

STRANGE BEDFELLOWS: SMARTERSAFER.ORG AND THE BIGGERT- WATERS ACT OF 2012

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Like any complex legislative undertaking, the 2012 Biggert-Waters Flood Insurance Reform and Modernization Act that President Barack Obama signed in July of 2012 represented dozens of compromises.¹ No major party to the discussion over flood insurance reform got everything it wanted. No one who participated contends that the reform—despite its significance—put the flood insurance program on stable ground for the long term. For all of its flaws and limitations, however, the Biggert-Waters Act was a breakthrough in one sense: it was a law that both traditionally conservative free-market groups and traditionally progressive environmental groups supported enthusiastically.²

Like most people involved in the effort to pass the bill, I entered this process with an idealistic goal—get the government out of the flood insurance business. (I still want that, although I now realize it will take a long time.) My own role was that of a think-tanker: I do research with no particular clients in mind and try to share it as widely as possible in a way that impacts public policy. Given my background and think-tank work, this goal was a natural one: I have spent the great bulk of my professional career at right-of-center think tanks that fight the environmental movement and have worked on Capitol Hill for a Republican Senate Majority Leader. All in all, I am a pretty conventional conservative. I voted for Mitt Romney, hate

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1. Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, 126 Stat. 405 (codified as amended at 42 U.S.C. § 4001–4129 (2006)).

2. See, e.g., *House's Planned Flood Insurance Reforms 'Good Start,' But Not 'Perfect'*, TAXPAYERS FOR COMMON SENSE (Mar. 8, 2011), <http://www.taxpayer.net/media-center/article/houses-planned-flood-insurance-reforms-good-start-but-not-perfect> (presenting a summary of various groups' positions on the bill in a press conference held soon after near-final legislative language was revealed).

high taxes, like guns, oppose abortion, and want vastly smaller, less intrusive government. I am deeply suspicious of bureaucratic rulemaking and believe that environmental protection must sometimes take a back seat to economic growth. Although I count a number of environmentalists as friends, enjoy the outdoors, and believe that climate change is real, a problem, and human-caused, I likely do not count as a “green”—even a conservative green—by any commonly held standard. For example, I disagree with nearly every major environmental initiative the Obama administration has launched and think that current campaigns against natural gas development are misguided.

Yet, through SmarterSafer.org, some other conservatives and I became close policy allies of many environmentalists. This Essay is about this “strange bedfellows” coalition called SmarterSafer.org that I helped found, which helped pass the Biggert-Waters Act. In the next few pages, I describe the final bill itself, outline the role that SmarterSafer.org played in helping Congress shape what became law, describe how SmarterSafer.org came into being and operates, and offer some potential lessons that SmarterSafer.org’s experience may hold for environmental activists and free-market conservatives who want to find common cause.

I. AN INTRODUCTION TO BIGGERT-WATERS

The Biggert-Waters Act may well be the largest revamping of the flood insurance program since its origin in 1968.³ The law does four major things. First, it raises insurance premiums for some “non-conforming properties” that have been provided flood insurance at below-market rates since their communities first joined the program, generally in the 1970s.⁴ Second, it establishes a variety of new procedures—including another level of oversight through a technical mapping advisory council—intended to improve the maps used to define flood rates, incorporating “the best available science”—including science related to potential climate change—into these new maps.⁵ Third, it allows premiums charged to insured properties to rise

3. COMM. ON FIN. SERV., SECTION BY SECTION SUMMARY: THE BIGGERT-WATERS FLOOD INSURANCE REFORM ACT OF 2012 (2012), *available at* <http://www.ciab.com/WorkArea/DownloadAsset.aspx?id=3208&libID=3230>.

4. Biggert-Waters Flood Insurance Reform Act, Pub. L. No: 112-141. §§ 100215(d), 100216(b) (H.R. 4348, 112th Cong., 2012), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS--112hr4348enr/pdf/BILLS--112hr4348enr.pdf>.

5. *See id.* §§ 100215–100216.

at a significant rate on the basis of the new maps.⁶ Finally, it allows—but does not require—the program to begin the process of transferring a portion of the nation’s flood risk to the private sector through the purchase of reinsurance.⁷ Together, these efforts put the flood program on a distinctly different course: they end the bulk of explicit subsidies for development in environmentally sensitive areas; greatly improve the maps used to determine which properties pay what rates for flood insurance; and give private industry a small opening to begin assuming flood insurance risk.

