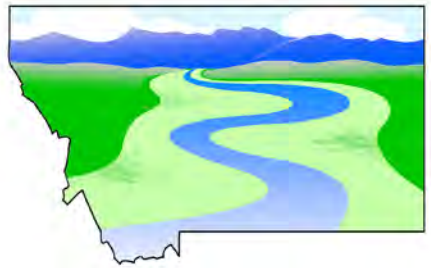
~ Lunch ~

Legal Training on Flood Risk Management for Local Communities

Lunch Sponsored By:



ASSOCIATION OF Montana FLOODPLAIN MANAGERS

Afternoon Session

LIABILITY AND PROCEDURES

Best Practices, Legal Considerations, Challenges, and Legal Cases:

1. Ordinance Adoption
2. Permitting
3. Variances & Appeals
4. Enforcement

Ordinance Adoption: Liability and Procedures

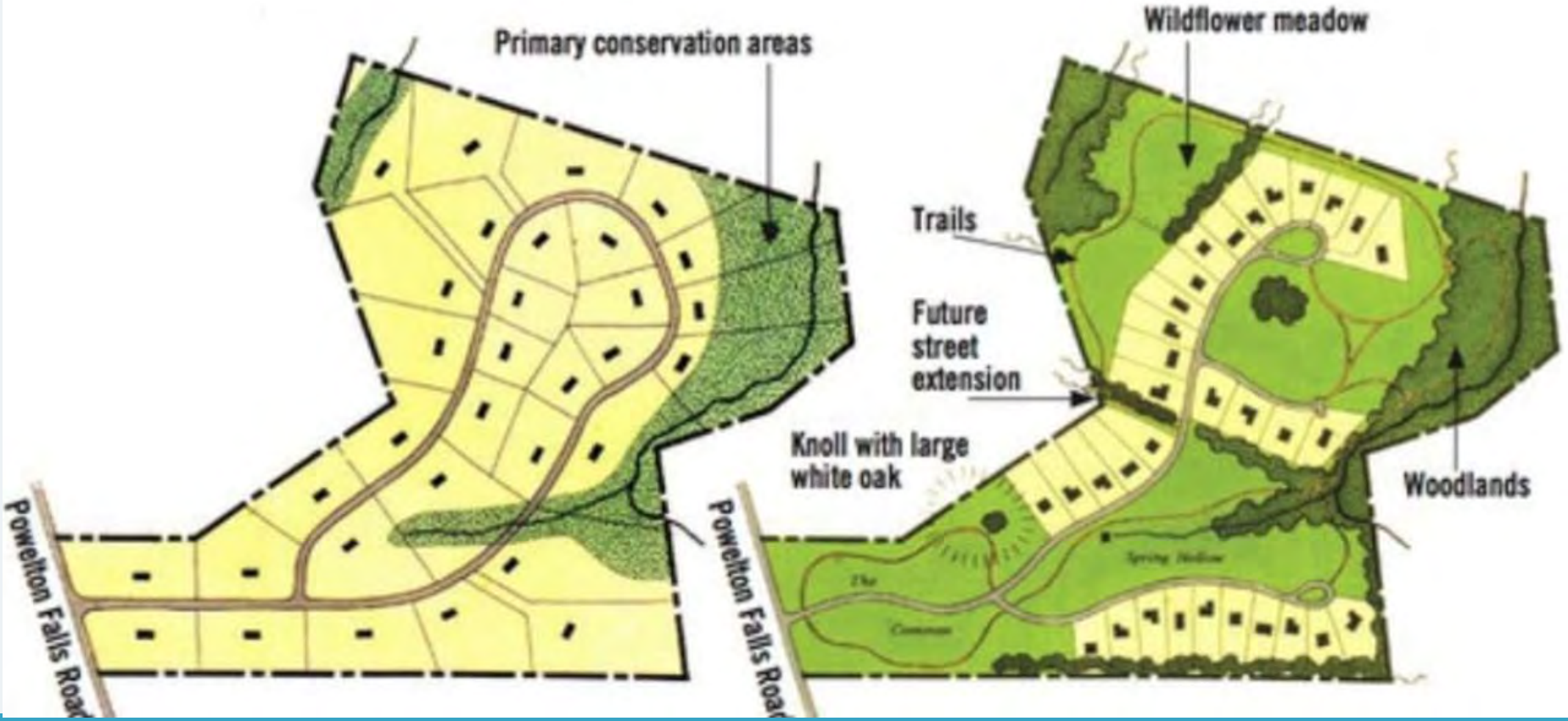
BEST PRACTICE: Stakeholder process

- Developing higher standards w/ partners
- Consensus process for preconceived notions



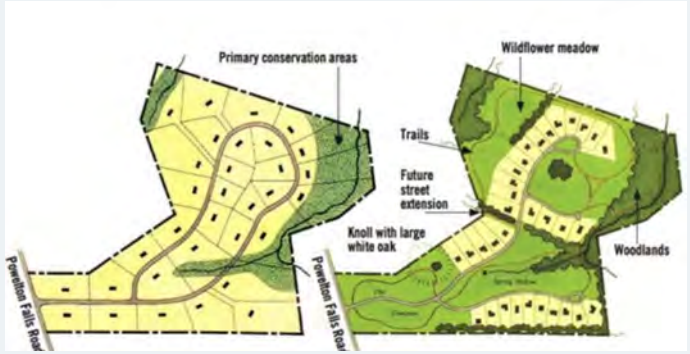
Ordinance Adoption: Liability and Procedures

