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CONFLICT AT THE CONFLUENCE: THE STRUGGLE OVER FEDERAL FLOOD PLAIN MANAGEMENT

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I. INTRODUCTION

Flooding on the Missouri and Mississippi Rivers in 1993 and 1995, followed by flooding on the Red River of the north in 1997, have directed national attention to the issue of floodplain management. This article will review the history and state of floodplain policy in St. Charles County, Missouri, and, more particularly, that area of the county governed by the Consolidated North County Levee District and located at the confluence of the Missouri and Mississippi Rivers. This area, wedged between two of the great rivers of the world, has some of the best farmland in the United States and has experienced three major floods between 1986 and 1995. This article will examine federal floodplain policy not only on its face but also as applied to this particular area.

II. HISTORY OF FLOOD PLAIN MANAGEMENT

By the early 1900s, the United States Army Corps of Engineers had begun constructing flood control projects in the Mississippi Valley.[1] In the bootheel region of Missouri, the same engineers who had dug the Panama Canal worked to drain hundreds of thousands of acres of swamp and build levees to protect the area from flooding of the Mississippi River.[2] The massive flood on the Mississippi in 1927 led to increased involvement by the federal government.[3] The United States Army Corps

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1. Floyd C. Shoemaker, *Kennett: Center of a Land Reborn in Missouri's Valley of the Nile*, 52 MO. HIST. REV. 99, 106-07 (1958); DUANE MEYER, THE HERITAGE OF MISSOURI—A HISTORY 456 (1963). In 1905, the Missouri legislature authorized the establishment of the Little River Drainage District, one of the nation's largest such projects, covering 500,000 acres reaching from the foothills just south of Cape Girardeau, Missouri, to the Arkansas border and including parts of seven counties. Shoemaker, *supra*. Due to the drainage project, the population of this area jumped from 21,706 in 1900, to 45,329 in 1950. *Id.* at 107. From a valuation of only a little over $2 million in 1890, the counties' valuation rose to over $39 million in 1955. *Id.*

2. MEYER, *supra* note 1, at 456.

3. JOHN M. BARRY, RISING TIDE—THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA 399 (1997). The flood of 1927 covered an area the size of Massachusetts, Connecticut, New Hampshire, and Vermont combined and stretched from Illinois to the Gulf of Mexico; over one million people were forced out of their homes. *Id.* at 21.

of Engineers built $8 billion worth of levees, dams, and channels along the lower Mississippi River south of St. Louis.[4] In contrast, the upper Mississippi remained a patchwork of private and local levees.[5] The Flood Control Act of 1936 broadened the Corps' authority to build flood control projects nationwide, and, over the next two decades, several billion dollars were spent for that purpose.[6]

III. THE ST. CHARLES EXPERIENCE

By the 1940s, smaller federal projects were proposed along the upper Mississippi and Missouri Rivers.[7] One, which came to be known as the "L-15 Project," would have protected the floodplain area in St. Charles County, Missouri, at the confluence of the Missouri and Mississippi Rivers.[8] The L-15 project was proposed after a series of floods in the 1940s and 1950s.[9] After the Corps of Engineers finished Lock and Dam 26 in Alton, Illinois, there followed, within the next fifteen years, four major floods.[10] There had been no major floods for the previous fifty years, and coming as they did after the completion of the dam, these floods were perceived by many as human-made.[11] Whatever the reality, it is important to appreciate that the people who had farmed the floodplain had this perception. It would influence a later generation's response to floodplain management.

Several flood studies were done during the 1960s. In fact, a federal levee project was very close to being funded until budgetary constraints in 1972, caused by the Vietnam War, canceled the project.[12] The 1973

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4. Judith Basehore Alef, *The Rise and Fall of the Mississippi River: The Cultural Politics of Land Development* (visited Mar. 19, 1998) <http://www.teleport.com/~orlo/be4/features/AfterFlood.html>.

5. *Id.*

6. Oliver A. Houck, *Rising Water: The National Flood Insurance Program and Louisiana*, 60 TUL. L. REV. 61, 65 (1985). The only requirement was that "the benefits to whomsoever they may accrue are in excess of the estimated costs and that the lives and social security of the people are otherwise adversely affected." 33 U.S.C. § 701(a) (1936).

7. Interview with Ray Machens, President of the Consolidated North County Levee District, in St. Charles, Mo. (Jan. 12, 1998). Ray Machens has served as President of the levee district since its formation. For many years prior to that, he served on one of the predecessors to the consolidated levee district and has been active in levee affairs throughout his life. His family has farmed in the floodplain for over 100 years and he has dealt with various federal agencies regarding floodplain management.

8. *Id.*

9. *Id.*

10. *Id.* Lock and Dam 26 was completed at Alton, Illinois, in 1937. The Dam, built to aid navigation on the Mississippi, created Alton Lake. The lake became and remains a recreational area.

11. *Id.*

12. *Id.* Congressman William Hungate (D-Mo.) was able to get a $140,000 appropriation for the North County Levee District to make possible the preparation of a comprehensive environmental impact statement and a study on the L-15 project. 118 Cong. Rec. H5786 (daily ed. June 20, 1972) (statement of Rep. Hungate). The Vietnam War caused interest rates to rise. In response, the House of Representatives passed H.R. 10203 on October 12, 1973, which would have frozen the interest rates at the 1968 level for the L-15 project. The bill never became law and the L-15 project did not proceed.

flood on the Mississippi River led to another big push for the project.[13] There had developed in the interval an additional problem with the cost-benefit formula. To be approved, the benefits derived from the project had to exceed the costs of construction. Floodplain regulations adopted by St. Charles County in 1978 had imposed floodways along the river where no structures, including levees, could be built. As a result of these regulations, any attempt to raise the levees would require that they be moved back from both the Missouri and Mississippi Rivers; leaving less land protected, and thus, diminishing the cost-benefit ratios.[14] In November of 1987, the Corps of Engineers finally closed the book on the L-15 project and declared that the project definitely would not be built.[15]

The decision could not have come at a worse time. The flood of 1986 devastated the area, and since it came in October, many crops were lost. Previous amendments to Public Law 84-99, the rehabilitation program for damaged levees, were an additional blow.[16] First, federal law required that all levees must have public sponsorship to be eligible for rehabilitation assistance.[17] Second, the local public entity had to contribute twenty percent of the cost of repairing the levees.[18] While the first of these requirements was not yet in effect, the twenty percent funding was a big problem.[19] Ultimately, the people of the area had to

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13. Interview with Ray Machens, President of the Consolidated North County Levee District, in St. Charles, Mo. (Jan. 12, 1998).

14. *Id.* In 1967, the local farmers had formed the North County Levee District under Chapter 245, RSMo., but had stopped short of asking the court to approve a plan of reclamation and actually building a levee at their own expense. *Id.* The district did not proceed for two reasons. *Id.* First, they were relying upon the federal promises to build the L-15 project. *Id.* Second, the Corps of Engineers had the authority and the money to repair damaged levees after a flood. *Id.* The agricultural community had become totally reliant and dependent upon the federal government to build and pay the entire cost of repair to all public and private levees after floods. *Id.*

15. *Id.*

16. FARM LAW-MO. BAR-CONTINUING LEGAL EDUCATION, UPDATE S-3, § 15.4 LEVEES AND DRAINAGE DISTRICTS (Dec. 1990).

17. *Id.*

18. *Id.*

> In order to qualify for public sponsorship a levee system or organization must be one of the following: (a) legal subdivision of state government; (b) local unit of government such as a city or county; or (c) state charter organization such as a levee board. The St. Louis District of the U.S. Army Corps of Engineers indicated that a drainage or levee district organized under state law had to submit to it a copy of the court order or other papers documenting such incorporation of such an entity to verify that it was, indeed, eligible for the rehabilitation program.

Id.

19. Interview with Ray Machens, President of the Consolidated North County Levee District, in St. Charles, Mo. (Jan. 12, 1998). Although two levee districts were in existence, the largest had never asked the circuit court to approve its plan of reclamation, and thus, no benefits had been assessed. *Id.* A smaller district, the Cul-de-Sac Levee District had been set up in 1917 but had been inactive for 30 years. *Id.* Up to that point, the federal government had been taking care of levees and there was no need for levee districts to worry about levee repairs. *Id.*

rely upon voluntary donations from property owners to raise the money to repair the damaged Missouri River levee.[20] Large sections of an abandoned railway embankment, which provided levee protection for several miles along the Missouri River near St. Charles, were no longer maintained by the railroad and also had to be repaired.[21]

With the levees rebuilt, but the L-15 Project dead, local leaders took action. First, they consolidated the existing circuit court levee districts into a single district.[22] The consolidated district then filed a plan of reclamation, which was approved by the Circuit Court of St. Charles County, and prepared to float a $2.5 million bond issue to finance the improvements.[23] The local leaders were determined that if the federal government would not build a levee, they would build it themselves.

