purchase contract is signed to foster transparency in residential real estate transactions. In North Carolina, the first disclosure form was required by the addition of the Residential Property Disclosure Act (Disclosure Act).¹ It lists the items required to be disclosed, such as damage or deficiencies in house systems or structures, and of other potentially hazardous conditions of the property.² This Chapter was significantly revised in 2011³ primarily to add new questions to the form related to homeowners' associations.⁴

The North Carolina Real Estate Commission (NCREC) was created in 1957 to regulate real estate activity within North Carolina.⁵ It is made up of nine members, including six members who are real estate professionals and three members of the public who are not part of the real estate industry and have no financial input in the real estate industry. The NCREC sets education standards, issues licenses, and enforces rules related to real estate professionals. The NCREC also provides educational content for the residential property-buying public.

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¹ An Act to Create the Residential Property Disclosures Act, N.C. Sess. Laws 1995-476 (codified at N.C. GEN. STAT. § 47E).

² N.C. GEN. STAT. § 47E-3.

³ An Act to Amend the Planned Community Act and the Condominium Act, N.C. Sess. Laws 2011-362.

⁴ Curtis E. Aldendifer, [*Property Disclosure Form Revised as of January 1 To Include Properties Governed by Owners Associations*](#), NORTH CAROLINA REAL ESTATE COMMISSION (Feb. 2012).

⁵ N.C. GEN. STAT. § 93A-1.

The NCREC promulgates rules to implement the Disclosure Act pursuant to its rulemaking authority.⁶ Following the initial passage of the Disclosure Act in 1996, the NCREC promulgated its first set of rules related to the disclosure form in 1997. The new rules took effect in 1998. To date, the NCREC has amended the disclosure statement rule twelve times.⁷

In 2005, Representative Pricey Harrison sponsored two bills requiring sellers to disclose coastal hazards to prospective purchasers of coastal properties.⁸ Before her time in the North Carolina House of Representatives, Representative Harrison was appointed by Governor Hunt to the Coastal Resources Commission (CRC). She served until 2004 when she ran for a House Seat and won. During her years of service on the Coastal Resources Commission, she heard stories of homeowners who said they were not aware of the inherent risks of buying oceanfront property.⁹ These stories inspired her to introduce her coastal hazards disclosure bills. While there were some meetings with legislative staff and stakeholders to refine the language of her bills, neither bill made it to the full House for consideration. Stakeholders, including representatives of the Homebuilders Association and Realtors Association, raised concerns in these meetings about how coastal hazards information would be accessed in a timely manner to not slow a real estate transaction. At that time, the discussion focused on recording maps of coastal hazard areas in the register of deeds offices, which at the time were just starting to have online record searching—much different than the availability of relevant data online today.

III. SELC’S PETITION FOR RULEMAKING ABOUT FLOODING HAZARDS

On December 1, 2022, the Southern Environmental Law Center (SELC), on behalf of several environmental-group clients, filed a Petition for Rulemaking

⁶ The NREC’s rulemaking authority can be found at N.C. GEN. STAT. §§ 93A-3(c) and 93A-51.

⁷ 21 N.C. ADMIN. CODE 58A .0114.

⁸ H.R. 1512, 2005 Reg. Sess. (N.C. 2005); H.R. 1628, 2007 Reg. Sess. (N.C. 2007) (both bills short titled Coastal Hazards Disclosure).

⁹ Gareth McGrath, [*Building Near Inlets a Risky Proposition*](#), WILMINGTON STAR NEWS (Mar. 26, 2005).

(SELC Petition).¹⁰ The SELC Petition sought to change the NCREC's administrative rule which lists what information is required on the Disclosure Form and proposed the addition of flood-related disclosure questions to the Disclosure Form. The clients included the Natural Resources Defense Council, North Carolina Justice Center, MDC Inc., North Carolina Disaster Recovery and Resiliency School, Robeson County Church Community Center, and NC Field.¹¹ In the period leading up to the filing of the petition, North Carolina had recently experienced flooding and damage to coastal properties from Hurricanes Matthew, Florence, Dorian, and others. In addition to damage from these more frequent and intense tropical storms, in 2010 the CRC released its initial report on sea level rise.¹² A 2012 N.C. law required the CRC to have a draft update to the 2010 report by March 2015, with an updated report finalized by 2016.¹³ The CRC finalized and released its 2015 update in accordance with these deadlines.¹⁴ The CRC released an additional sea level rise science update in 2024.¹⁵ These reports, as well as international reports, predict accelerating sea level rise that will inevitably impact coastal properties through flooding.

The NCREC is an agency of the state.¹⁶ As an agency of the state, the NCREC is subject to the North Carolina Administrative Procedure Act, which provides that “a person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption.”¹⁷ Petitions for Rulemaking are a less-frequently used tool for citizens to engage with a commission-agency about potential changes to administrative rule language.

¹⁰ Press Release, Southern Environmental Law Center, [North Carolina Real Estate Commission Petitioned to Disclose Flood History](#) (Dec. 1, 2022).