Regardless, the bill does not contain many of the ideas that played a role in the conversation about flood insurance over the years. By renewing the program, the bill continues a near-total federal government monopoly on writing primary flood insurance for private homes and smaller businesses for at least another five years. As a proponent of the free market, this is not what I wanted. Likewise, language that would have expanded “mandatory purchase” of flood insurance for holders of federally backed mortgages to “residual risk” areas located behind levees (essentially areas that would have to purchase flood insurance but for the existence of a levee) never made it into the passed version of the bill.⁸ The program’s massive, almost certainly impossible to pay debt to the United States Treasury—which increased by another \$12 billion in the wake of Hurricane Sandy—also went unaddressed in the final bill.⁹

In short, the Biggert-Waters Act was not a total win for any party involved and certainly did not achieve all the goals I had when the process began. Additionally, we need time to fully assess the Act’s virtues and limitations and to determine how successfully its vision is implemented. Nonetheless, both environmental and free-market groups hailed the Act as a victory. For free-market groups, higher rates and tentative steps towards private companies taking responsibility for flood risk raised the prospect that the size and scope

6. *Id.* § 100205.

7. *Id.* § 100232.

8. The language was originally included in § 100206 of the committee report but was deleted from the final version.

9. Adam Martin, *Obama Signs Aid Bill on Sandy's Three-Month Anniversary*, N.Y. MAG. (Jan. 29, 2013, 11:36 PM), <http://nymag.com/daily/intelligencer/2013/01/obama-signs-sandy-aid-bill.html>.

of government might be reduced over time.¹⁰ For environmental groups, the Act presented an opportunity to discourage development in floodplains, particularly in light of climate change.¹¹ Finally, some insurers believed the bill would be better for their business and would encourage improved preparedness in particularly disaster-prone areas.¹²

This unusual coincidence of objectives was borne out through SmarterSafer.org. Although the specifics of the bill were drafted largely by Congressional members and staff, several major ideas from SmarterSafer.org and its members ended up in the law. As a leading participant in SmarterSafer.org, I took part in numerous meetings and helped draft memoranda that influenced the shape of the bill. A few portions of the final law—for example, § 100216's creation of a technical mapping advisory council—were taken directly from SmarterSafer.org proposals. Furthermore, the broad outlines of the bill closely reflected SmarterSafer.org's own statement of principles.¹³ In short, SmarterSafer.org did more than just sign letters or issue positions: it had a real, measurable influence on public policy.

II. THE GENESIS OF SMARTERSAFER.ORG AND ITS SUCCESS

Like many other coalitions of strange bedfellows, SmarterSafer.org was born in a time of crisis. In mid-2007, the House of Representatives passed legislation that would have created a national catastrophe backstop, making taxpayers ultimately responsible for a large portion of the nation's coastal insurance costs.¹⁴ The proposal had support from the nation's two largest

10. R.J. Lehmann, *R Street Welcomes Agreement on Reforms to National Flood Insurance Program*, R STREET INST. (June 29, 2012), <http://rstreet.org/news-release/r-street-welcomes-congressional-agreement-on-national-flood-insurance-program-reforms/>.

11. See Matt Gannon & Joshua Saks, *Senate Must Act on Flood Insurance*, LAS VEGAS REV. J. (April 18, 2012), <http://www.lvrj.com/opinion/senate-must-act-on-flood-insurance-147883235.html> (showing a combined insurer and environmental perspective).

12. *Id.*

13. See *SmarterSafer.org Statement of Principles*, SMARTERSAFER.ORG, <http://www.SmarterSafer.org/uncategorized/smartersafer-org-statement-of-principles> (last visited Feb. 11, 2013) (focusing on building smarter, encouraging safety, using nature, insuring based on risk, assuming responsibility, and targeting government assistance).

14. Press Release, Committee on Financial Services, House Passes Klein-Mahoney Homeowners' Insurance Bill (Nov. 8, 2007), *available at* <http://democrats.financialservices.house.gov/press110/press110907.shtml>. For an analysis of how taxpayers would ultimately be responsible for the costs, see generally ROBERT J. SHAPIRO & APARNA MATHUR, *THE ECONOMIC EFFECTS OF PROPOSALS FOR FEDERAL NATURAL CATASTROPHE REINSURANCE AND NEW LOAN PROGRAMS: WHO PAYS AND WHO BENEFITS?*

homeowners' insurance companies as well as from a variety of other interests, including local insurance agents and the New York City Mayor's Office.¹⁵ As a result, it seemed to me and many of my colleagues that the federal government was going to start interfering in property insurance markets by selling subsidized insurance with premiums far lower than those found in the free market to people living in coastal areas, and that there was nothing that could be done to stop it.