What the board of supervisors did not realize was that in the preceding decades, the federal government had passed laws and established regulations that made it nearly impossible to raise the existing levees in this area of St. Charles County.[24] The first hurdle to overcome was

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20. *Id.* The boards of the two levee districts sent out letters to all the landowners in the districts. *Id.* Everyone was asked to contribute two dollars per acre. *Id.* Many did, but there were many who contributed nothing. *Id.* Large donations were obtained from McDonnell Douglas which had a facility in the levee district that had been forced to shut down for two days during the 1986 flood. *Id.* Another large contribution came from Union Electric, whose power plant in Portage des Sioux, Missouri, had been cut off and its workers had been forced to come to work in a barge during the flood. *Id.* Without the cooperation of these two corporate citizens, there would have been insufficient revenue to rebuild the levees since there was no mechanism to force payment of any assessment. *Id.*

21. The embankment belonged to the Missouri Kansas Texas (KATY) Railroad and had been abandoned pursuant to the federal Rails to Trails Act just prior to the flood. In the past, the railroad had always come in immediately, after any flood, to repair any damage to its embankment. It was necessary for the railroad to make such repairs to restore usage of the track. Also, the railroad's easements for right-of-way required that they "maintain the embankment." The Missouri Department of Natural Resources took over possession of the property pursuant to the Rails to Trails Act. The levee district eventually entered into a license agreement with the Department of Natural Resources allowing them to use the embankment for levee purposes. The levee district eventually turned the railroad embankment into a levee, to meet the standards of the Corps of Engineers.

22. Plan of Consolidation, the Consolidated North County Levee District, No. CV187-2697CC (Cir. 11. July 10, 1987) (Order granting consolidation). On July 10, 1987, the court approved the consolidation of the North County Levee District and the Cul-de-Sac Levee District, Inc., into the Consolidated North County Levee District. The levee district stretched from the city limits of St. Charles, Missouri, on the Missouri River, down to the confluence and back up the Mississippi River to just upstream of Portage des Sioux, Missouri. The levee provides protection for approximately 30,000 acres of farmland and associated improvements in the Missouri River and Mississippi River floodplains. Total levee alignment under the maintenance of the levee district is approximately 34.5 miles in length.

23. *Id.* (Order granting Plan of Reclamation signed on Mar. 19, 1990).

24. UNITED STATES CORPS OF ENGINEERS, HYDRAULIC INVESTIGATION MISSOURI RIVER LEVEE HEIGHT AND ALIGNMENT ST. CHARLES COUNTY, MISSOURI 1-2 (1990).

Section 404 of the federal Clean Water Act.[25] It took the district nearly two years and $40,000 to get a 404 wetland permit from the Corps of Engineers.[26] The second hurdle would prove even higher. In 1978, the federal government had persuaded St. Charles County to enter the National Flood Insurance Program and to adopt floodplain regulations.[27]

IV. THE NATIONAL FLOOD INSURANCE PROGRAM

A. HISTORY OF THE NFIP

In the wake of massive flooding in Kansas and Missouri in 1951 and 1952, President Truman recommended a federally subsidized flood insurance program which Congress chose not to pass at that time.[28] In 1965, Congress directed the Federal Department of Housing and Urban Development (HUD) to prepare a report recommending flood insurance as part of a mix of structural and disaster relief measures.[29] A separate task force recommended a flood insurance program with the following prophetic warning: "A flood insurance program is a tool which should be used expertly or not at all. Correctly applied it could promote wise use of floodplains. Incorrectly applied it would exacerbate the whole problem of flood losses."[30]

The National Flood Insurance Act became law in August of 1968.[31] In 1973, Congress passed another Flood Disaster Protection Act and found that flood losses were increasing "largely as a result of the accelerating development of, and concentration of population in, areas of flood and mud slide hazards. This development was being encouraged

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25. Federal Water Pollution Control Act Amendments of 1972 § 404, 33 U.S.C. § 1344 (1988). Section 404 requires permits for placing "pollutants" in the "waters of the United States," sets forth a far broader federal interest and expands the scope of federal regulation beyond "navigable waters" to include all "waters of the United States." Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2nd Cir. 1975). This includes "adjacent wetlands." 33 C.F.R. § 328.3 (1996). In determining whether to issue a permit for levee development the Corps must conduct a public interest review and comply with statutory guidelines. 40 C.F.R. § 230 (1996).

26. Interview with Ray Machens, President of the Consolidated North County Levee District in St. Charles, Mo. (Jan. 12, 1998). In addition to all of the normal engineering expense, the levee district was forced to do an archeological study in the area near Portage des Sioux, Missouri. *Id.* As the name implies, Portage des Sioux was the point at which the Sioux Indians would leave the Mississippi River and carry their canoes across the narrow isthmus to the Missouri River to avoid some 30 miles of paddling. Indian artifacts, including many arrowheads, are abundant in the area. The levee district spent nearly $20,000 to pay an archeologist to map the area so that it could proceed with the levee. It was also required to plant species of endangered plants in the area where the levee construction was conducted and to mitigate several acres of land to make up for the area where the levee was widened. 33 U.S.C. § 125 (1994).

27. ST. CHARLES COUNTY, MO., REV. ORDINANCES § 5 (1993).

28. Oliver A. Houck, *Rising Water: The National Flood Insurance Program in Louisiana*, 60 TUL. L. REV. 61, 67 (1985).

29. *Id.* at 68.

30. *Id.* at 69 (citing H.R. Doc. No. 89-465, at 3-8 (1966)).

31. National Flood Insurance Act of 1968 § 1340, 42 U.S.C. § 4012 (1982).

by federal agencies and by the availability of federally insured loans, grants and guarantees for land acquisition and construction in floodplain areas."[32]

To remedy this problem, Congress added another federal flood insurance program to provide federally subsidized insurance where the private market was too smart to go.[33] Federal assistance, including assistance from federally insured lending institutions, for construction in flood prone areas was made contingent upon the purchase of flood insurance, the availability of which was dependent upon community participation in the flood insurance program.[34] The federal government enforced its will by providing the carrot (flood insurance) to get each local entity to use the stick (floodplain ordinances), which greatly restricted the ability to build or develop in the floodplain.

The National Flood Insurance Program (NFIP), which will celebrate its thirtieth birthday this year, is presently administered by the Federal Insurance Administration (FIA) of the Federal Emergency Management Agency (FEMA) in Washington, D.C., and through ten regional offices throughout the country.[35] The NFIP's ultimate success depends upon the adoption of floodplain management ordinances in each community in every state.[36]

B. THE PROGRAM

A community applies for participation in the NFIP either because of interest in eligibility for flood insurance or because it has received notification from FEMA that it contains one or more flood hazard areas.[37] After the adoption by a community of resolutions or ordinances to minimally regulate new construction in flood hazard areas, FEMA authorizes the sale of flood insurance in the community up to the Emergency Program limits.[38] FEMA assesses the degree of flood risk and development potential and arranges for a study of the community to determine base flood elevations (BFEs) and flood risk zones. Communities with

32. Houck. *supra* note 28, at 70 (citing Pub. L. No. 93-234, 87 Stat. 975).

33. *Id.* at 71 (citing AMERICAN INSURANCE ASSOCIATION, STUDIES ON FLOOD AND FLOOD DAMAGE 1952-55 3 (1956)). The insurance industry published a series of reports in the 1950s which concluded that because of the high risks involved, private insurance against flood losses could not be underwritten successfully.

34. *Id.* at 71.

35. *Id.* at 73.

36. *Id.*

37. *Id.* at 73-74.

38. Federal Emergency Management Agency, 44 C.F.R. § 361.6 (1996). The emergency program's flood insurance coverages are: single family buildings—$35,000; other residential buildings—$100,000; non-residential buildings—$100,000; residential contents—$10,000; and non-residential contents—$100,000.

minimal or no flood risk are converted to the Regular Program without a study.[39]

FEMA provides the studied community with a Flood Insurance Rate Map and a Flood Hazard Boundary Map delineating BFEs and flood risk zones. The community is given six months to adopt this information as part of its local zoning and building code ordinances.[40] After the community adopts more stringent ordinances provided by FEMA, it is converted to the NFIP's Regular Program.[41]

Once in the Regular Program, FEMA authorizes the sale of additional flood insurance in the community up to the Regular Program limits, and the community implements the floodplain management measures it has adopted. Having tasted the carrot, citizens now must feel the stick.[42] FEMA arranges for "periodic community assistance visits" with local officials to, as their literature suggests, provide technical assistance regarding compliance with NFIP floodplain management requirements.[43] These visits may be routine in communities with a long history of zoning. However, in agricultural communities, which often have little or no zoning experience, the FEMA officials often seem more like inquisitors than federal bureaucrats that are "here to help." A bad visit from FEMA can result in the community being put on suspension, and ultimately being expelled from the NFIP.[44] The mere threat of such

39. *Id.* The Base Flood Elevation is the elevation of the flood with a 1% chance of being equaled or exceeded in any given year; commonly referred to as the "100-year flood." 44 C.F.R. § 59.1 (1996).

