Welcome

Legal Training on Flood Risk Management for Local Communities



Overview & Logistics

Morning Session - FLOOD RISK MANAGEMENT

1. Overview of National & Montana Perspective
2. Legal Foundation The National & Montana Landscape

LUNCH (onsite)

Afternoon Session - LIABILITY AND PROCEDURES

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

Wrap-up

Lunch Sponsored By:



ASSOCIATION OF Montana FLOODPLAIN MANAGERS

Training Instructors

National Team Introductions

State/Local Team Introductions

Round Robin

Name

Location

Title

Challenge in Flood Risk Management



ASFPM Mission

Reduce the losses, costs, and human suffering caused by flooding

and…

Protect the natural and beneficial functions of floodplains without impacting the property rights of others.



Fort Lauderdale, King Tides of October 17-18, 2016.
Image Credit: NOAA



Natural "green barriers" help protect this Florida coastline and infrastructure from severe storms and floods.
Image Credit: NOAA

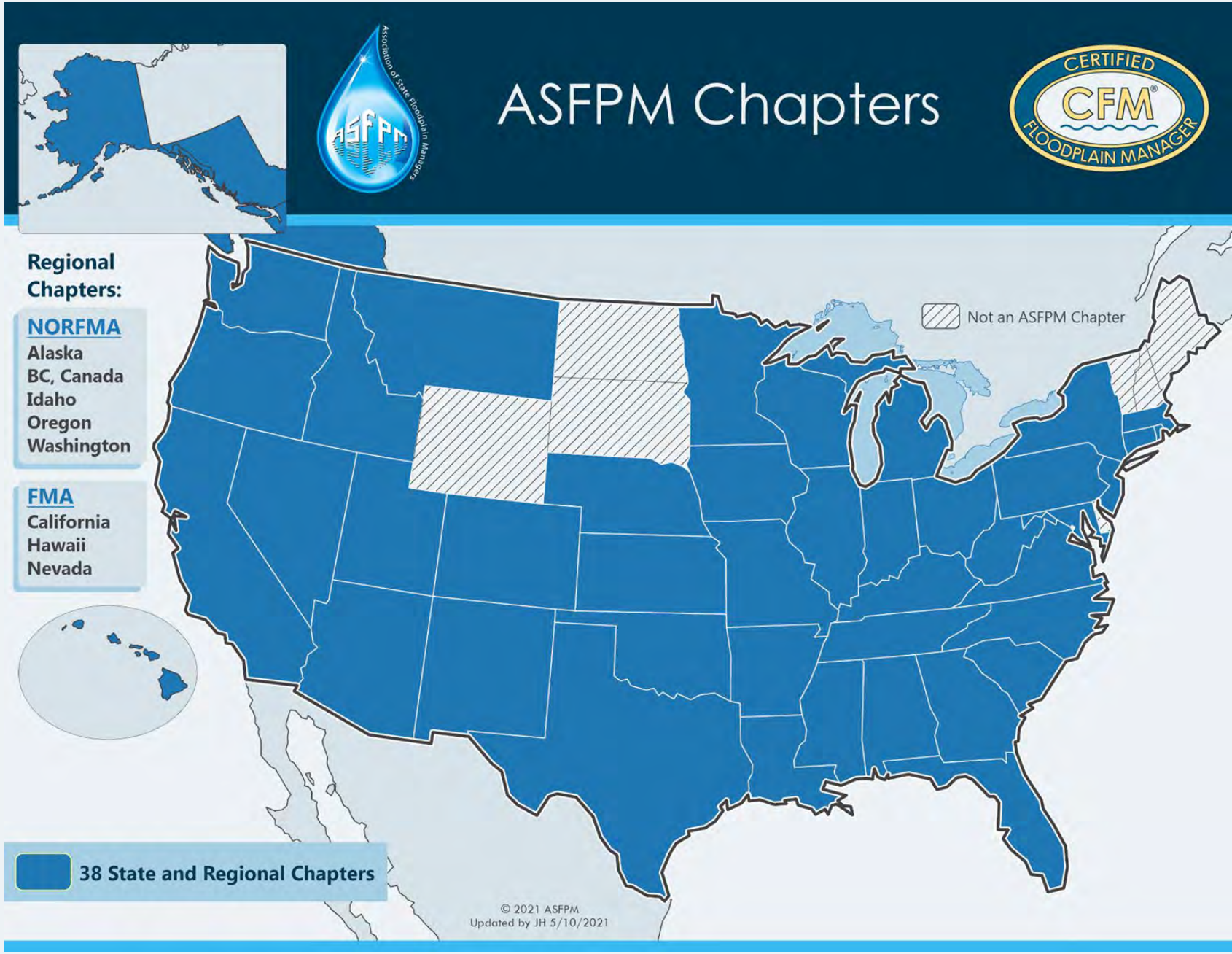
Association of State Floodplain Managers

19,000+ Members

38 Chapters

10,000+ Certified Floodplain Managers

15 Policy Steering Committees



What is ASFPM's vision?