"Getting to Yes" – Conservation Subdivisions



Ordinance Adoption: Liability and Procedures

"Getting to Yes" – Conservation Subdivisions



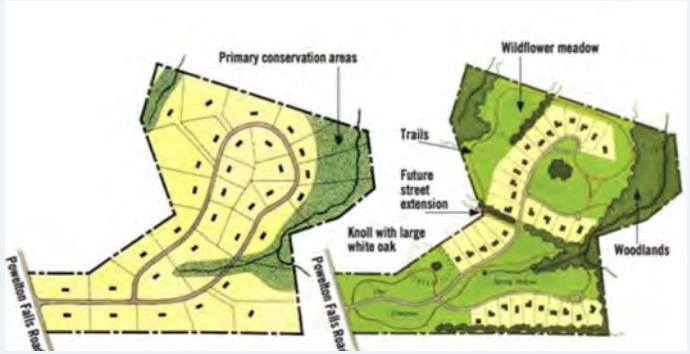
- Planning tool that uses a community's Zoning Ordinance to develop a set of unique regulations aimed at environmental protection that 1) identifies conservations areas, 2) locates infrastructure and roads around the conservation areas, positions the homes on the most desirable land, and, finally, draws the lots lines (featuring smaller yards than a conventional subdivision

- Conserves wetlands, floodplain, riparian buffers, and other environmentally sensitive lands, and may also protect wildlife habitats, woodlands, historical sites – basically anything the community wants to protect that is of a environmental benefit to the community

- Provides the same number of lots with less cost to the developer (i.e. same # of rooftops on smaller lots or "density-neutral")

Ordinance Adoption: Liability and Procedures

"Getting to Yes" – Conservation Subdivisions

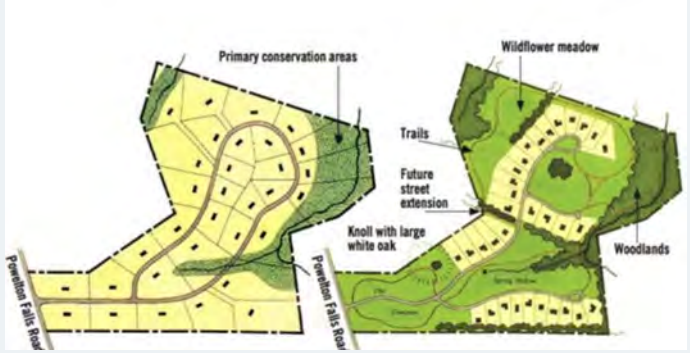


- Provides the same number of lots with less cost to the developer (i.e. same # of rooftops on smaller lots or "density-neutral")
  - Homes are "clustered on the most stable / least sensitive buildable land
  - Less roads and less stormwater infrastructure = less future maintenance costs for HOA or community
  - Less linear footage of water and sanitary sewer lines = dollars saved by the developer and less future maintenance costs for the utility provider who takes over the lines
  - More green and undivided open space – permanently deed restricted from future development – becomes a shared amenity for the subdivision's residents
  - Amenities such as walking paths can be required

Ordinance Adoption: Liability and Procedures

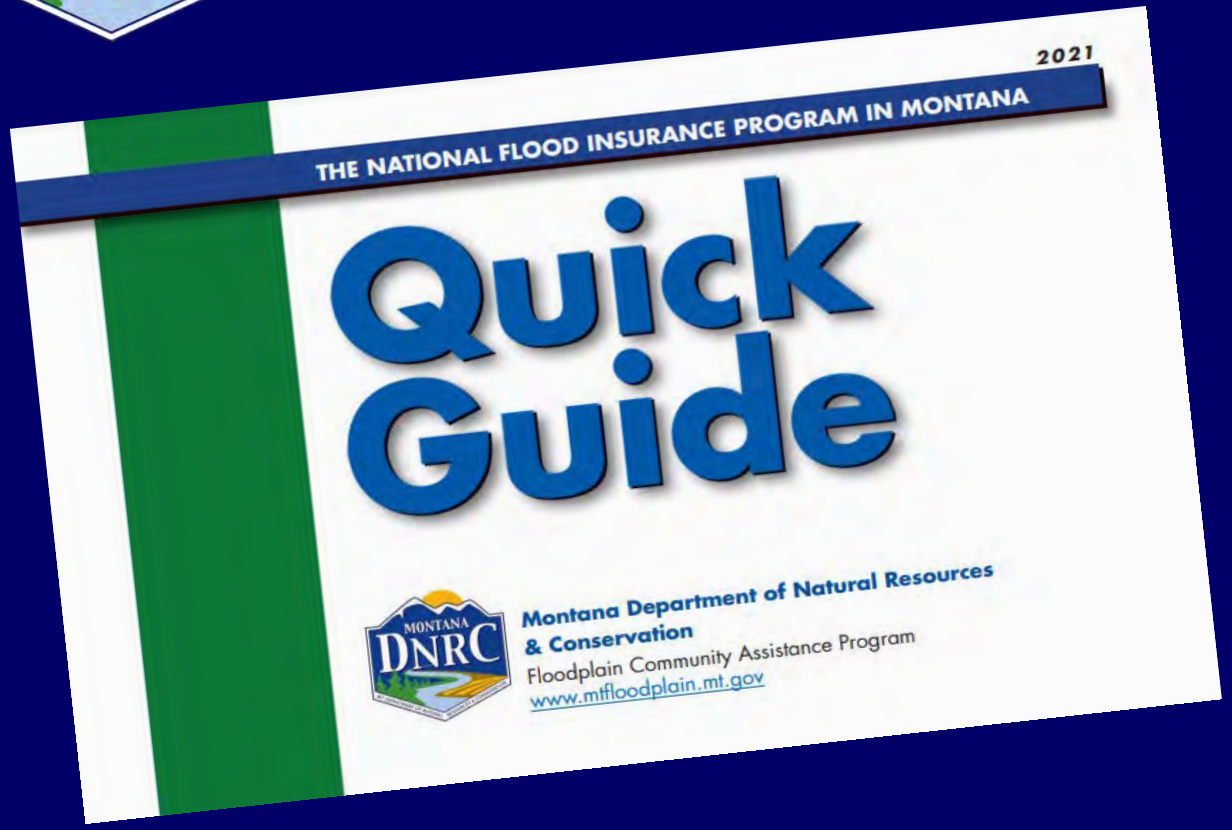
"Getting to Yes" – Conservation Subdivisions