40. FEDERAL EMERGENCY MANAGEMENT AGENCY, NO. 186, MANDATORY PURCHASE OF FLOOD INSURANCE GUIDELINES 3 (1997). The official flood insurance rate map for a regular program community delineates the Special Flood Hazard Areas (SFHA's) and applicable risk premium zones. SFHA's are those areas within the floodplain that have a one percent chance of being flooded in any given year (the 100-year floodplain). SFHA's are represented on the flood maps by darkly shaded areas designated with the letter "A" or "V." FEMA uses engineering studies to determine the delineation of these areas or zones subject to flooding. *Id.*

41. Federal Emergency Management Agency, 44 C.F.R. § 61.6 (1996). The regular program flood insurance coverage is $250,000 for a residential building and $500,000 for non-residential or small business. Contents coverage is up to $100,000 for residential and $500,000 for non-residential or small business. *Id.*

42. FEDERAL EMERGENCY MANAGEMENT AGENCY, HOW THE NFIP WORKS (1996). The most significant of the required ordinances is one which allows building permits for new residential construction in flood hazard areas only for buildings to be constructed so that the lowest floor will be located above the BFE. Non-residential buildings can be either elevated or flood proofed to that elevation. *Id.*

43. *Id.*

44. Federal Emergency Management Agency, 44 C.F.R. § 59.24 (1996); *see also* Letter from Frank Begley, Chief of Natural & Technological Hazards Division, FEMA, to Gerald Ohlms, Presiding Commissioner of St. Charles County (June 23, 1989). St. Charles County received such a visit in 1984 and the result was a letter dated February 23 of that year from Frank Begley, informing the County that since they had been unwilling to deny requests for variances from the floodplain ordinances (variances are specifically allowed within the regulations FEMA required the county to adopt), FEMA had recommended that the Section 1362 project application submitted by the County in October, 1983, which would have allowed FEMA to purchase existing flood prone structures, not be considered for funding. *Id.* The County responded by a near moratorium on variances which then led to an outcry

action is intimidating and leads to an outcry from citizens who may lose flood insurance. In addition, to call the FEMA bureaucrats' bluff, small local communities must go to court and spend large sums of money while FEMA is represented by the capable and well-funded United States Attorney.[45]

The FEMA regulation requiring that new structures must be elevated or made flood-proof to the BFE is also problematic.[46] Unfortunately, the Flood Hazard Boundary Maps rarely contain flood elevations, and communities are instructed to make use of any other available information that would indicate the BFE. If the applicant disagrees with the determination of the local official, the burden is on the applicant to have a survey done to establish the elevation. While large projects have little problem getting the engineering they need, such information is not readily available for the small farmer or individual homeowner.

The Flood Hazard Boundary Map will ultimately show a floodway in which "encroachments, including fill, new construction, substantial improvements, and other developments" will be prohibited if they result in "any increase" in flood levels.[47] Once again, large projects can afford the engineering costs to get a "no rise" certificate. The farmer, small business, or single family homeowner who simply wants to enlarge a structure in the floodway finds that the engineering cost is prohibitive.[48]

C. RECENT DEVELOPMENTS IN THE PROGRAM

In the wake of the 1993 flooding in the Midwest, Congress acted to increase flood insurance coverage in an effort to reduce flood damage and to reduce federal expenditures for disaster assistance to flood

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from property owners who felt that the regulations were too inflexible. *Id.*

45. Interview with Steve Lauer, Director of Planning and Zoning for St. Charles County, in St. Charles, Mo. (Feb. 1998).

46. *See* 44 C.F.R. § 60.3 (1996).

47. 44 C.F.R. § 60.3(d) (1996). This section states that the floodway is based on the principle that the area chosen for the regulatory floodway must be designed to carry the waters of the base flood, without increasing the water surface elevation of that flood more than one foot at any point. *Id.*

48. A procedure is set out in 44 C.F.R. § 65.12(3) which allows a community to permit encroachment in the floodway with the permission of all other affected jurisdictions. In practice, the applicable standard seems to be any "significant increase" rather than "any increase." When bridges are built, piers create an increase although it may be insignificant, and FEMA has not yet required all bridges across our rivers to be suspension bridges from floodway line to floodway line. When the Highway 370 bridge was built in St. Charles, the Corps identified a rise which then impacted the height to which the levee district could build its levee system. Letter from Frank Begley, Chief of Natural & Technological Hazards Division, FEMA, to Gerald Ohlms, Presiding Commissioner of St. Charles County (June 23, 1989). The supervisors of the levee district were further amazed when the Casino Station Gambling Casino was able to get a no-rise certificate, with regard to its "boats in a moat" project where a large bath tub was built along the river bank and gambling boats were floated. According to the Casino, the flows were not affected since the level of the ground on the landward side of the structure was lowered. Also the area was deforested and paved, increasing the velocity of the water to make up for any rise caused by the obstruction.

damaged properties.[49] The law included measures to encourage the public to buy flood insurance and to prohibit federally regulated lenders from making, increasing, extending, or renewing any loan on floodplain property unless flood insurance is purchased.[50] Further, flood insurance must be maintained during the term of the loan.[51] The 1994 National Flood Insurance Reform Act indirectly impacts regulated as well as unregulated lender security because borrowers who have received certain disaster assistance and then failed to obtain flood coverage are barred from receiving future disaster aid.[52] The Act also implements a much needed thirty-day waiting period, with a few exceptions, before the policy becomes effective.[53] The previous five-day waiting period allowed individuals to wait until the water started to rise before they purchased flood insurance.[54]

All of these changes were necessary because of the multi-billion dollar flood damage in the Midwest during the summer of 1993. The low level of participation among eligible property owners kept disaster relief payments high.[55] Congress realized that more people needed to be brought into the program and attempted to do so by creating more negative consequences for property owners who did not have insurance.[56] Concurrently, as the stakes were raised there was even more pressure on the community to stay in the program.

V. FEDERALISM QUESTIONS

Without flood insurance, very little development can take place in the floodplain; without the local jurisdiction enacting the floodplain regulations no one is eligible for flood insurance. Early lawsuits challenging the constitutionality of requiring the enactment of local regulation as a

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49. FEDERAL EMERGENCY MANAGEMENT AGENCY, NO. 186, MANDATORY PURCHASE OF FLOOD INSURANCE GUIDELINES 3 (1997). The reasons for the Reform Act included the NFIP's low reserves as well as low levels of participation among eligible property owners. It was estimated that fewer than 2 million of 11 million structures in the floodplain were covered by flood insurance. This was due to the high cost of the insurance, lax enforcement by federally regulated lending institutions, and the fact that homeowners often allowed their flood insurance to lapse. Congressional activity culminated with the passage of H.R. 3474 which was enacted as Reform Act of 1994, Title V, Pub. L. No. 325, 108 Stat. 2160, 2255-87 (1994).

50. FEDERAL EMERGENCY MANAGEMENT AGENCY, NO. 186, MANDATORY PURCHASE OF FLOOD INSURANCE GUIDELINES 19 (1997).

51. *Id.*

52. *Id.* The flood insurance requirements apply to lenders or services that are not federally regulated and that do not sell loans to the Federal and National Mortgage Association and the Federal Home Loan Mortgage Corporation (Fannie Mae and Freddie Mac) or other government sponsored enterprises.

53. *Id.*

54. *Id.*

55. *Id.* at 3.

56. *Id.*

condition for federal assistance, including flood insurance, were unsuccessful.[57] For instance, in *Texas Landowners Rights Association v. Harris*, the court found that the NFIP did not violate the Fifth, Tenth, or Fourteenth Amendments because it offered inducements for local participation rather than simply mandating compliance.[58]

A. THE TENTH AMENDMENT

In *Adolph v. Federal Emergency Management Agency*, the plaintiffs complained that the consequences of noncompliance were so severe that the elected officials really had no alternative other than to comply.[59] The court rejected the plaintiffs' "*in terrorem* characterization of the consequences" plaintiffs would have suffered had the parish council declined participation, stating:

> They draw an equally drastic, and similarly fallacious, portrait of what might have happened if their community had decided not to participate in the program and federal funds (FHA, HUD, and VA) and programs (NFIP and such others as EPA sewage facilities) had, thus, become unavailable in Plaquemines Parish. Contrary to plaintiffs' assertions, however, if the parish had chosen not to participate in the program, conventional mortgages through federally-regulated institutions, such as FDIC and FSLIC members, would still be available, for example.[60]

The *Adolph* court refused to accept plaintiffs' argument that a more "conservative" Supreme Court might be more likely to find a regulatory taking.[61]

The *Adolph* court was not asked to consider how a more "conservative" Supreme Court might view the Tenth Amendment problems of the NFIP, especially since loans by federally-regulated institutions, such as

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57. *See* Adolph v. Federal Emergency Management Agency, 854 F.2d 732 (5th Cir. 1988); Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978).

58. *Harris*, 453 F. Supp. at 1029, 1031. Political subdivisions from 12 states sued the Secretary of Housing and Urban Development challenging constitutionality of NFIP and the regulations implementing them. *Id.* at 1026-27. The court held that the general welfare clause of the Constitution does not limit Congress, but actually gives an expansive grant of power enabling Congress to impose certain principles of federalism upon the states. *Id.* at 1030. Due process arguments concerning "takings" by the federal government were similarly denied. *Id.*

59. *Adolph*, 854 F.2d at 738.

60. *Id.* at 738.

61. The court found that *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), do not significantly alter judicial review of alleged takings since the FEMA regulations do not deny the owner economically viable use of their land. The state supreme courts have upheld local ordinances more restrictive than the NFIP. *Adolph*, 854 F.2d at 737, 738.

the FDIC and the FSLIC, are now required to have flood insurance.[62] Perhaps the recent amendments to the NFIP, along with the increased willingness of the federal courts to hear Tenth Amendment claims, might allow a reassessment of the Tenth Amendment argument that has been previously rejected.[63]

Principles of federalism embodied in the Tenth Amendment prohibit Congress, through FEMA, from coercing the states and their political subdivisions into adopting its floodplain programs. Although Congress has a variety of methods by which it may urge a state to adopt a legislative program, one fundamental principle applies to all of them: Congress may not coerce a state into doing so.[64] This limitation is based on principles of federalism embodied in the Tenth Amendment, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[65]

The Supreme Court clearly noted in *New York v. United States* that Congress may encourage a state to adopt legislation to serve federal objectives by simply attaching conditions to the receipt of federal funds pursuant to its powers under the spending clause.[66] When properly employed, these methods do not violate the Tenth Amendment because they allow state and local governments to remain responsive to the local electorate's preferences, and state and local officials to remain accountable to the people.[67]