As a free-market activist, then running a small insurance project for a free-market think tank, the Competitive Enterprise Institute (CEI), I did not like this and did not know anyone in the free-market movement who did either. To supporters of the free market, federal takeover of property insurance represents an oversized, over-powerful government's latest effort to ruin a functioning private market. The concept of moral hazard further lends itself to concerns that government-run insurance would ultimately lead to more destructive development in coastal areas.¹⁶ The bill, while passed freestanding, was debated largely in the context of the flood insurance program that was then moving forward in Congress.

Although some of the companies that were then supporting my work protested vigorously—many had written more homeowners' insurance policies than they should have in hurricane-prone areas and wanted the government to assume the risk for them—my bosses at the CEI stood by me even after it became clear that my donors would not. My own first efforts to fight back—a coalition letter signed by a few friends I had worked with at the American Enterprise Institute and a few other groups—was just one of several hundred such letters a typical office in Congress receives each day; even though I worked on the Hill myself and have many friends there, none of them even mentioned it to me. As such, I believe almost nobody read it. Presentations I made at Grover Norquist's Leave Us Alone Coalition's Wednesday meeting, at similar meetings at the state level,

(2008), *available at* http://www.abir.bm/downloads/Report_on_the_Effects_of_Proposed_Hurricane_Legislation-Shapiro-Mathur-August_2008.pdf.

15. These interests organized themselves into a coalition called protectingamerica.org. Its full membership list can be found at: <http://www.protectingamerica.org/coalition-members>. Not all members necessarily support all objectives.

16. Moral hazard is the lack of incentive to protect against risk created when some or all of the consequences of that risk are removed. All insurance creates some moral hazard. When subsidies or government provision of insurance shield risk takers from even paying a risk-adjusted premium, the incentives to take risks that may be socially harmful are particularly intense.

and at the House of Representatives' Republican Study Committee meeting were always received politely but never resulted in much action. My fellow conservatives were more interested in fighting President Obama's plans to take over the healthcare industry than they were in dealing with a complicated, wonky flood insurance bill. At one point, I believed that the bill would become law and that there was nothing I could do about it. I focused my attention on Florida, where Governor Charlie Crist had just rammed through a major expansion of the government's role in the state's insurance market.¹⁷

This soon changed. While crossing a street in Tallahassee after a meeting with potential allies in Florida, I received a call from a flood insurance expert who then worked for the National Wildlife Federation. He invited me to a meeting with others who had written and thought about flood issues and, because I had read his work in writing my own master's thesis on the Federal Emergency Management Agency, I immediately accepted despite my suspicion of the environmental movement.

The first meeting, which took place at the offices of a major K Street law firm retained by a reinsurer, included a number of conservative activists I had worked with in the past, an insurance lobbyist I had met once before, some other lobbyists I had never met, and some environmentalists I did not know at all. What surprised me was that the environmentalists in the room did not just sympathize—they actually got it: most people nodded when I suggested privatizing the flood program altogether as a long-term goal and the most enthusiastic response came from the same environmental leader who had invited me to the meeting. And that is how what became SmarterSafer.org began.

Under the initial banner of Americans for Smart Natural Catastrophe Policy (the name was changed to SmarterSafer.org a year later) the e-mails flew around the coalition and the government outreach individuals after each meeting joined by coalition members. Within about six weeks of the first meeting, a collection of environmental activists, free-marketers, and insurance interests had met with an outright majority of the offices in the United States Senate. In May of 2008, less than a year after the passage of the bill seemed assured, the Senate rejected a companion measure to add

17. See *Fla. Gov. Crist Signs Property Insurance Bill*, INS. J. (Jan. 25, 2007), <http://www.insurancejournal.com/news/southeast/2007/01/25/76298.htm> (explaining the passage of the bill and its terms).

hurricane wind coverage to the flood insurance program, which would have accomplished much the same thing as a “backstop,” by an overwhelming 73-19 vote.¹⁸ (The actual House measure that brought the coalition together never got a Senate vote.) As a result of continued pressure from members of SmarterSafer.org, neither I nor anyone else I know in the coalition saw any similar legislation ever come to a final floor vote in Congress again.

This quick victory led to an offensive phase: in 2009, 2010, and 2011, members of the same coalition met with offices all over the Hill to push an agreed-upon agenda on flood insurance, mitigation, insurance policy in general, and wetlands preservation.¹⁹ Some efforts—like tax credits intended to encourage property mitigation—went nowhere. Some bigger efforts also fell by the wayside: my own major priority going into the debate, a pilot program that would encourage experimentation with purely private flood insurance, had the support of major environmental groups but never gained support from the insurance industry. Indeed, not a single well-known primary insurance company was willing to step forward and offer to participate in such a program; without this, it was not credible to press forward on the idea of phased privatization.