An adaptable nation resilient to flooding and prepared for tomorrow's changing climate.



Natural "green barriers" help protect this Florida coastline and infrastructure from severe storms and floods. Credit: NOAA

What is ASFPM's mission?

- Promote education, policies and activities that:
  - Reduce the losses, costs, and human suffering caused by flooding
  - Protect the natural and beneficial functions of floodplains without impacting the property rights of others



Fort Lauderdale, King Tides of October 17-18, 2016. Image Credit: NOAA

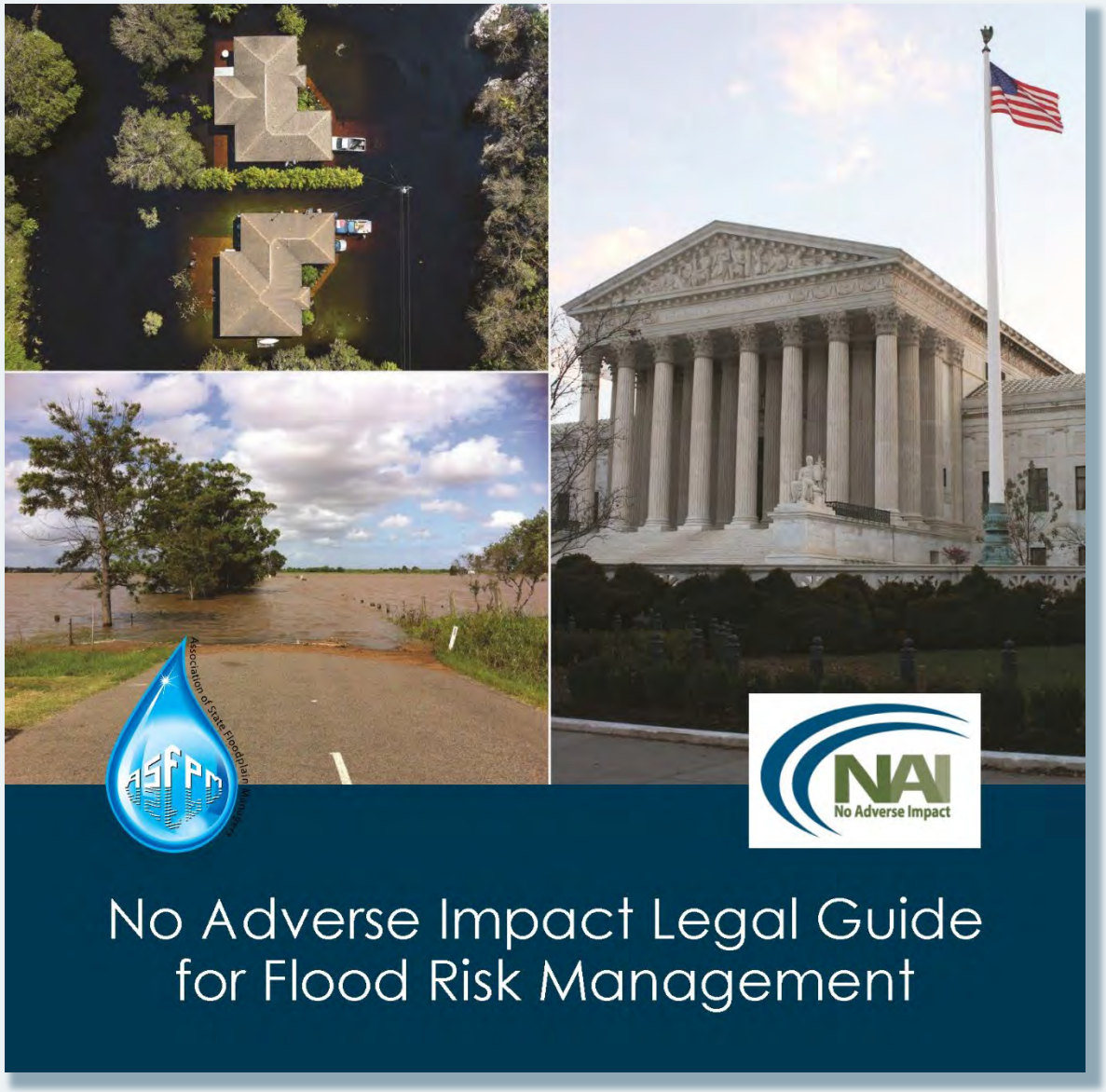
Disclaimer

This presentation is neither intended to be, nor may it be taken as legal advice. For legal advice, consult with an attorney licensed to practice in your jurisdiction and demonstrating expertise in applicable subject matter.