- Reduces stormwater runoff (less "ponds and pipes")
- Protects natural drainage corridors
- Preserves native biodiversity
- Planners generally agree that conservations subdivisions curb urban sprawl and protect wildlife habitats better than large-lot subdivisions





MONTANA DNRC





The Local Floodplain Ordinance

Your REGULATIONS

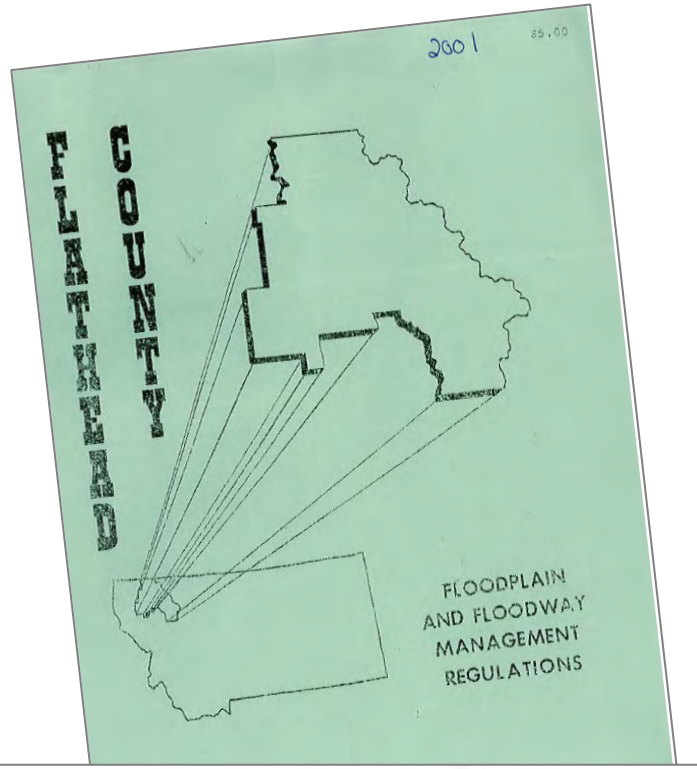
Do you know where it is?

Do you know what it says?

Do you use it when permitting?

The local "Floodplain Hazard Management Regulations"

(aka Ordinance) guide development in the floodplain and outlines how the community should administer and enforce its floodplain program.



RESOLUTION NO. 522

WHEREAS, Flathead County is currently enrolled in the emergency phase of the National Flood Insurance Program and is preparing to enter the regular phase of the National Flood Insurance Program by the adoption of land use regulations for the proper delineated areas pursuant to the provisions of the Floodplain and Floodway Management Act, hereinafter referred to as the "Act", Section 76-5-101, et seg., M.C.A., and,

WHEREAS, Flathead County has gone through the required public hearings necessary to make changes and corrections in preliminary floodplain maps and has recently received the final proofed maps from the Federal Emergency Management Agency, and, pursuant to the Act, Flathead County must adopt land use regulations for the delineated flood areas within six months of the State Board of Natural Resources and Conservation issuing an order designating the floodplain and floodway and notifying Flathead County of such designation,

COMMUNITY REGULATIONS

Your Local Floodplain Ordinance

- Outline the community's floodplain regulations and requirements
- Meet State and Federal minimum standards
- Must be updated when maps are updated or standards change
- Go through the local notice and adoption procedure
- Undergo FEMA review
- Receive review and approval from the DNRC Floodplain Program

1.2 Regulatory Authority



1. Floodplain and Floodway Management is codified at Montana Code Annotated (MCA) Title 76, Chapter 5 and describes the authority, procedures and minimum standards for local regulations.