The Court's concern in *New York* was Congress' improper use of these methods to coerce states into doing its bidding. *New York* involved a challenge to three provisions of the Low-Level Radioactive Waste Policy Act.[68] The Supreme Court upheld the first provision of the Act, which provided monetary incentives to states to comply with a series of deadlines for developing waste disposal plans, because it was an appropriate use of congressional power under the spending clause.[69] The second provision, which provided for surcharges and access restrictions at active disposal sites for waste from states that failed to meet certain deadlines, was also upheld.[70] The Court found that Congress has the

62. FEDERAL EMERGENCY MANAGEMENT AGENCY, NO. 186, MANDATORY PURCHASE OF FLOOD INSURANCE GUIDELINES 19 (1997).
63. *Harris*, 453 F. Supp. at 1030.
64. New York v. United States, 505 U.S. 144 (1992).
65. U.S. Const. amend. X.
66. *New York*, 505 U.S. at 167.
67. *Id.* at 167-69.
68. *Id.* at 169-75.
69. *Id.*
70. *Id.* at 173-74.

power, under the Commerce Clause, to authorize the states to discriminate against interstate commerce.[71]

The third provision of the Act, a "take title" penalty, provided that states that could not provide for disposal of their waste by 1996 had to take ownership and possession of the waste from the private waste producers or assume liability for all damages incurred by the producers.[72] The Court utilized the Tenth Amendment to strike down the third provision, demonstrating its clear concern with Congress presenting states with "choices" that are, in fact, no choice at all.[73] The incentive offered to state governments was the "choice" between ownership of waste or regulating according to the instructions of Congress.[74] But this type of "choice" violated the Constitution because it, in fact, "offer[ed] a state government no option other than that of implementing legislation enacted by Congress."[75] Theoretically, states had the option of accepting ownership of the waste instead of implementing legislation for its disposal.[76] This was not really an option, however, because no state could afford to let the waste remain unprocessed and risk being saddled with liability for damages to those harmed by exposure to toxic substances.[77] Action by Congress requiring such a choice is inconsistent with the Constitution's division of authority between federal and state governments because states "choosing" this alternative would be "commandeered" into the regulatory purposes of the federal government.[78]

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71. *Id.* at 173-75.
72. *Id.* at 152-55.
73. *Id.* at 175-77.
74. *Id.* at 173-79.
75. *Id.* at 177.
76. *Id.* at 176.
77. *Id.*
78. *See id.* at 176. In *New York*, the Supreme Court, concerned about the injury to state sovereignty that could result where Congress forces states into doing what the federal government is unwilling to do itself, stated, the accountability of both state and federal officials is diminished because "it may be state officials who will bear the brunt of public disapproval, while federal officials who devise the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 167-69; *see also*, Printz v. United States, 117 S. Ct. 2365, 2382 (1997). In *Printz v. United States*, the Supreme Court found that the Brady Act violated the principles of *New York*. *Printz*, 117 S. Ct. at 2384. The court found that:

> by forcing state governments to absorb the financial burden of implementing a federal regulatory program, [m]embers of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the states are not forced to absorb the cost of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even when one in the designated federal data base) that causes a purchaser to be mistakenly rejected.

Id. at 2382

Other courts have recognized the specific limitation articulated in *New York*. In *Board of Natural Resources v. Brown*,[79] the Ninth Circuit considered whether the Forest Resources Conservation and Shortage Relief Act violated the Tenth Amendment by requiring the issuance of regulations by state officials banning the export of timber from state and federal lands within the state.[80] In spite of the federal government's argument that the Act did not compel the state to regulate since it could simply refrain from selling timber, the court noted that the record showed the state stood to lose $500 million over ten years if it halted sales.[81] Applying *New York*, the court reasoned that the choice to halt timber sales was nothing more than a "Hobson's choice," giving the state the option of regulating according to federal law or losing substantial income.[82] The court held that the Act violated the Tenth Amendment because there was no real choice.[83]

B. THE NFIP IN PRACTICE

While the original NFIP, on its face, may not appear to violate the Tenth Amendment, the NFIP after the 1994 amendments making non-compliance an even greater burden may violate the Tenth Amendment as it is applied. The coercive application of FEMA regulations can be seen by looking at two specific episodes in the relationships between FEMA, the State of Missouri, and its political subdivision, St. Charles County.[84]

The authority to enforce floodplain regulations through local city or county ordinances is found under a city's or county's relevant

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79. 992 F.2d 937, 938 (9th Cir. 1993).

80. Board of Natural Resources v. Brown, 992 F.2d 937, 938 (9th Cir. 1993).

81. *Id.* at 945.

82. *Id.* at 945-47.

83. *Id.* at 947. The FEMA regulations deal with land use which has traditionally been a local issue. *See* United States v. Lopez, 514 U.S. 549, 567-70 (1995) (stating that to uphold the statute at issue, which made it a federal offense to possess a firearm in a school zone, would have required the court to accept that "there never will be a distinction between what is truly national and what is truly local"); *see also*, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding that the 11th Amendment barred Congress from abrogating the state's sovereign immunity under the Commerce Clause sending a clear message that there are limits on congressional authority).

84. In one instance, FEMA responded to a request from St. Charles County that they be at public hearing on the density floodway by stating:

> the county professional staff is well versed in all aspects of the proposed ordinance . . . and should be amply prepared to answer questions from members of the public . . . . FEMA staff attendance at the Council meeting would neither provide additional information nor facilitate the legislative process of the County Council. Therefore, FEMA staff will not attend.

Letter from Stephen R. Harrell, Chief of Natural & Technological Hazards Division, FEMA, to Eugene C. Schwendemann, County Executive, St. Charles County Council, Missouri (Mar. 4, 1993) (on file with the St. Charles County Planning Dept).

zoning statute.[85] The FEMA floodplain regulations apply to public, as well as private property.[86] Thus, one political subdivision of the State of Missouri (in this case, St. Charles County) was expected to enforce its zoning regulations against another political subdivision (in this case, the Consolidated North County Levee District). Even though the issue of governmental immunity from zoning had been well established in Missouri.[87]

In response to this inconsistency, the Consolidated North County Levee District asked their state senator to request an Attorney General's Opinion on whether they were subject to the county's regulations. The Opinion stated that local zoning ordinances, such as the floodplain ordinances, were not applicable to public uses of property where a political subdivision (in this case, the levee district) has the power to acquire lands by the exercise of the power of eminent domain.[88]

At about the same time, the Missouri Supreme Court decided the case of *St. Charles County v. Dardenne Realty Co.*[89] In *Dardenne Realty*, St. Charles County sued several private levee owners who had raised their levees without first getting a floodplain permit.[90] The Supreme

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85. MO. REV. STAT. § 89.020 (1994) (authorizing city zoning); MO. REV. STAT. § 64.010 (1994) (authorizing county zoning); MO. REV. STAT. § 49 (1994) (authorizing counties that do not wish to have zoning to pass FEMA regulations).

86. 44 C.F.R. § 60.12(a) (1996). This section provides:

> The state shall comply with the minimum floodplain management criteria set forth in sections 60.3, 60.4 and 60.5. A state shall either (1) comply with the floodplain management requirements of all local communities participating in the program in which state-owned properties are located; or (2) establish and enforce floodplain management regulations which, at a minimum, satisfy the criteria set forth in sections 60.3, 60.4 and 60.5.

Id. In the case of *Stolte v. Pena*, No. 4:96-CV928GFG (D. Mo. 1996), the plaintiff city, in an attempt to stop a highway project, refused to issue a floodplain permit for the project. The State of Missouri, through Executive Order 97-09, established floodplain management regulations to be applied to state projects with enforcement by the State Emergency Management Agency. The federal district court found that the executive order, and its integrated floodplain management regulations for state-owned development, were valid and authorized.

87. *See* City of St. Louis v. Bridgeton, 705 S.W.2d 524, 528 (Mo. Ct. App. 1985) (holding that the city of St. Louis not subject to the zoning ordinances of the City of Bridgeton when expanding its airport); Applebaum v. St. Louis County, 451 S.W.2d 107 (Mo. 1970) (holding that St. Louis County is not required to comply with the zoning ordinances of municipalities in locating an incinerator and landfill); St. Louis County v. City of Manchester, 360 S.W.2d 638 (Mo. 1962) (en banc) (holding that the city of Manchester was restricted in the selection of a sewage treatment plant by the zoning laws of the County of St. Louis which operated under a constitutional charter); State v. Kopp, 330 S.W.2d 882 (Mo. 1960) (holding that the city of Raytown was not subject to the zoning laws of Jackson County in locating a sewage disposal plant); State v. Farris, 304 S.W.2d 896 (Mo. 1957) (en banc) (holding that the city of Ladue could not restrict through its zoning ordinance the school board's power to select, locate, and take in the domain property from a public school).

88. 117 MO. ATT'Y GEN. 1989. Withdrawn after the relevant statute was later amended.

89. St. Charles County v. Dardenne Realty Co., 771 S.W.2d 828, 831 (Mo. 1989) (en banc). Among the defendants in the case was August A. Busch, III (the beer baron). This case was a good example how a plaintiff with sufficient funds can often challenge the regulations on their face and as applied. However, the expense of doing so is usually not justified for a small landowner seeking a permit for a small project.

90. *Id.* at 829.

Court of Missouri held that the state law authorizing county zoning "shall not be exercised so as to impose regulations or to require permits with respect to land used or to be used for the raising of crops."[91] The court, therefore, found that land used for agricultural purposes is exempt from county zoning requirements, including the county floodplain order.[92]

The statute under which the Consolidated North County Levee District was formed states that the owners of a majority of the acreage "may form a levee district for the purpose of having such land and other property reclaimed and protected from the effects of overflow and other water for sanitary or *'agricultural purposes.'*"[93] Given the agricultural purposes of the levee district and in light of the agricultural exemption articulated in *Dardenne Realty*, a real question existed as to whether a county can require a levee district to obtain a permit for construction of a levee.