Statements of fact and opinions expressed are those of the presenters individually and, unless expressly stated to the contrary, are not the opinion or position of the Association of State Floodplain Managers.

No Adverse Impact Legal Guide

A web-based guide for floodplain management



Updates case-law and legal arguments for NAI based approaches, released June 2023. Primary audience for attorneys; working on project to develop narratives for floodplain managers.

Morning Session

The National Perspective on Flood Risk Management

National Policies Practices and Regulations impacting risk and community liability

Missoula & Bozeman, Montana · September 2026

Tim Trautman, PE, CFM
Subject Matter Expert, ASFPM
Former Char-Meck Storm Water Program Manager

Terri Turner, AICP, CFM
owner of HALO Strategic Planning
Former Floodplain Manager Agusta, GA

Flood Risk Management – National Perspective

Managing flood risk EFFECTIVELY

- Why is it important?
- Why is risky?



Flood Risk Management – National Perspective

Buzzwords and Synonyms:

- Community Resilience
- Flood Risk Reduction
- Sustainable Communities
- No Adverse Impacts
- Protecting Health & Safety



Flood Risk Management



Communities & States - at the forefront of building resilient communities

- Public Health & Safety
- Response & Recovery
- Land use (influence)
- Building & Development Codes
- Public Infrastructure
- …. And more

Risk Reduction Approach

"Stop the Bleeding"





"Heal the Wounds"



Planning Practices & No Adverse Impact

What are your community's minimum standards for flood risk management and floodplain stewardship?

- ❑ The minimum standards of the NFIP
- ❑ Higher standards and regulations
- ❑ I don't have a clue
- ❑ Standards? What standards?

“Best Management Practices” for Floodplain Management

- Utilizing Accurate and Up-to-Date Mapping and Data
- Incorporating Natural Topography into Long Range Land-Use Planning
- Encouraging Flood Risk Reduction in all Planning Related Documents, especially the Community’s Comprehensive Plan
- Utilizing Planning for Post-Disaster Recovery
- Avoiding / Prohibiting Development of High At-Risk-for-Flood Areas
- Prohibiting Fill in Special Flood Hazard Areas (SFHAs) and “Areas Known to Flood”
- Preserving and Restoring Natural Floodplain Functions and Protecting Natural / Riparian Buffers, Wetlands, and Open Spaces Prone to Flood

“Best Management Practices” for Floodplain Management

- Utilizing Smart Zoning Controls / Enforcing Strict Zoning Ordinances & Subdivision Regulations / Employing Conservation Subdivision Regulations
- Integrating Green Infrastructure into Local Ordinances
- Utilizing Policy Guides Jointly Developed by APA and ASFPM, such as “Subdivision Design and Flood Hazard Areas”
- Implementing Property Buyouts and Relocation of Repetitively Flood Structures
- Integrating Hazard Mitigation into Local Land-Use Planning
- Utilizing No Adverse Impact (NAI) Flood Risk Reduction & Floodplain Stewardship in All Land Use Development-Related Ordinances & Regulations

WHY NAI?

NFIP Limitations….