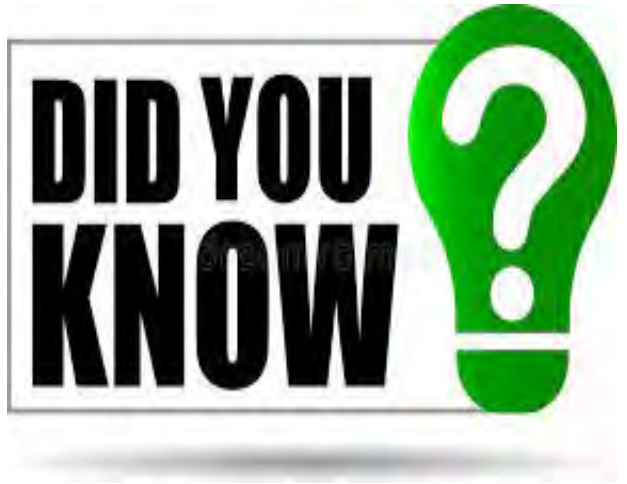
2. Regulation for Floodplain Management established by the Montana Department of Natural Resources and Conservation (DNRC) are located in Administrative Rules of Montana (ARM), Chapter 36.15.

3. The authority to regulate development in specifically identified flood hazard areas has been accepted pursuant to 76-5-301, MCA.

1.13 DISCLOSURE PROVISION

All property owners or their agents in the Regulated Flood Hazard Areas shall notify potential buyers or their agents that such property, including any permitted uses transferred, is located within the Regulated Flood Hazard Area and is subject to regulation and any permitted uses that are transferred. Information regarding Regulated Flood Hazard Area and the repository for Floodplain maps is available in the Floodplain Administrator's office.

- (ARM 36.15.204(2)(g))



1.17 DISASTER RECOVERY



In the event of a natural or man-made disaster,

The Floodplain Administrator should

- Participate and coordinate assistance with FEMA, MTDES, MTDNRC, and other state, local and private emergency service organizations.
- Provide information to structure owners concerning Hazard Mitigation and Recovery
- Complete a cursory structure condition survey (street view / in RFHA)
- Shall notify property owners that a permit may be necessary for an alteration or substantial improvement before repair or reconstruction commences on damaged structures.

Owners should be advised that structures that have suffered substantial damage and will undergo substantial improvements require a floodplain application and permit and must be upgraded to meet the minimum building standards herein during repair or reconstruction.((MCA 76-5-404(3)(b) (ARM 36.15.702) (44 CFR 60.3(c)(2 and 3))

NOTE: This applies even when structures are damaged by natural or man-made disasters such as floods, fires, earthquakes, mudslides, or winds.

Ordinance adoption: liability & procedures

The legal spine

Adoption is where substantive-challenge risk concentrates, and it starts with authority. A community's power to regulate floodplains is delegated by the state through enabling legislation; every ordinance traces back to that grant.

- Authority first: every ordinance traces to the state's enabling delegation.
- A weak adoption record (notice, hearing, findings, vote) is the first thing challenged.
- Higher standards are lawful and defensible when grounded in a documented public purpose. Remember 44 CFR 60.1(d).
- Where local and NFIP rules conflict, the more restrictive governs; defects risk program standing.

CASE / DISCUSSION

Permitting: Liability and Procedures

BEST PRACTICE: Making permitting a partnership

- Permitting Technical Guidance Document
  - Cliff notes for efficient permitting
  - Explain “why” for higher standards
  - Streamline processes where possible
  - Create forms/tools for consistent and comprehensive information submittal
  - Document interpretations

Permitting: Liability and Procedures

"Getting to Yes" – Key Strategies

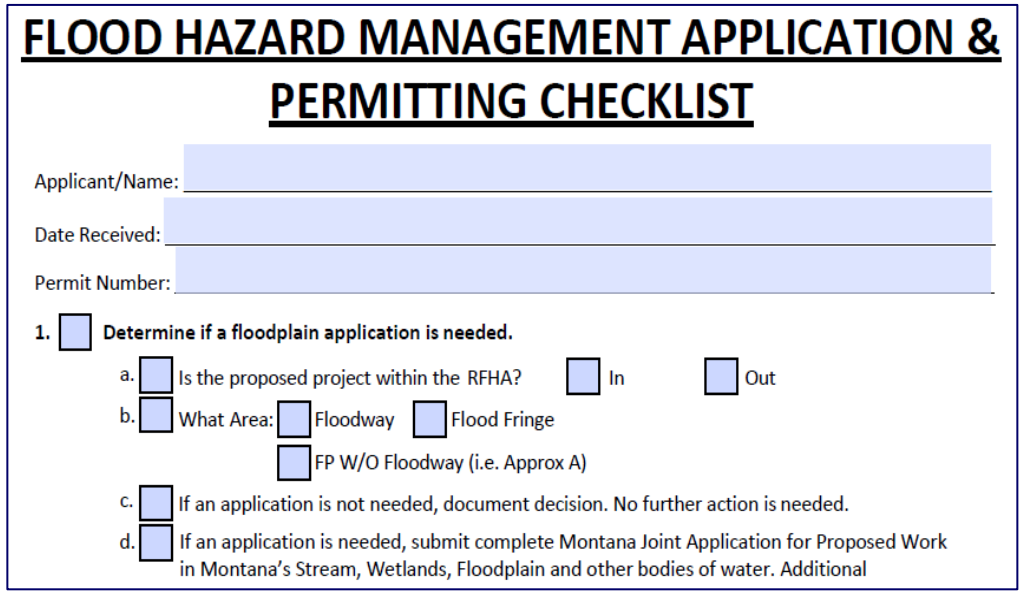


- **Verify Accurate Base Flood Elevations (BFEs)**
  - Utilize the current Flood Insurance Rate Map (FIRM) AND the current Flood Insurance Study (FIS)
- **Require Flood Permits for ALL Man-Made Changes** (DON'T Utilize Standard Building Code Exemptions!)
  - Grading, filling (no matter how small)
  - Accessory buildings (no matter what size)
  - Small structural changes like a new roof (multiple small changes could add up to substantial improvement – Be sure to tract substantial improvement!)
- **Improve Inter-office Coordination** (connect the FP Administrator's Office to Planning, Zoning and your Building Department to catch unpermitted work early
- **Require Pre- and Post-Construction Proof of Required Elevation Compliance** – Collect Elevation Certificates BEFORE pouring the foundation and immediately after construction finishes to ensure compliance (this requires coordination with your Building Inspectors!!)