Given the uncertainty created by the Attorney General's Opinion and the *Dardenne Realty* case, FEMA went to the Missouri Capitol seeking a change in state law during the 1990 legislative session.[94] Their bill, when debated on its merits, was soundly defeated in the Missouri House due in large part to the efforts of the St. Charles County delegation.[95] Before the 1992 legislative session, FEMA sent a letter to every county and every legislator informing them that sixty counties would be suspended from eligibility for the flood insurance program if the legislature did not pass the legislation FEMA wanted.[96] With this threat hanging over it, the legislature passed FEMA's bill after a fierce debate in which even those who voted for the bill complained about having a gun placed to their head by FEMA.[97] Many legislators were very disappointed that the state did not fight this action in the courts as the state government had far more leverage and much greater financial resources than the local jurisdictions.

If the State of Missouri could not withstand the pressure created by the threat of suspension, no one would expect St. Charles County to fare

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91. *Id.*

92. *Id.* at 831.

93. MO. REV. STAT. § 245.015 (1986) (emphasis added).

94. H.B. 1706, 85th Mo. Leg., 2nd Sess. (1990).

95. Journal of the House, 85th Mo. Leg., 2nd Sess. (Apr. 25, 1990).

96. Letter from C.M. "Bud" Schauerte, Administrator of Federal Insurance, Federal Emergency Management Agency, to Steven E. Ehlmann, Missouri State Representative, St. Charles, Missouri (Sept. 13, 1990).

97. H.B. 72, 86th Mo. Leg., 1st Sess. (1991). The new statute stated, "Levee districts organized pursuant to Chapter 245, RSMo., . . . are subject to floodplain management regulations adopted by any county." MO. REV. STAT. § 49.600 (1986), as amended. The agricultural exemption was also removed. MO. REV. STAT. § 64.620 (1986), as amended.

any better. On June 27, 1989, St. Charles County received a letter from Frank Begley, FEMA Region VII, stating that during the 1986 flood, the levees of the Consolidated North County Levee District on the Missouri River had ruptured with the result that up to 95,000 cubic feet per second of water spilled across the peninsula formed by St. Charles County.[98] He added that "the floodway currently depicted on the Missouri River does not account for the flows going across St. Charles County," and gave the county the option of a new standard hydraulic model floodway or to opt for what was called a "density floodway."[99]

After a series of meetings, St. Charles County reluctantly agreed that instead of a traditional floodway, they would allow a density floodway, thus allowing people to develop up to an eighteen percent wider floodway, rather than the zero percent development required in a traditional narrow floodway.[100] FEMA required the density floodway ordinance to contain language calling for no continuous fill.[101] This meant that the Consolidated North County Levee District would not be allowed to raise its levees since a levee would constitute continuous fill. To raise the levees everywhere else would be worthless so long as the section within the density floodway could not be raised and would always be the low spot on the levee system.

The meetings held on this matter were contentious, with the farmers wanting the county to reject the density floodway and take the matter to court.[102] The density floodway was supported by certain property owners who were afraid that the county would lose its flood insurance and disaster assistance should there be a flood.[103] While all members of the county council felt that they were being coerced by FEMA, they did

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98. Letter from Frank Begley, Action Regional Director of Federal Emergency Management Agency, to Gerald Ohlms, Presiding Commissioner of St. Charles County (June 23, 1989).

99. *Id.* The letter went on to say:

> As you may surmise, the density floodway may address many of the problems which the county may face. However, neither the standard floodway nor the density floodway would allow for the encroachment presented by a levee. We are aware of the interests by the levee districts in St. Charles County in developing a levee. However, given the matter before us, we must work together to deter such actions at this time.

Id.

100. ST. CHARLES COUNTY, MO., ORDINANCE NO. 93-40 (1993).

101. *Id.*

102. Ralph Dummit, *Insurance Maps for Flood Plain Assailed, OK'd*, ST. CHARLES POST-DISPATCH, Dec. 12, 1992, at 1. Dennis Miller, *No Choice Left on Flood Maps, Says Commissioners*, ST. CHARLES JOURNAL, Dec. 20, 1992, at 1.

103. *Id.*

vote five to two in favor of the density floodway.[104] The county council members had no real choice; they could not leave the county without assistance in the event of a flood.[105]

The regulatory scheme created by the NFIP violates the bedrock principles of federalism and the Tenth Amendment in the same way as the "take title" provision did in the *New York* case.[106] Although the NFIP provisions give Missouri and its political subdivisions a theoretical choice as to whether to adopt local ordinances, the choice is entirely illusory. If St. Charles County or the State of Missouri chooses not to regulate according to Congress' wishes, they would expose their people to having no flood insurance, disqualify them from any federally regulated loans, and disqualify both their citizens and themselves from any federal aid in time of flood.[107] Just as in *New York*, where states had to "take title" to all the waste, Missouri and its subdivisions would have to "take title" to every problem associated with flooding at a cost far in excess of that seen as a "Hobson's choice" in *Board of Natural Resources*.[108]

New York made clear that Congress may only influence state policy choices through means "short of outright *coercion*."[109] If federal law "crosse[s] the line distinguishing encouragement from *coercion*" it is "unconstitutionally *coercive*."[110] Where, as here, the FEMA regulatory scheme diminishes political accountability because "due to federal

104. ST. CHARLES COUNTY, MO., ORDINANCE NO. 93-100 (1993). Council Chair, Carl Bearden, wrote a letter to FEMA Region VII, on June 25, 1993, stating, "We are extremely disappointed with the appearance of your agency using the threat of rescinding flood insurance as leverage towards making St. Charles County a backwater basin." Letter from Carl Bearden, Council Chair, to Frank Begley, Action Regional Director of Federal Emergency Management Agency (June 25, 1993).

105. On May 18, 1993, FEMA sent a letter to Eugene Schwendemann of St. Charles County, threatening suspension on June 16, 1993, if the ordinance was not passed. Less than a month after Councilman Bearden's letter dated June 25, 1993, the 1993 flood was well under way. The 1993 flood was the most devastating flood in the history of St. Charles County, and the county and individuals received hundreds of millions of dollars in federal aid as a result of the flood. One cannot imagine what would have happened to the county and its inhabitants without this federal assistance.

106. New York v. United States, 505 U.S. 144, 169-75 (1992).

107. REPORT AND RECOMMENDATIONS OF THE GOVERNOR'S TASK FORCE ON FLOODPLAIN MANAGEMENT 6 (July 1994). One year after the flood of 1993, 37,000 Missourians had applied for disaster assistance from FEMA and $26.25 million had been distributed for individual and family grant assistance. Public assistance to local governments totaled $82.1 million.

108. *New York*, at 505 U.S. at 169-75; Board of Natural Resources v. Brown, 992 F.2d 937, 945 (9th Cir. 1993).

109. *New York*, 505 U.S. at 165-67 (emphasis added).

110. *Id.*

coercion, elected state officials cannot regulate in accordance with the views of the local electorate," it is unconstitutional.[111]

VI. EQUAL PROTECTION QUESTIONS

While the FEMA Floodplain Regulations certainly appear fair on their face, the experiences of St. Charles County show that they can be unfair as applied. While no one would want to see new federal or state bureaucracies, the fact that FEMA uses existing local bureaucracies to enforce the regulations is also one of the program's greatest weaknesses. The Consolidated North County Levee District is an agricultural levee district where ninety-five percent of the land is used for agriculture. It is located within a fast developing suburban county which has had county planning and zoning for nearly thirty years with an experienced and professional staff to enforce every FEMA regulation. This is in contrast to rural Missouri counties. Most do not have planning and zoning, and therefore, no building department, making enforcement in those counties lax.[112] It is extremely difficult to explain to the people in St. Charles County why levees cannot be built because of regulations, when those same regulations never seem to be a problem for their cousins living in other counties. While this uneven enforcement is certainly unfair, it probably does not rise to the level of a constitutional violation.[113]

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111. *Id.* The essential question under the 10th Amendment is whether a Congressional mandate is backed up by an enforcement mechanism that is sufficiently coercive to rob the state of all reasonable choice in the matter. *See, e.g.*, Kentucky Div. v. Turfway Park Racing Ass'n, 20 F.3d 1406, 1415 (6th Cir. 1994) (holding no 10th Amendment violation where "the State remains free to ignore . . . a request"); Zych v. Unidentified, Wrecked and Abandoned Vessel, 811 F. Supp. 1300, 1321 (N.D. Ill. 1992) (holding that statute did not violate the 10th Amendment because "[n]o penalty is imposed if a state refuses" to develop regulations in accordance with the statute). The FEMA regulations are intended to be that kind of enforcement mechanism. The question is whether the FEMA regulations have "crossed the line distinguishing encouragement from coercion." *New York*, 505 U.S. at 175-77. The severity of nonparticipation ineluctably leads to the point where the State "may not decline to administer the federal program." *Id.* at 2429; *see also* South Dakota v. Dole, 483 U.S. 203, 211-212 (1987) (holding no constitutional violation where only five percent of funds available under a federal grant would be withheld).

112. Bills have been filed by the author in the Missouri General Assembly in the last five years which would establish the State Emergency Management Agency as the permitting authority for all counties and cities which do not have planning and zoning. This would ensure uniform enforcement of regulations throughout the state. To date, efforts have been unsuccessful to pass a bill.