Few Restricted Areas

- Seaward of mean high tide
- Floodways

No requirement to protect natural functions of floodplains

No limits on siting of critical facilities

Fill in floodplain is allowed and facilitated



Today's Floodplain Is Not Necessarily Tomorrow's Floodplain



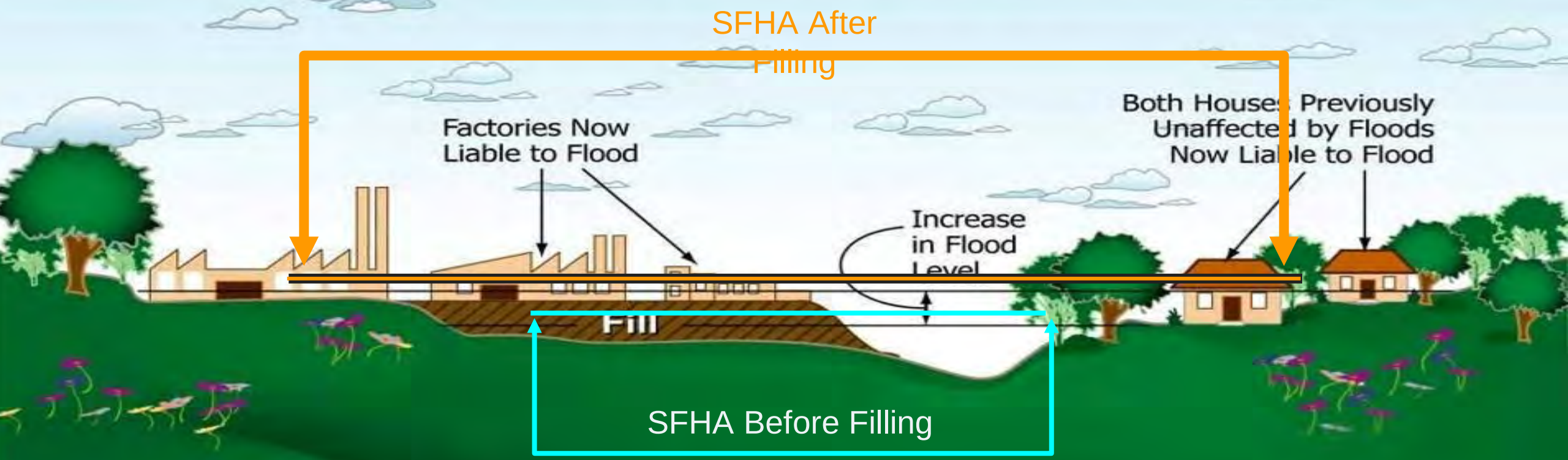
Flood water spreads out and slows down on undeveloped floodplain.

Today's Floodplain Is Not Necessarily Tomorrow's Floodplain



If you allow fill in the floodplain,
you change the dynamics of the floodplain.

Today's Floodplain Is Not Necessarily Tomorrow's Floodplain



If floodplains are filled, there is an increase in the land area needed to store and convey flood waters.
This means your home or business may be impacted.

What is NAI?

No Adverse Impact (NAI) is an approach that ensures that the action of any community or property owner, public or private, does not adversely impact the rights of others.

What is NAI?



The true strength of the No Adverse Impact approach is that it encourages local decision making to ensure that future development impacts will be identified, considered on a watershed-wide basis and mitigated.

It is a truly comprehensive strategy for reducing flood losses and costs.

How to Implement NAI?

- Identify ALL the impacts of a proposed development or program
  - Drainage, storage
  - Sediment, erosion
  - Access
  - Flood Safety
- Determine which properties or community members will be impacted
- Notify affected persons of the impacts of ANY proposed development



How to Implement NAI?

- Design or redesign the project to avoid adverse impacts
- Require appropriate mitigation measures
  - Acceptable to the community
  - Acceptable to the affected persons



Results of Utilizing NAI Principle



- Potentially impacted persons are notified
- Impacted persons can voice concerns to community officials
- Impacted persons are not victimized by improper development, community action, or approval of same

NAI Principles Lead to a Process

- Legally acceptable
- Understandable
- Palatable to community as a whole
- Working around the nation
- Non-adversarial
  - Not pro-development
  - Not anti-development



NAI Floodplain Regulations

- Consistent with sustainable development
- Provides a pragmatic standard for regulation
- Complements good wetland & stormwater regulation
- Works on both a local & regional basis
- Provides points for FEMA Community Rating System (CRS) Program



Local NAI Programs



- Develop and adopt NAI community-based plans
- Adopt NAI strategies
- Educate citizens about the “Good Neighbor Policy”

“Each locality controls the character of its disasters, forcing stakeholders to take responsibility for natural hazards and realize that decisions they make today will determine future losses. …”

Dennis Mileti, *Disasters by Design*

NAI Benefits



- Will reduce future flood damages
- Will reduce future suffering
- Will protect the communities' natural resources and amenities
- Will improve the quality of life
- Will provide for more sustainable growth within the community
- Will reduce the community's liability

NAI Potential Benefits

- Improved water quality and reductions in non-point pollution impacts
- Green corridors, which also serve as additional areas for floodwater storage
- Improved groundwater recharge
- Better bank stabilization and better erosion control
- Most NAI initiatives provide credits for the Community Rating System (CRS) if your community participates in the program

Table 110-1. CRS classes, credit points, and premium discounts.