Floodplain Regulations Continued:

Section 7: Floodplain permit application requirements

- Review fee
- Complete, signed application
- Detailed plans
- Copies of other applicable permits



FLOOD HAZARD MANAGEMENT APPLICATION & PERMITTING CHECKLIST

Applicant/Name: _____

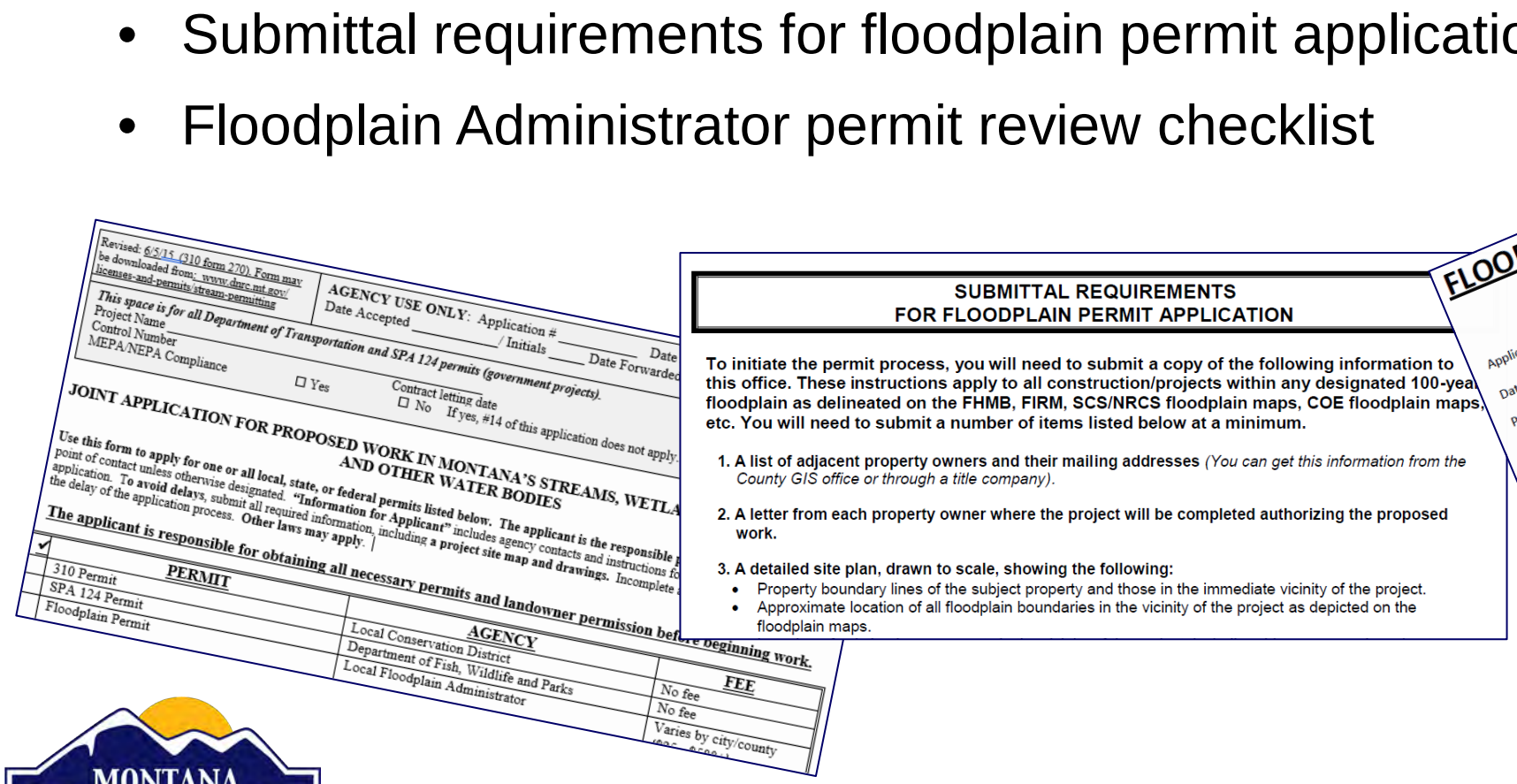
Date Received: _____

Permit Number: _____

1. ☐ **Determine if a floodplain application is needed.**
   - a. ☐ Is the proposed project within the RFHA? ☐ In ☐ Out
   - b. ☐ What Area: ☐ Floodway ☐ Flood Fringe
     ☐ FP W/O Floodway (i.e. Approx A)
   - c. ☐ If an application is not needed, document decision. No further action is needed.
   - d. ☐ If an application is needed, submit complete Montana Joint Application for Proposed Work in Montana's Stream, Wetlands, Floodplain and other bodies of water. Additional

KEY DOCUMENTS

- The joint application + “information for applicant” instructions
- Submittal requirements for floodplain permit application
- Floodplain Administrator permit review checklist


Revised: 6/5/15 (310 form 270). Form may be downloaded from: www.dnrc.mt.gov/licenses-and-permits/stream-permitting

AGENCY USE ONLY: Application # ____ Date Accepted ____ / Initials ____ Date Forwarded

This space is for all Department of Transportation and SPA 124 permits (government projects).