113. Memorandum concerning Unequal Enforcement of Law—Equal Protection, from Margaret J. Toalson, Missouri Senate, Division of Research, to Senator Steve Ehlmann (January 29, 1998) (on file with the author). There seems to be no cases addressing the unequal enforcement of federally influenced ordinances by political subdivisions. There have been cases challenging selective enforcement of state laws and local ordinances. Courts appear to have used a similar analysis as for criminal defendants. *See, e.g.*, Fair v. City of Galveston, 915 F. Supp. 873 (S.D. Tex. 1996); Barber v. Municipality of Anchorage, 776 P.2d 1035 (Alaska 1989); Ardt v. Department of Professional Regulation, 578 N.E.2d 128 (Ill. Ct. App. 1991). There are provisions governing selective enforcement of laws as applied in criminal cases. So long as the statue is rationally based, intentional selectivity does not violate equal protection rights. United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973). If the selective enforcement is based on race, religion, or the intent to prevent the exercise of constitutional rights,

Another potential equal protection problem arose after the 1993 flood, when thousands of structures in St. Charles County were condemned pursuant to the "51% rule." This rule requires that any structure requiring substantial improvement, which equals or exceeds 50% of the market value of the structure before the start of construction, could not be rebuilt unless raised above the 100-year flood level.[114] In Region VII of FEMA, all of the jurisdictions were instructed to use *fair market value* in determining whether the structure was damaged at least 50%. Meanwhile, across the Mississippi River from St. Charles County, in the State of Illinois, which is in FEMA Region V, *replacement cost* was used to enforce the "51% rule."[115] When this was brought to the attention of FEMA by the local Congressman, FEMA was forced to back down in Region VII and allow jurisdictions to use *replacement cost* in figuring the "51% rule." This meant that many structures which had previously been condemned now could be rehabilitated and reoccupied.[116] In some communities it meant the difference between almost every structure having to be torn down and almost every structure being eligible for rehabitation.[117]

(i.e., improper motives) then an equal protection problem occurs. United States v. Salazar, 720 F.2d 1482 (10th Cir. 1983). Such intentional discrimination must be as to a particular class, not the individual. Porter v. Board of Educ., 837 F. Supp. 255 (N.D. Ill. 1993). Failure to prosecute others under the same law does not establish selective enforcement unless the prosecution was based on unjustifiable standard (arbitrary, illegal, etc.). King v. Pimentel, 890 P.2d 1217 (Kan. Ct. App. 1995).

114. 44 C.F.R. §§ 59.1, 60.3 (1996).

> Substantial improvement means any reconstruction, rehabilitation, addition or other improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the start of construction of the improvement. This term includes structures which have incurred "substantial damage," regardless of the actual repair work performed.

Id.

115. Ralph Dummit, *Insurance Maps for Flood Plain Assailed, Ok'd*, ST. LOUIS POST-DISPATCH, Dec. 15, 1992, at 1A; *see also*, Dennis Miller, *Two Legislators Seek to Waive Floodplain Rule*, ST. CHARLES JOURNAL, Aug. 18, 1993, at 1A, 15A; William Freivogel, *Ruling Aid Rebuilding in Flood Plain*, ST. LOUIS POST-DISPATCH, Sept. 3, 1993, at 1A, 12A.

116. The cost to build a new structure is almost always more than the fair market value of the structure. By using replacement cost, more homeowners had the option of rebuilding their houses.

117. In West Alton, Missouri, almost every structure received a red tag from St. Charles County indicating it was condemned and would have to be torn down. At the same time, Portage des Sioux, an incorporated city with its own FEMA ordinances, condemned no one. The people of West Alton eventually got relief through the change to replacement costs and the buy-out program, but the experience left a bad taste in their mouths. After a second flood in 1995, West Alton incorporated as a fourth-class city so that they would be able to have local, rather than county, enforcement of FEMA floodplain regulations.

While FEMA corrected this inconsistency in the aftermath of the flood, Region VII has since gone back to using the stricter market value standard where large numbers of structures are no longer involved. One has to wonder at what point this type of uneven enforcement violates the Equal Protection Clause. People are being deprived of their property and should be entitled to equal treatment.

VII. OTHER PROBLEMS

A. THE PURE HYDROLOGY MODEL

The FEMA Floodplain Regulations, as applied, can also be arbitrary, capricious, and unreasonable for several additional reasons. When told that the FEMA regulations kept them from improving their levees, the board of the Consolidated North County Levee District hired a consultant and had a series of meetings with FEMA and the Corps of Engineers. The Corps of Engineers eventually did a study to determine the extent that levees could be raised in St. Charles without causing induced flooding elsewhere.[118] It was determined that the primary problem was a very old railroad bridge built in the West Alton area parallel to the Highway 67 bridge.[119] This bridge did not provide an adequate opening to convey the 100-year flood with only a one-foot rise, the requirement of a floodway.[120] Adding too much additional height to the existing levees in the floodway would combine with this restriction to cause induced flooding elsewhere.[121] The Corps did eventually conclude that a twenty-year level of protection with no "freeboard"[122] could be built so long as the levee district met certain requirements, including persuading St. Charles and St. Louis counties to make certain floodway adjustments.[123]

When FEMA required the density floodway, the strategy of floodway adjustment had to be abandoned by the Consolidated North County Levee District. Even before this, FEMA was taking the position that the change in floodways had to be approved not only by St. Louis and St. Charles counties, but by every jurisdiction in any way impacted. Since this meant about ten other jurisdictions, it became an impossible task.[124] What appears on paper as a reasonable procedure for amending the floodway, becomes in practice, a nearly impossible task.

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118. *See* UNITED STATES CORPS OF ENGINEERS, *supra* note 24, at 4.

119. *Id.* at 2-3.

120. 44 C.F.R. § 60.3(d)(3) (1996).

121. *See* UNITED STATES CORPS OF ENGINEERS, *supra* note 24, at 4.

122. "Freeboard" means a factor of safety, usually expressed in feet, above a flood level for purposes of floodplain management.

123. *See* UNITED STATES CORPS OF ENGINEERS, *supra* note 24, at 9. The study required the Consolidated North County Levee District to do the following: (1) move the existing levees back to the embankment of the railroad bridge mentioned above; (2) get St. Louis County to adjust its floodway line so that the floodway would include Pelican Island; and (3) get St. Louis County to agree to certain adjustments in the floodway lines in St. Louis County. *Id.*

124. Meeting held in St. Louis on Dec. 13, 1995, at Senator Bond's office. Most jurisdiction were only slightly impacted, but it would be nearly impossible to get all the city councils to act on a proposal that, while it does them no harm, it also does them no good.

The FEMA regulations are based on a pure hydrology model which does not take into consideration the prior history and present land uses of any particular floodplain area.[125] While this regulatory program allows a federal veto on all land use decisions in the forty-three percent of St. Charles County that is floodplain, it does not take into consideration any of the traditional land use criteria, including highest and best use of the land.[126] There are floodplain areas in St. Charles County with close to a 100-year level of protection that have only agricultural uses and no residents. The Consolidated North County Levee District, with over 30,000 acres, more than 3,000 residents before 1993, a Union Electric generating plant providing electricity for the entire area, an assembly plant for McDonnell Douglas, and an historic community like Portage des Sioux, has an effective eleven-year level of protection.[127] Yet, based on the pure hydrology model contained in the overly broad FEMA regulations, that eleven-year levee cannot be raised.

B. BLANKET PRICING OF INSURANCE

While not everyone in the floodplain is equally flood-prone, the premium for the flood insurance coverage is fixed at a below cost rate, unrelated to the risk involved.[128] The premiums go into a fund from which the claims are paid and to which the Federal Treasury supplements, to the extent needed.[129] This blanket pricing of flood insurance is another irrational aspect of the NFIP. Club houses on the river bank, converted to low-income housing that are frequently flooded, may get the same rate as 100 year old farm houses built on a ridge that may have been flooded only once during their existence.[130]

The entire floodplain management scheme was intended to discourage development in the floodplain areas, to decrease the number of people living in those areas, and decrease disaster payments.[131] Like

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125. *See* 44 C.F.R. § 60.3(a)(3) (1996).

126. PHILLIP LANGDON, A BETTER PLACE TO LIVE 202 (1994).

127. *See* UNITED STATES CORPS OF ENGINEERS, *supra* note 24, at 9.

128. FEDERAL EMERGENCY MANAGEMENT AGENCY, NO. 186, MANDATORY PURCHASE OF FLOOD INSURANCE GUIDELINES 5 (1997).

129. *See* National Flood Insurance Program, 42 U.S.C. §§ 4001-27 (1994).

130. The St. Charles County Planning and Zoning Department has a map showing that flood insurance claims, especially repeat claims, are on structures along the rivers, including trailer courts, not farm homes.

131. FEDERAL EMERGENCY MANAGEMENT AGENCY, NO. 186, MANDATORY PURCHASE OF FLOOD INSURANCE GUIDELINES 1 (1997). The reasons for the Reform Act included the NFIP's low reserves as well as low level of participation among eligible property owners. It was estimated that fewer than two million of 11 million structures in the floodplain were covered by flood insurance. This was due to the high cost of the insurance, lax enforcement by federally regulated lending institutions, and the fact that homeowners often allowed their flood insurance to lapse. Congressional activity culminated with the passage of H.R. 3474 which was enacted as Reform Act of 1994, Title V. Pub. L. 325, 108 Stat. 2160, 2255-87 (1994).

many federal programs, though well intentioned, it has had unforeseen consequences.