¹¹ *Id.*

¹² N.C. COASTAL RES. COMM’N SCI. PANEL ON COASTAL HAZARDS, [NORTH CAROLINA SEA-LEVEL RISE ASSESSMENT REPORT](#) (2010).

¹³ Act of Aug. 1, 2012, N.C. Sess. Laws 2012-202 (requiring a five-year update to the 2010 sea level rise report).

¹⁴ N.C. COASTAL RES. COMM’N SCI. PANEL ON COASTAL HAZARDS, [NORTH CAROLINA SEA-LEVEL RISE ASSESSMENT REPORT, 2015 UPDATE TO THE 2010 REPORT AND 2012 ADDENDUM](#) (2015).

¹⁵ N.C. COASTAL RES. COMM’N SCI. PANEL ON COASTAL HAZARDS, [NORTH CAROLINA 2024 SEA LEVEL RISE SCIENCE UPDATE](#) (2024).

¹⁶ N.C. GEN. STAT. § 150B-1.

¹⁷ *Id.* § 150B-20; 21 N.C. ADMIN. CODE 58A.0700.

The Petitioners sought to amend the NCREC disclosure to require sellers to disclose information about past flood damage to potential buyers. Petitioners argued that the NCREC only requires that property sellers disclose whether a home is in a flood plain or subject to a flood hazard. Petitioners describe this language as “falling outside of best practices for flood hazard disclosure.” It argued that such a disclosure would not require identification of relevant issues such as actual damage to a property, cost of flood insurance, and if previous owners have received federal disaster assistance. The Petition asserted that flooding in North Carolina will continue to worsen with climate change, and the proposed disclosures will provide North Carolina homebuyers with critical information regarding flood history and flood risk, including by empowering homebuyers to mitigate the risks of a flood-prone home.¹⁸ Finally, Petitioners stated that strong, bi-partisan support for flood disclosure exists in North Carolina.

On February 15, 2023, the NCREC granted the petition for rulemaking and began rulemaking at its March 15, 2023 and April 19, 2023 meetings. On May 17, 2023, the NCREC reviewed over 700 public comments concerning the proposed rule change, reviewed a draft of the amended Disclosure Form (different from the amended rule) which included items about flooding on it, and voted to adopt the rule changes as presented by staff.¹⁹ The added questions included:

- (F5) Is the property location in a federal or other designated flood hazard zone?
- (F6) Has the property experienced damage due to flooding, water seepage, or pooled water attributable to a natural event such as heavy rainfall, coastal storm surge, tidal inundation, or river flow?
- (F7) Have you ever filed a claim for flood damage to the property with any insurance provider including the NFIP?
- (F8) Is there a current flood insurance policy covering the property?
- (F9) Have you received assistance from FEMA, US SBA, or any other federal disaster flood assistance for flood damage to the property?

¹⁸ 21 N.C. ADMIN. CODE 58A .0114 (as reviewed by the Rules Review Commission on May 18, 2023).

¹⁹ [*Commission Meeting of May 17, 2023*](#), N.C. REAL EST. COMM’N (May 31, 2023).

- (F10) Is there a flood or FEMA elevation certificate for the property?²⁰

After proceeding through the rulemaking process, the Rules Review Commission approved the amended disclosure form rule at their May 18, 2023 meeting. The rule became effective on July 1, 2023. Following the Rules Review Commission's approval of the amended rule, the NCREC staff worked to amend the Disclosure Form.²¹

While the NCREC granted the petition for rulemaking to allow the addition of flood information, it is interesting to speculate about whether the NCREC would similarly grant a petition for rulemaking which proposed the addition of a coastal hazards question on the Disclosure Form. On one hand, a comment by one of the NCREC board members during discussion of the SELC's Petition might forecast a stormier reception of a coastal hazards disclosure requirement by the NCREC. The comment differentiated the proposed flood-related disclosures, which would be applicable to all 100 counties of the state, from disclosures that may only apply to a sub-set of the state, such as the twenty coastal counties governed by the Coastal Area Management Act (CAMA). Further, the NCREC is comprised of a majority of members (six of nine) who are real estate professionals. These members may be less likely to vote for additional disclosures to be added to the form. During the hearing on the SELC's petition, the board discussed making it clear that the form is to be filled out by the owner and not the real estate professional. The board also discussed concerns about ensuring that listing agents were not responsible for gathering information related to flood issues.

On the other hand, the inclusion of a discussion about what other states have for their own disclosure forms could be helpful to assure NCREC members that other states have successfully included coastal hazards information on their disclosure forms. For example, Texas' Seller's Disclosure Notice—which was last updated in 2023—is quite robust.²² It includes information about flooding in

²⁰ N.C. REAL EST. COMM'N, [RESIDENTIAL PROPERTY AND OWNERS' ASSOCIATION DISCLOSURE STATEMENT](#) (2025).