Project Name
Control Number
MEPA/NEPA Compliance ☐ Yes Contract letting date ☐ No If yes, #14 of this application does not apply.

JOINT APPLICATION FOR PROPOSED WORK IN MONTANA'S STREAMS, WETLA AND OTHER WATER BODIES

Use this form to apply for one or all local, state, or federal permits listed below. The applicant is the responsible p point of contact unless otherwise designated. "Information for Applicant" includes agency contacts and instructions fo application. To avoid delays, submit all required information, including a project site map and drawings. Incomplete the delay of the application process. Other laws may apply.

The applicant is responsible for obtaining all necessary permits and landowner permission before beginning work.

✓	PERMIT	AGENCY	FEE
	310 Permit	Local Conservation District	No fee
	SPA 124 Permit	Department of Fish, Wildlife and Parks	No fee
	Floodplain Permit	Local Floodplain Administrator	Varies by city/county

SUBMITTAL REQUIREMENTS FOR FLOODPLAIN PERMIT APPLICATION

To initiate the permit process, you will need to submit a copy of the following information to this office. These instructions apply to all construction/projects within any designated 100-yea floodplain as delineated on the FHMB, FIRM, SCS/NRCS floodplain maps, COE floodplain maps, etc. You will need to submit a number of items listed below at a minimum.

1. **A list of adjacent property owners and their mailing addresses** *(You can get this information from the County GIS office or through a title company).*
2. **A letter from each property owner where the project will be completed authorizing the proposed work.**
3. **A detailed site plan, drawn to scale, showing the following:**
   - Property boundary lines of the subject property and those in the immediate vicinity of the project.
   - Approximate location of all floodplain boundaries in the vicinity of the project as depicted on the floodplain maps.

FLOOD HAZARD MANAGEMENT APPLICATION & PERMITTING CHECKLIST

Applicant/Name:
Date Received:
Permit Number:

1. **Determine if a floodplain application is needed.**
   a. Is the proposed project within the RFHA? In Out
   b. What Area: Floodway Flood Fringe FP W/O Floodway (i.e. Approx A)
   c. If an application is not needed, document decision. No further action is needed.
   d. If an application is needed, submit complete Montana Joint Application for Proposed Work in Montana's Stream, Wetlands, Floodplain and other bodies of water. Additional

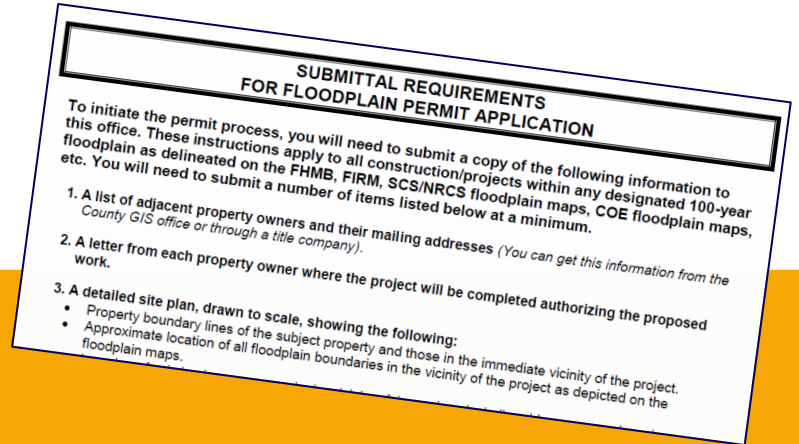
Links to these documents on the DNRC Floodplain website.

MONTANA DNRC

JOINT APPLICATION

Submittal Requirements

- A list of adjacent property owners and their mailing addresses
- A signature or letter from each property owner where the project will be completed, authorizing the proposed work
- A statement, along with calculations, specifying the amount of fill that will be placed within the floodplain
- Specific requirements for houses, buildings, bank stabilization, bridges, ponds, and roads
- A definitive statement from a qualified individual or engineer that the project:
  - Can withstand a 100-year flood
  - Will not adversely effect surrounding land owners (upstream, downstream, across stream or adjacent)
  - As well as what effect this proposed project will have on 100-year Base Flood Elevations