Before the federal government got into floodplain management, there were three main groups of people in the floodplain. The first group were residents of old, established towns such as Portage des Sioux. The town was founded in the late eighteenth century, built on the highest ground in the area and until 1993, had never been flooded.[132] When Portage des Sioux was flooded, it was subject to the same regulations as repeat offenders who had already made repeated claims.[133]

Among the second group in the St. Charles County floodplain were the residents living in club houses along Alton Lake that had been built after the Alton Dam was completed in the early 1930s. Knowing they would be flooded often, owners built the houses of cheap materials, often elevating them so as to minimize flood damage. No one would spend the amount of money required to turn them into permanent residences when they could not be insured against flooding. When the federal government decided to insure these club house structures, people quit using them as club houses. The club houses were rented out and became low income housing.[134] The net result in St. Charles County was to have additional people moving into floodplain areas.[135] Also among the second group were the residents living in mobile home parks. Before flood insurance, one must assume that people moved mobile homes into the floodplain with the intent to move them out when a flood appeared imminent. After flood insurance, people made no effort to move; they simply collect on their damaged trailer which is almost always a total loss.[136]

The third group in the floodplain were the farmers who found it necessary to have their farm buildings and homes close to their fields in order to make a decent living upon the fertile land of the floodplain. The farmers built their homes on ridges and assumed they would be flooded only every fifty years or so. [137]

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132. PAUL R. HOLLRAH, A HISTORY OF ST. CHARLES COUNTY (1997).

133. *See* 44 C.F.R. § 59.1 (1996). However there is an exception to the ban on "substantial improvement" for "historic structures."

134. Interview with Ray Machens, President of the Consolidated North County Levee District, in St. Charles, Mo. (Jan. 12, 1998).

135. Population of Portage des Sioux Township: 1900—n/a; 1910—2,202; 1920—2,119; 1930—2,151; 1940—2,127; 1950—1,985; 1960—2,974; 1970—3,869; 1980—9,114. U.S. DEPT. OF COMMERCE, U.S. CENSUS BUREAU (census tables for each general population census since 1910). Portage Township combined with Rivers Township around 1990. It was no longer a township after late 1980s. Portage des Sioux, the town, is now listed under Rivers Township.

136. After the 1986 flood, Congress actually relaxed the standards applied to mobile homes. 44 C.F.R. § 60.6 (1996).

137. Interview with Ray Machens, President of the Consolidated North County Levee District, in St. Charles, Mo. (Jan. 12, 1998).

While farmers never asked for federal intervention, they were now faced with extensive land use regulations which greatly devalued their property and hampered their ability to farm. The most recent example of this was the doing away with the "agricultural exemption" by the Missouri General Assembly in 1990.[138] This change, at the insistence of FEMA, meant that farmers now would have to elevate not only their homes but also their farm structures in the event that they were more than fifty percent destroyed by any flood.[139] To justify increased regulation, FEMA pointed out that St. Charles County was among the highest in total floodplain claims of all counties in the nation.[140] In fact, the vast majority of the claims were the old club houses along the rivers. Yet, every time FEMA tightens its regulations, farmers are the most affected. It is the farmers who want better levee protection and larger homes, but are thwarted by the regulation. The club houses are mostly outside the levees. Furthermore, most residents of mobile home parks did not support the levee district because many actually made money on the floods.[141]

Given the above, it is not surprising that people would object to the fact that the flood insurance program treats all the various groups listed above in the same way. This means that farmers or townspeople who had their house flooded for the first time in 1993 are treated the same as the person whose home is subject to flood damage every four or five years.[142] While the latter is collecting frequent checks from the federal government, the former feels the brunt of the regulations. This was never more apparent than during the 1993 flood, when people whose homes were never previously flooded were being forced out or forced to rebuild above the 100-year floodplain. The overall result is that the flood insurance program has failed to achieve its purposes, and has in the process, created a great deal of animosity against the federal government's intervention in land use decisions in St. Charles County.[143]

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138. MO. REV. STAT. § 64.620 (1986).

139. 44 C.F.R. § 60.6 (1996). The 1994 amendment now allows for variances for agricultural structure.

140. Phil Linsalata, *The Flood of '93—Uncle Sam's Left Hand*, ST. LOUIS POST-DISPATCH, Sept. 4, 1994, at 1B.

141. My favorite story is of the lady who came out of her trailer to encourage the farmers sandbagging on the levee. She asked them to hold back the flood one more day—until the five-day waiting period on her flood insurance had run and the policy would be in effect. Support of mobile home owners was not essential to the levee district since voting is based on the number of acres owned. *See* MO. REV. STAT. § 245.070 (1990).

142. Dennis Miller, *Two Legislators Seek to Waive Floodplain Rule*, ST. CHARLES JOURNAL, Aug. 18, 1993, at 1A, 15A.

143. Kathleen Best & Phil Linsalata, *In the End Everyone Pays*, ST. LOUIS POST-DISPATCH, Nov. 21, 1993, at 3A; Phil Linsalata, *Want to Buy Flood Insurance? Good Luck*, ST. LOUIS POST- DISPATCH, Nov. 21, 1993, at 4A; Kathleen Best & Phil Lansalata, *Going Back for More*, ST. LOUIS POST-DISPATCH,

The NFIP should be amended to take into consideration repetitive loss as a factor in determining whether structures will be rebuilt or torn down.[144] Structures that have been the beneficiaries of numerous claims and which the federal government has subsidized for years should not continue to be rebuilt and become a further burden on the Federal Treasury. However, the people who have a good reason to live in the floodplain, or who had made few claims until the flood of 1993, should not be penalized because the 500-year flood happened to come during their lifetime.[145] A FEMA publication states:

> Prior to 1968, the Federal Government attempted to control coastal and riverine flooding on a national scale through re-channeling, using dams and levees to restrict the flow of waters . . . . But the increasing costs of these projects and high annual totals of flood-related damage influenced the Government to explore the possibility of decreasing disaster relief payments through flood insurance.[146]

The residents of the Consolidated North County Levee District had never benefitted from the government's largess on the L-15 project. Now, over the last twenty-five years, they have seen constantly increasing disaster and relief payments every time there is a flood.

C. FEDERAL RELIEF

Meanwhile, the Great Flood of 1993 did over $2 million worth of damage to the levee system.[147] To gain the twenty percent cost share, another bond issue was necessary. Due to the efforts of the board of supervisors, the levee district was the second levee to be completely fixed after the 1993 flood. The flood of 1994 came within inches of topping the levee. Sandbagging efforts by the levee district held the levee and only minor damage was done in 1994 saving the Federal Treasury

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Nov. 21, 1993, at 5A.

144. The 1994 Reforms do treat repetitive losses a little differently.

145. Many of the club houses are already on property owned by the Corps of Engineers, and the Corps' leases specifically precludes them from making flood disaster applications. However, no one enforces this matter to the detriment of the federal budget. If there is a buy-out of any of the land protected by the levee district, it is absolutely necessary that the legislation authorizing such buy-out allow and require that the government also pay off the assessments against the property they are buying out. There is precedent for this in the State of Missouri. When the Conservation Commission bought up property in the district for a wildlife sanctuary, they agreed to make payments in lieu of taxes on the ground purchased. If the federal government buys this land or provides money for local entities to purchase it, it will, of course, become tax exempt. Any effort to collect the taxes owed from the previous owner will be difficult, as the people who are bought out are likely to leave the area. In this respect, the program had exactly the opposite effect intended.

146. FEDERAL EMERGENCY MANAGEMENT AGENCY, NO. 186, MANDATORY PURCHASE OF FLOOD INSURANCE GUIDELINES 3 (1997).

147. Interview with Ray Machens, President of the Consolidated North County Levee District, in St. Charles, Mo. (Jan. 12, 1998).

millions of dollars (a service for which they received no thanks).[148] 1995 was another story. The 1995 flood took its toll on the levee, once again forcing the district to come up with funds to repair the levee system.[149] The levee system protects 30,000 acres of some of the best farm land in Missouri. Without the efforts of the levee district board these three floods, over a nine-year period, would have totally devastated this area and destroyed its economic productivity.

After repairing the damage from the 1995 flood, the board of supervisors again turned its attention to reducing the regulatory burden that condemned it to forever having an effective eleven-year level of protection; a situation which they felt would doom the economic future of the area. The board decided it would take an act of Congress to fix this problem, and they began working with Congressman Jim Talent (R-Chesterfield) and Senator Christopher "Kit" Bond (R-Missouri) to effect a change in the law.

In the fall of 1996, the federal statute was changed to allow a maximum twenty-year level of protection on both sides of the Missouri River from St. Charles to the confluence with the Mississippi River.[150] In addition, the board was able to get the Corps of Engineers to initiate a

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148. In fact, in October 10, 1995, Jerry B. Uhlmann, Director of the Missouri State Emergency Management Agency, and David Shorr, Director of the Missouri Department of Natural Resources, signed a Memorandum of Agreement for "Preservation of the Leveed Floodways on the Upper Mississippi and Lower Missouri Rivers," with representatives of Illinois, Iowa, Kansas, Minnesota, Nebraska, and Wisconsin. Among other things, it was agreed that "flood fighting should not be permitted to raise the effective level of levee protection during a flood if such actions will increase flood damages elsewhere." FEMA immediately called upon each state to "amend or otherwise modify existing administrative or operating plans to reflect the principles of this agreement." Letter from Warren Pugh, Division Director, Response and Recovery Division, to Jerry B. Uhlmann, Director, State Emergency Management Agency, (Dec. 12, 1995). Levee districts became alarmed. *Drainage District Officials Want Levee Policy Explained*, THE QUINCY HERALD-WHIG, Dec. 17, 1995. A resolution was passed against the agreement in the Missouri Senate and the State Emergency Management Agency immediately reaffirmed its prior sandbagging policy. Letter from Jerry B. Uhlmann, Director, State Emergency Management Agency, to Warren Pugh, Division Director, Response and Recovery Division (Feb. 9, 1996).