III. LESSONS FROM SMARTERSAFER.ORG

Through frequent but largely informal conversation, SmarterSafer.org helped build consensus and alert everyone to what was and was not possible. Its membership fluctuated over the years. Some groups expected to be paid for signing letters and dropped out when they were not; others left over policy disagreements; others just lost interest. Nonetheless, the coalition remained a true “strange bedfellows” coalition of groups that rarely agreed on much.²⁰ Membership in SmarterSafer.org includes some insurance groups like the National Association of Mutual Insurance Companies (the nation’s largest property and casualty insurance trade association), the Reinsurance Association of America, and household-name insurers like Chubb and USAA. Other participants include environmental groups like the National Wildlife Federation and

18. Jim Abrams, *Senate Rejects Adding Wind Coverage to Flood Insurance Program, 73-19*, INS. J. (May 12, 2008), <http://www.insurancejournal.com/news/national/2008/05/12/89918.htm>.

19. SMARTERSAFER.ORG, *supra* note 13.

20. William Gibson, *Group Formed To Oppose National Catastrophe Fund*, S. FLA. SUNSENTINEL (May 27, 2009, 4:40 PM), http://articles.sun-sentinel.com/2009-05-27/news/0905280108_1_homeowners-private-insurance-market-disasters.

American Rivers, as well as right-of-center groups like the American Conservative Union, National Taxpayers Union, CEI, and R Street Institute (the small conservative think tank that I now head).

These groups have drastically different views on issues outside of the coalition's purview. Coalition member CEI, for example, questions whether or not climate change deserves a public policy response,²¹ while members like the National Wildlife Federation and American Rivers consider a response to climate change to rank amongst their top public policy priorities.²² Based on my five years of experience with the coalition, I would offer a few pieces of advice for people seeking to create similar coalitions on environmental issues that involve parties with vastly different views.

A. Recognize That Environmental Concerns May Not Always Dominate

Although I do care about the environment, it is not what gets me up in the morning. On flood insurance, I was far more interested in privatizing a destructive government program for its own sake than I was in the environmental benefits that might result from doing so. Some environmentalist friends have told me that they do not care about flood insurance privatization so long as they get a more sensible floodplain management policy. Likewise, while insurance interests tended to lean towards conservation-oriented practices—insurers have long been leaders in corporate America's efforts to deal with climate change—they quite properly put business concerns ahead of any particular environmental goal.²³ While every member of SmarterSafer.org cares about the environment, less than half of SmarterSafer.org's members would self-identify as primarily environmental groups. This actually made the coalition more effective. Not all lawmakers—much less all Americans—put the environment on top of their priority lists and hearing about environmental issues from perspectives *other* than that of the

21. Michael Shnayerson, *A Convenient Untruth*, VANITY FAIR, May 2007, available at <http://www.vanityfair.com/politics/features/2007/05/skeptic200705>.

22. *Global Warming*, NAT'L WILDLIFE FED'N, <http://www.nwf.org/Wildlife/Threats-to-Wildlife/Global-Warming.aspx> (last visited Mar. 20, 2013); *Climate Change & Rivers: Preparing for the Impacts of Climate Change*, AM. RIVERS, <http://www.americanrivers.org/initiatives/climate/> (last visited Apr. 8, 2013).

23. See, e.g., Al Lewis, *Global Warming no Hoax to Insurance Companies*, MARKETWATCH.COM (Sept. 9, 2011), http://articles.marketwatch.com/2011-09-09/commentary/30750008_1_climate-change-climate-research-community-global-warming.

environment can actually help convince people to take certain actions that environmentalists favor.

B. Keep Things Informal

SmarterSafer.org has never been incorporated, raised a dollar in its own name, or run paid advertising. It has no staff of its own, no dues, no president, and no bylaws. Things are so informal that one of the groups that most influences its activities, the centrist budget watchdog Taxpayers for Common Sense, is actually an affiliate member of the coalition that does not endorse all of SmarterSafer.org's statements. (It has disagreed with some mitigation tax credits SmarterSafer.org has pushed.) On a day-to-day basis, a lobbying firm retained by one of the corporate partners involved with SmarterSafer.org provides administrative coordination, an e-mail hub, and arranges occasional in-person meetings. A vice president of the firm—a respected former congressional staffer who worked on the Hill during the coalition's early days—serves as meeting chair, referee, and ringmaster for the sometimes unruly coalition. Large group calls and meetings take place periodically and smaller groups of heavily involved individuals talk informally by e-mail much more often. SmarterSafer.org position papers—on disaster policy, floods, and housing—are issued about once a year and are typically the product of collaborative work. The result of this has been that the coalition is easy to join and easy to leave: participants take what they need from it and give what they can. This helps the coalition remain broad and effective.