SUBMITTAL REQUIREMENTS
FOR FLOODPLAIN PERMIT APPLICATION

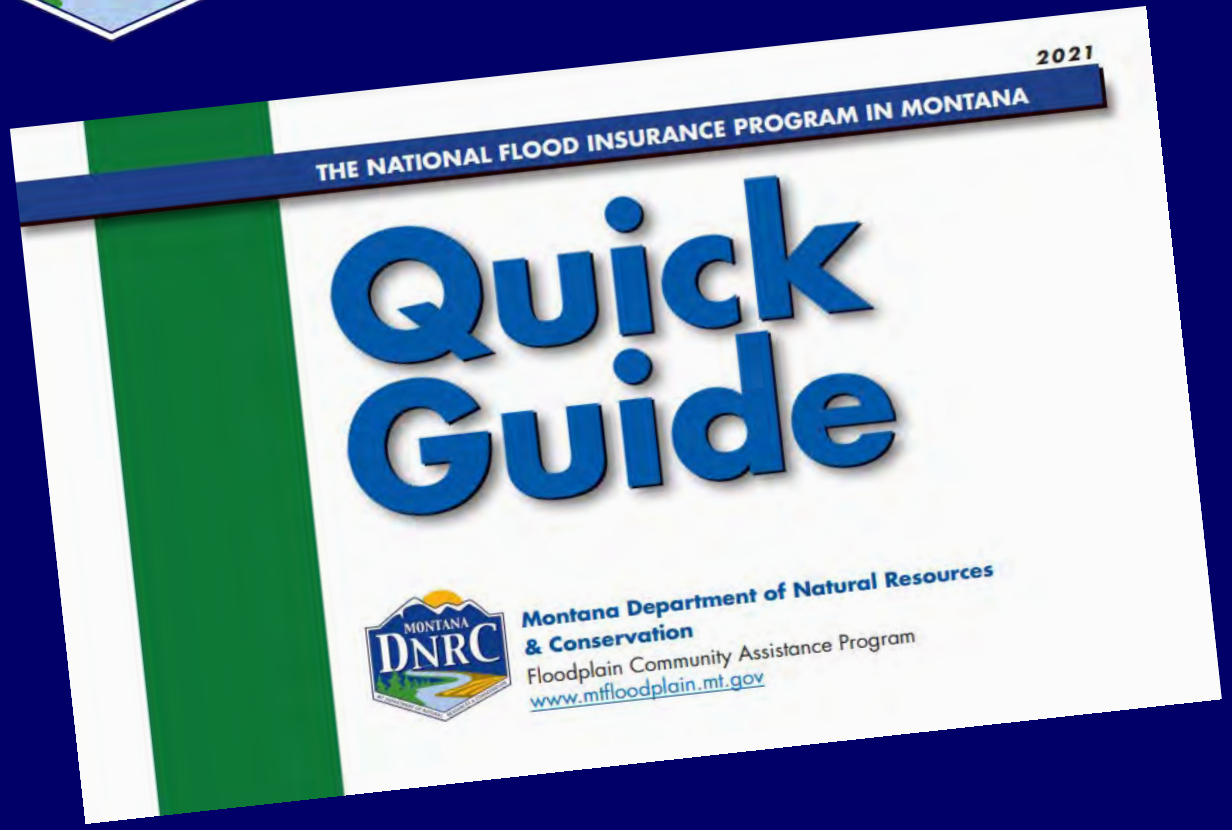
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MONTANA DNRC

JOINT APPLICATION

MONTANA DNRC





- ✓ *Deadlines*
- ✓ *Other permits*
- ✓ *Regulatory criteria*
- ✓ *Public notices*
- ✓ *And more!*

FLOOD HAZARD MANAGEMENT APPLICATION & PERMITTING CHECKLIST

Applicant/Name: _____

Date Received: _____

Permit Number: _____

1. ☐ **Determine if a floodplain application is needed.**
   - a. ☐ Is the proposed project within the RFHA? ☐ In ☐ Out
   - b. ☐ What Area: ☐ Floodway ☐ Flood Fringe ☐ FP W/O Floodway (i.e. Approx A)
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   - d. ☐ If an application is needed, submit complete Montana Joint Application for Proposed Work in Montana's Stream, Wetlands, Floodplain and other bodies of water. Additional

MONTANA DNRC

PERMITTING CHECKLIST

Floodplain Regulations Continued:

SECTION 8: APPLICATION EVALUATION

- Floodplain permit turnaround period for reviewing applications
- Notification Requirements - Who you should notify (adjoining property owners, public notice, etc.) and the timelines to follow
- Decisions - permit criteria, conditions, and requirements
- Send copy of Final Decision to State DNRC

Permitting: liability & procedures

The legal spine

- Consistency and the record: treat like applicants alike, document every decision.
- Know the clocks; a missed deadline can hand over a default approval.
- Conditions need a documented nexus and rough proportionality (Nollan / Dolan / Koontz / Sheetz).
- Confirm inspection authority; entry to verify compliance has Fourth Amendment limits.

CASE / DISCUSSION

The Montana glamping permit.

Staff knew they'd be sued either way, so they followed the regs and built the record. The model outcome.

Variances & Appeals: Liability and Procedures

BEST PRACTICE: Ordinance based process

- Consider allowing variances for certain higher standards
- Get attorney involved early when challenging permits or interpretations
- Awareness of written emails/documentation
- Situations where challenges will come from either side:
  - Case overview from Charlotte

Variances & Appeals: Liability and Procedures

"Getting to Yes" – Key Strategies

- **Scrutinize "Hardship" Claims**
  - Applicants must PROVE a "good and sufficient cause" AND "an exceptional hardship" (and financial hardship is NOT a hardship!) before granting any deviation from your Ordinance / Regulations
- **Protect Public Safety at All Costs** – Reject any variances that:
  - Have the potential to increase flood heights (at all) or increase flood velocities (at all)
  - Creates extraordinary public expenses, or
  - Has the potential to cause harm to the public or to endanger emergency responders
- **Enforce the "Minimum Relief" Standard** - Ensure that a granted variance represents the absolute minimum modification required to make the property usable
- **Maintain Transparent Records** – Document the technical justification, Board findings, and specific conditions for every approved or denied appeal
- **Warn of Insurance Risks** – Clearly notify applicants that variances do not lower flood insurance rates and often cause severe flood insurance premium hikes

SECTION 12. VARIANCES

12.1 GENERAL - A variance from the minimum development standards of these regulations may be allowed. An approved variance would permit construction in a manner otherwise as required or prohibited by these regulations. ((44 CFR 59.1) (ARM 36.15.218))

12.2 VARIANCE APPLICATION REQUIREMENTS:

12.3 NOTICE REQUIREMENTS FOR FLOODPLAIN VARIANCE APPLICATION Public Notice of the Floodplain permit application and Variance application shall be given pursuant to Section 8.2.