²¹ *Id.*

²² TEX. REAL EST. COMM'N, [SELLER'S DISCLOSURE NOTICE](#) (2023).

questions 6-8, and question 10 gives notice that property in a coastal area near the Gulf coast or Intracoastal Waterway may be subject to either the Open Beaches Act²³ or the Dune Protection Act.²⁴ It also includes a penalty for a non-disclosure. Florida's Seller's Property Disclosure Form²⁵ is similarly robust as it relates to coastal hazard notification. It requires disclosure of the property's location "seaward of the coastal control line" in Question 3(d) and disclosure of the presence of mangroves or other environmentally sensitive areas in Question 9(d). Both Texas and Florida have monetary penalties when a Seller inappropriately completes the disclosure form. Perhaps the NCREC would be interested in strengthening the Disclosure Form to match that of these other coastal states.

IV. WHAT COULD A NORTH CAROLINA COASTAL HAZARDS DISCLOSURE LOOK LIKE?

If a petitioner were to propose rulemaking to add disclosure of coastal hazards to the Disclosure Form, what kind of information would be most helpful to potential buyers while still being easy to access in the often fast-paced real estate market? About two decades ago, the NCREC teamed up with Spencer Rogers of North Carolina Sea Grant to produce an educational brochure entitled "Questions and Answers on Purchasing Coastal Real Estate in North Carolina."²⁶ It gives general information about potential coastal hazards, and who to contact for additional information. This brochure was last updated in 2011, so the information and contacts are out of date. Mr. Rogers produced the brochure for potential coastal real estate buyers, especially those who come from other states who may not know North Carolina's rules.²⁷ While this brochure is not currently required to be provided to a potential buyer, this is the kind of information that would be helpful to all coastal real estate buyers. Future rulemaking might make sharing this brochure a requirement of the seller.

²³ [Open Beaches](#), TEX. GEN. LAND OFF. (last visited July 7, 2025).

²⁴ TEX. NAT. RES. CODE § 63.001 (2025).

²⁵ FLA. REALTORS, [SELLER'S PROPERTY DISCLOSURE-RESIDENTIAL](#) (2016).

²⁶ N.C. REAL EST. COMM'N, [QUESTIONS AND ANSWERS ON: PURCHASING COASTAL REAL ESTATE IN NORTH CAROLINA](#) (2011).

²⁷ Brad Rich, [Buying Your Piece of Coastal Heaven](#), COASTAL REV. (June 19, 2012).

If North Carolina followed the lead of other states like Texas and Florida, it could include information about CAMA—North Carolina’s law regulating coastal development near the ocean—to potential buyers. The portions of the coastal management program which would be most helpful to potential property buyers would be information about oceanfront setbacks, average oceanfront erosion rates, areas of jurisdiction where a permit is required, and what activities require a CAMA permit. Like the Sea Grant brochure, any information disclosure would likely need to be conveyed in general terms with contact information to government agencies for more specific questions so that the information does not quickly become out of date and require frequent updates.

Several public and private organizations are providing information about flooding and coastal hazard risks, including the National Oceanic and Atmospheric Association (NOAA), Zillow, and First Street. NOAA’s Office for Coastal Management developed a Coastal Flood Exposure Mapper GIS tool to allow online visualization to help buyers and communities assess their coastal hazard risks.²⁸ While it captures flood risk, its disclaimer notes that it does not account for erosion or subsidence, which would be especially helpful for oceanfront properties. Zillow researched how many homes (and the value of said homes) are at risk from the impacts of sea level rise, concluding that by 2100, almost 300 U.S. cities would lose at least half their homes and 36 U.S. cities would be completely lost.²⁹ Further, in 2024, Zillow added climate risk data, such as flood, wildfire, wind, heat, and air quality, to its listings by partnering with First Street to use their climate risk modeling.³⁰

Based on what other states have done related to coastal hazards disclosures and given the resources and data available, an educational notice approach appears to be most helpful. This could include updating the Sea Grant brochure and perhaps making sellers provide a copy or a link to a copy to

²⁸ [Coastal Flood Exposure Mapper](#), NAT’L OCEANIC & ATMOSPHERIC ADMIN. (last visited July 7, 2025).

²⁹ Krishna Rao, [Climate Change and Housing: Will a Rising Tide Sink All Homes?](#), ZILLOW (June 2, 2017).

³⁰ Susan Kelleher, [What is Climate Risk Data and How to Use It When Shopping for a Home](#), ZILLOW (Oct. 31, 2024).

perspective buyers so that they can more easily learn about coastal hazards impacting the property and who to contact for more detailed information.

V. CONCLUSION

Based on the success of SELC and its clients' Petition related to flooding hazards, it appears that a petition for rulemaking could be an effective tool to request the NCREC to similarly add coastal hazards information to the Disclosure Form. Like the flooding-related information now on the Disclosure Form, making a potential buyer aware of coastal hazards is an important consumer protection tool. The petition serves as a formal way to initiate changes to state regulations which the NCREC must consider and respond to. With climate change consequences such as sea level rise and more extreme storms, the importance of effective notice of coastal hazards will become more critical over time to ensure best practices that reflect both buyers and sellers.