C. Seek Limited Consensus

SmarterSafer.org never tried to seek consensus on the issues that many of its members considered *most* important: it never developed a group position on climate change (in meetings I attended, conservative groups objected) or a stance firmly for or against the idea of privatizing the flood insurance program (primary insurers objected in the same meetings). Instead, it sought consensus amongst its members where it could be achieved without members giving up key parts of their missions or sacrificing their identities as “conservatives,” “insurers,” or “environmentalists.” Plenty of issues fell by the wayside as a result. Sometimes issues were left out of SmarterSafer.org's agenda because of priorities rather than ideology. For example, as a vice president of the Heartland Institute, I worked outside of SmarterSafer.org to educate Congress about a new way to

split losses between private insurers and the national flood insurance program that eventually became law as part of the final bill.²⁴ Nobody in the coalition openly opposed this legislatively-determined allocation process as far as I know—although some insurers would have preferred it not become law—but enthusiasm for it was also wanting.

D. Do Not Question Motives

Conservatives, a few progressive friends tell me, are all in the pay of big, sinister corporations.²⁵ Environmentalists, more than a few conservatives say, are “watermelons” (green on the outside, red on the inside) that seek to use environmental concerns to forward a socialist or communist agenda.²⁶ Both of these statements contain a grain of truth: some conservative activists, just like some environmental activists, *do* in fact serve as donor mouthpieces. Some environmentalists are far more concerned with establishing their vision of a just society, which includes central planning of large portions of the economy, than they are with the environment *per se*. But this is not the norm. Even the types of corruption that exist on both sides do not always result from stereotypical or sinister motives. In almost any setting, when people act for reasons that are not noble—desire for personal fame, for example—these motives usually are not particularly sinister or secret but, rather, reflections of ordinary human foibles that most share. In any case, it is not particularly productive to question other groups’ motives even if they really are sinister. If one can more effectively accomplish a given goal by working with *any* group that does not promote violence or hatred, then refusing to work with such a partner on principle is almost certainly going to be counterproductive. This does not mean that serious disagreements should not be allowed and did not happen with SmarterSafer.org: all environmental groups abhorred the Heartland Institute’s position that climate change was not a crisis and did not significantly result from human causes. One of my colleagues at the

24. Scott Richardson & Eli Lehrer, *Solving the Flood/Wind Problem After Hurricane Losses: The Case for a Standardized Loss Allocation System*, THE HEARTLAND INST. 2 (June 2011), http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/30236.pdf.

25. See, e.g., Mark Pocan, *Inside the ALEC Dating Service*, PROGRESSIVE, Oct. 2011, available at http://progressive.org/inside_alec.html (explaining how conservatives are paid by corporations).

26. See, e.g., Thomas DiLorenzo, *Why “Environmentalists” Are Called “Watermelons,”* LRC BLOG (Dec. 7, 2009, 8:07 AM), <http://www.lewrockwell.com/blog/lewrw/archives/44417.html> (calling environmentalists “watermelons”).

Heartland Institute, likewise, questioned my participation in SmarterSafer.org on the basis that the Heartland Institute ought to work to abolish the Environmental Protection Agency, repeal almost all environmental laws, and defeat the environmental movement in every possible way. Environmentalists remained in the coalition with me, however, and, until the Heartland Institute decided to launch a billboard campaign comparing climate change believers to terrorists, I largely ignored my colleagues who dealt with climate change. (After that, my colleagues and I working on insurance issues quit our jobs with the Heartland Institute and founded R Street Institute.)

IV. FINAL THOUGHTS

In the wake of the Biggert-Waters Act's passage, SmarterSafer.org has stayed together and is currently focusing its efforts on disaster management. SmarterSafer.org did not try to do too much at the same time. It focused on a few goals and achieved most of them. On a daily basis, SmarterSafer.org did not try to change the world or convert any group to any other group's way of thinking: conservatives were able to forward conservative ideas and environmentalists were able to forward environmental ideas. Hearts and minds did not change. But mutual understanding advanced. And public policy *did* change—not radically, but in a very real way.