12.4 EVALUATION OF VARIANCE APPLICATION

12.5 DECISION

12.6 JUDICIAL REVIEW

Any person or persons aggrieved by the Floodplain permit and variance decision may appeal such decision in a court of competent jurisdiction.

13.1 GENERAL An administrative appeal may be brought before the {Board of Adjustment, County Commission, or other panel} for review of the Floodplain Administrator's order, decision to grant, condition or deny a floodplain permit or interpretation of the Regulated Flood Hazard Area boundary.

13.2 APPEALS REQUIREMENTS The following provisions apply to administrative appeals:

13.3 NOTICE AND HEARING

13.4 DECISION

A judgment on an appeal shall be made within 30 days of the hearing unless set otherwise. The decision may affirm, modify, or overturn the Floodplain Administrator's decision. A decision on an appeal of a permit cannot grant or issue a variance. A decision may support, reverse or remand an order or determination of a boundary of the Regulated Flood Hazard Area by the Floodplain Administrator.

13.5 JUDICIAL REVIEW

Any person or persons aggrieved by the decision on an administrative appeal may appeal such decision in a court of competent jurisdiction.

Case Studies –

- Park County
- Gallatin County



Variances & appeals: liability & procedures

The legal spine

- The 44 CFR criteria are the floor: exceptional hardship, no rise in flood heights, minimum relief.
- Hardship runs with the land, not the applicant's finances.
- Warn the applicant of the insurance consequence of building below BFE; document it.
- A pattern of improper variances is what FEMA looks for in a compliance action.

CASE / DISCUSSION

Enforcement: Liability and Procedures

BEST PRACTICE: Consistency in processes

Catch issues early

Documentation is especially important

Plug holes in permit processes

- AutoHolds process using GIS tools

MONTANA DNRC

MT FLOODPLAIN CAP



Enforcement

Role of Community, State, and FEMA

- **Community**
  - Review all development proposals
  - Enforce floodplain ordinance
  - Assure that builders/developers obtain permits
  - Inspect for compliance
  - Maintain records including “as-builts”
- **State**
  - Enforce state floodplain standards
  - Provide technical assistance to communities, property owners, and developers
- **FEMA**
  - Work with local communities to provide technical assistance
  - Enforcement relating to community standing in NFIP
  - Section 1316 – Denial of Flood Insurance

Compliance to NFIP and State Regulations

- FEMA expects non-compliant development to be brought into compliance **to the fullest extent possible:**
    - Anything less than full compliance with NFIP minimum standards requires sign off from FEMA
- State of Montana has higher standards that must be addressed and considered also.

Compliance to NFIP and State Regulations

Communities not complying with NFIP regulations may be subject to:

- Probation
- Suspension
- Reclassification under the Community Rating System (CRS)

FPA DUTIES FOR COMPLIANCE



- ✓ Adopt and enforce a local floodplain regulations
- ✓ Establish a process to address compliance by:
  - *Conducting regular (annual) tours of the floodplain*
  - *Receiving complaints and information from public*
  - *Addressing issues during permitting & recovery*
  - *Monitor and address Substantial Improvements (often done without permits)*
  - *Ensure that construction occurs in accordance with permit / plan*
  - *Establish steps to address compliance issues (letters, local attorney, 1316, etc.)*
  - *Tracking compliance issues*

Compliance is in effect – even after a disaster event when everyone wants to "get back to normal"

Violations may:

- Damage credibility of floodplain program.
- Result in legal actions
- Increase overall flood risks (not only to the property owner, but also other property owners – no adverse impact – NAI)
- May increases in flood losses damages.





DNRC Lease Land

Enforcement: liability & procedures

The legal spine

Enforcement is where due process governs. The community has to know what outcome it wants (compliance, penalty, or both) and follow a process that survives review.

- Due process is the whole game: notice of violation, chance to respond, clear remedy, defined penalty.
- The violation presumption: no elevation certificate, presumed non-compliant until shown otherwise.
- Escalation runs from notice through penalties to court action, and Section 1316 as a last resort.
- Confirm the limitations period with counsel; watch evidence admissibility (e.g., historic imagery).

CASE / DISCUSSION

Afternoon Session

LIABILITY AND PROCEDURES

Best Practices, Legal Considerations, Challenges, and Legal Cases:

1. Ordinance Adoption
2. Permitting
3. Variances & Appeals
4. Enforcement

Wrap-up

- Biggest Ah-Ha! Moment
- Most Useful Takeaway

Flood Risk Management, Liability & Procedures



Managing flood risk EFFECTIVELY

- Is important
- Is legally defensible
- Communities have the largest influence

Thank You