149. North County Levee District was forced to come up with over $1 million to fix flood-damaged levees over a nine-year period.

150. S. 640, 104th Cong. § 547 (1996).

> (a) In General.-- Notwithstanding any other provision of law or regulation, no county located at the confluence of the Missouri and Mississippi Rivers or community located in any county located at the confluence of the Missouri and Mississippi Rivers shall have its participation in the national flood insurance program established under chapter 1 of the National Flood Insurance Act of 1968 (42 U.S.C. 4011 et seq.) suspended, revoked, or otherwise affected solely due to that county or community permitting the raising of levees by any public-sponsored levee district, along an alignment approved by the circuit court of such county, to a level sufficient to contain a 20 year flood.
>
> (b) Permits.-- The permit issued under section 404 of the Federal Water Control Pollution Control Act (33 U.S.C. 1344) number P-1972, authorizing the reshaping and realignment of an existing levee, shall be considered adequate to allow the raising of levees under subsection (a).

Id.

study to determine if federal funds could be used to build a twenty-year agricultural levee.[151]

VIII. CONCLUSION

In his book, *Rising Tide, The Great Mississippi Flood of 1927 and How it Changed America*, John M. Barry makes the following observation about the federal efforts to prevent flooding on the lower Mississippi River: "To control the Mississippi River—not simply to find a *modus vivendi* with it, but to control it, to dictate to it, to make it then conform—is a mighty task. It requires more than confidence; it requires hubris. It was the perfect task for the nineteenth century."[152]

The events of the twentieth century have made us lose some of our faith in the efficiency of scientific progress delivered by engineers. In 1968, apparently not all in Congress had lost their faith in the possibility of social progress delivered by the social engineer.[153] For, to control the people of the Mississippi River floodplain, not simply to find a *modus vivendi* with them, but to control them, to dictate to them, to make them conform, is also a mighty task. It requires more than confidence, it also requires hubris. It was the perfect task for the twentieth century. As the NFIP was a centerpiece of the liberal ascendancy of the 1960s, the response by the people of St. Charles County was symptomatic of the conservative ascendancy of the 1980s.

People inhabiting the floodplains of St. Charles County moved there in the nineteenth century and cleared the land, drained the swamps, and built levees to guard against the ravages of nature.[154] There was no federal program to insure them against loss, and as a result, they were very careful where they built their homes. Most made wise economic decisions, but some did not. Later, to deal with those who did not, the

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151. Recent developments in Washington have increased the chances for St. Charles County to improve its levee protection. The Energy and Water Appropriations Bill contains $250,000 for the U.S. Army Corps of Engineers to study a possible raise of the levees between St. Charles and the confluence with the Mississippi River. Should the Corps recommend the project, and the federal government fund it, there is language in the Water Resources Development Act which eliminates some of the bureaucratic impediments to the project. The area in question has an effective level of protection of 11 years according to the Corps of Engineers. Nevertheless, the area has experienced three floods in the last 10 years. Efforts to achieve a 20-year level of protection with two-foot freeboard had to be scrapped because of induced flooding elsewhere. The 20-year plan was the highest level allowed by a Corps of Engineers' study completed several years ago. While the 20-year level is not what the Consolidated North County Levee District had sought, making this a federally sponsored levee, will relieve the local levee district of the burden of paying 20% of the cost of repair.

152. JOHN M. BARRY, RISING TIDE—THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA 21 (1997).

153. The 90th Congress had passed other ambitious social programs such as the Consumer Credit Protection Act and Fair Housing Act, all part of Lindon Johnson's "Great Society."

154. PAUL R. HOLLRAH, A HISTORY OF ST. CHARLES COUNTY (1997).

federal government imposed itself into the situation by implementing an ambitious attempt at social engineering—the NFIP. Even if well intentioned, federal efforts may have actually made the problem worse by granting a federal subsidy in the form of federal flood insurance to those who wished to live in the floodplain.

The way in which the regulations were promulgated and enforced has created very negative feelings by the local people against the federal government. Whether the regulatory scheme violates the Tenth Amendment or not, it certainly has made local inhabitants cynical as they see their local elected officials, constrained with impossible choices, forcing them to cede the property rights of their constituents in return for federal government largess. As the inhabitants see their property rights eroded, they see neighbors upriver largely unaffected in jurisdictions which have adopted identical regulations. They see a system in which hydrology rather than the interests of the citizens is paramount. People are also discouraged by the one-size-fits-all approach of the federal government. They see a system which fails to appreciate the positive role that levees have and will continue to play in floodplain management.[155]

We have probably gone too far to return to a *laissez-faire* approach to the floodplain. People should be willing to accept reasonable regulations in return for all of the federal benefits. However, the acceptance should be freely given, not coerced, and the regulations should be reasonable, not arbitrary.

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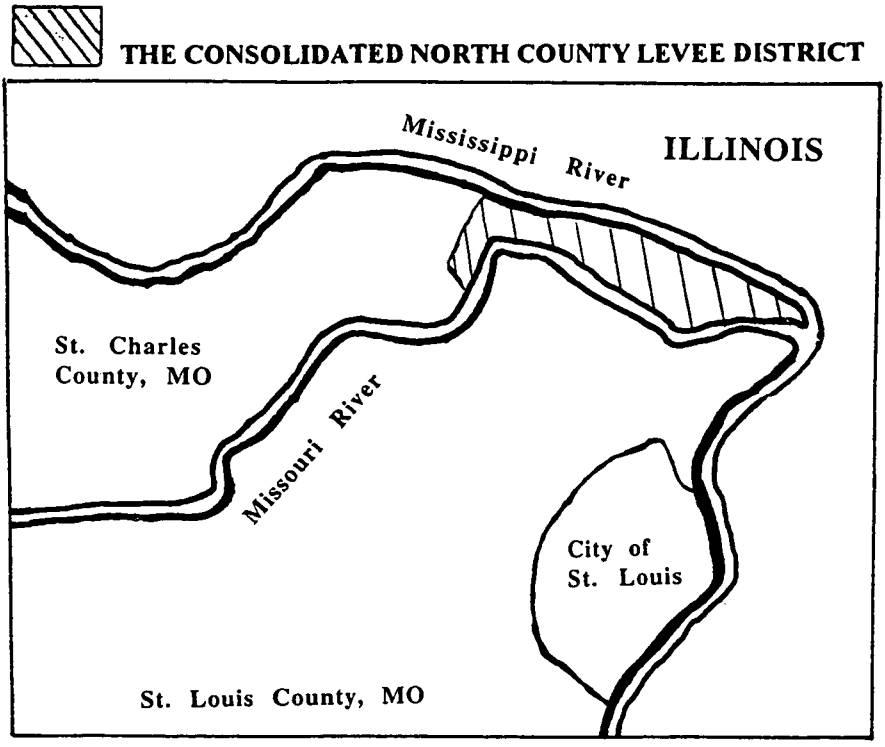
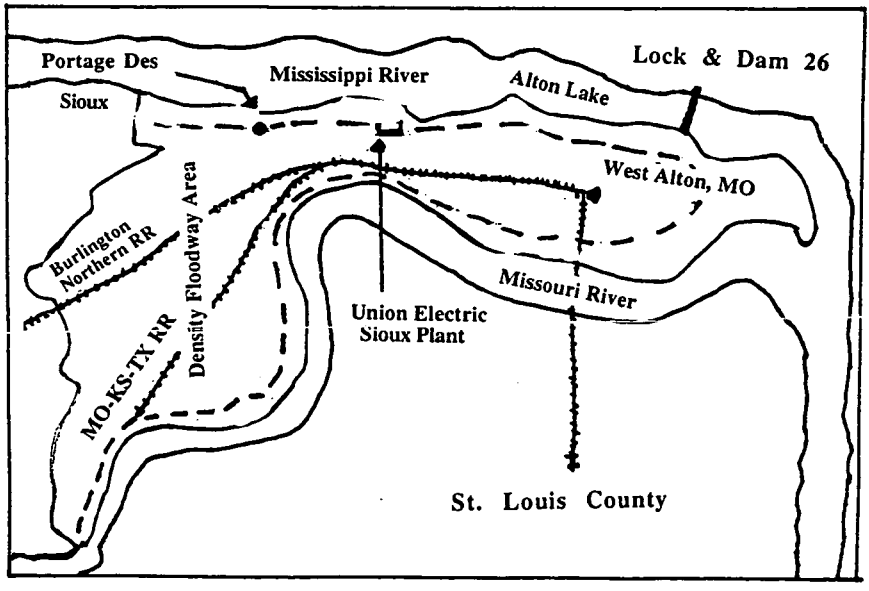
155. The Corps of Engineers concluded after the 1993 flood that, "floodplains are best managed through a combination of structural and non-structural measures that fully recognize the inherent risk of occupying flood hazard areas." EXECUTIVE SUMMARY, U.S. ARMY CORPS OF ENGINEERS FLOOD MANAGEMENT ASSESSMENT OF THE UPPER MISSISSIPPI RIVER AND LOWER MISSOURI RIVERS AND TRIBUTARIES (June 1995).


THE CONSOLIDATED NORTH COUNTY LEVEE DISTRICT
Mississippi River
ILLINOIS
St. Charles County, MO
Missouri River
City of St. Louis
St. Louis County, MO


Portage Des Sioux
Mississippi River
Alton Lake
Lock & Dam 26
West Alton, MO
Burlington Northern RR
Density Floodway Area
MO-KS-TX RR
Union Electric Sioux Plant
Missouri River
St. Louis County
— — — CURRENT LEVEE SYSTEM