CRS Class	Credit Points (cT)	Premium Reduction	
		In SFHA	Outside SFHA
1	4,500+	45%	10%
2	4,000–4,499	40%	10%
3	3,500–3,999	35%	10%
4	3,000–3,499	30%	10%
5	2,500–2,999	25%	10%
6	2,000–2,499	20%	10%
7	1,500–1,999	15%	5%
8	1,000–1,499	10%	5%
9	500–999	5%	5%
10	0–499	0	0

SFHA: Zones A, AE, A1–A30, V, V1–V30, AO, and AH

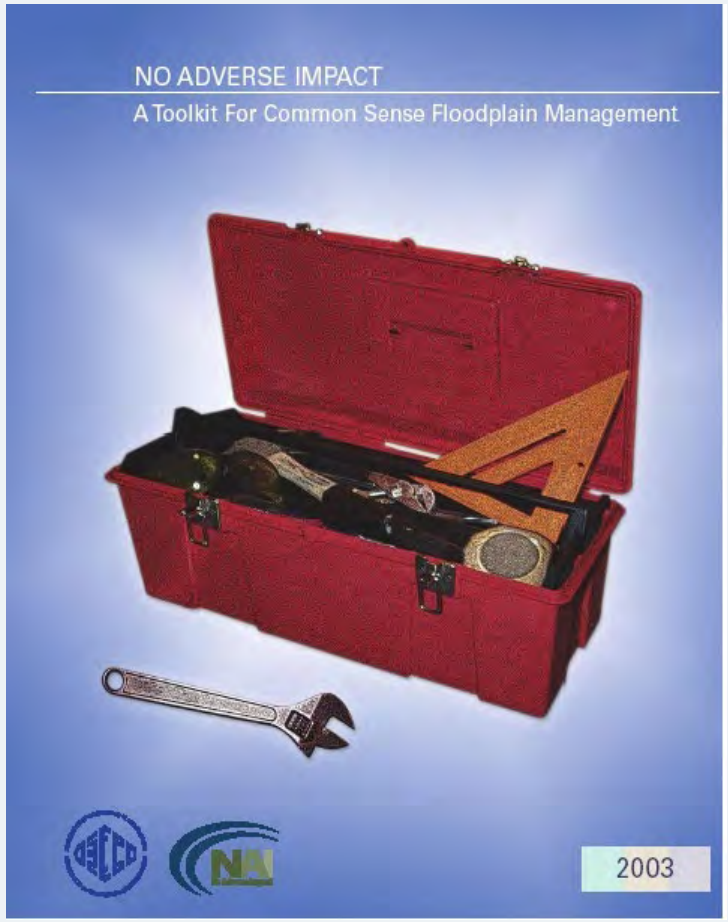
Outside the SFHA: Zones X, B, C, A99, AR, and D

Preferred Risk Policies are not eligible for CRS premium discounts because they already have premiums lower than other policies. Preferred Risk Policies are available only in B, C, and X Zones for properties that are shown to have a minimal risk of flood damage.

Some minus-rated policies may not be eligible for CRS premium discounts.

Premium discounts are subject to change.

ASFPM Support



NAI Toolkit published in 2003 to assist local communities in implementing NAI principles.

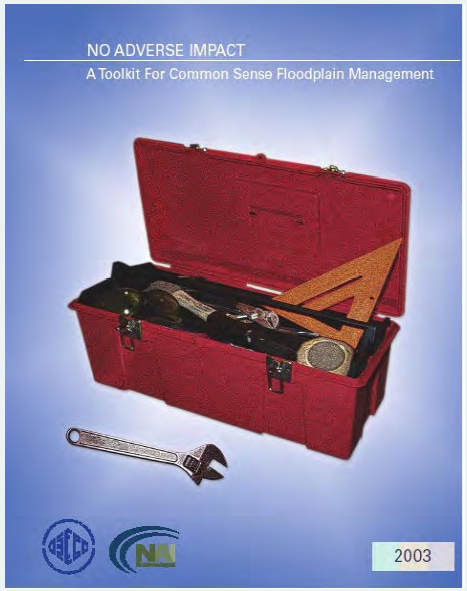
Coastal NAI Handbook added in 2006 to highlight coastal NAI principles.

NAI How-To Guides (2013 to 2019)

NAI Legal Guide (2023)

NAI Toolkit

- NAI is a principle - not a specific set of standards
- The NAI concept can be incorporated into all community activities
- The Toolkit presents ideas for integrating NAI into local programs to provide a higher level of flood protection
- Each NAI program is unique - It is tailored to the community's specific situation



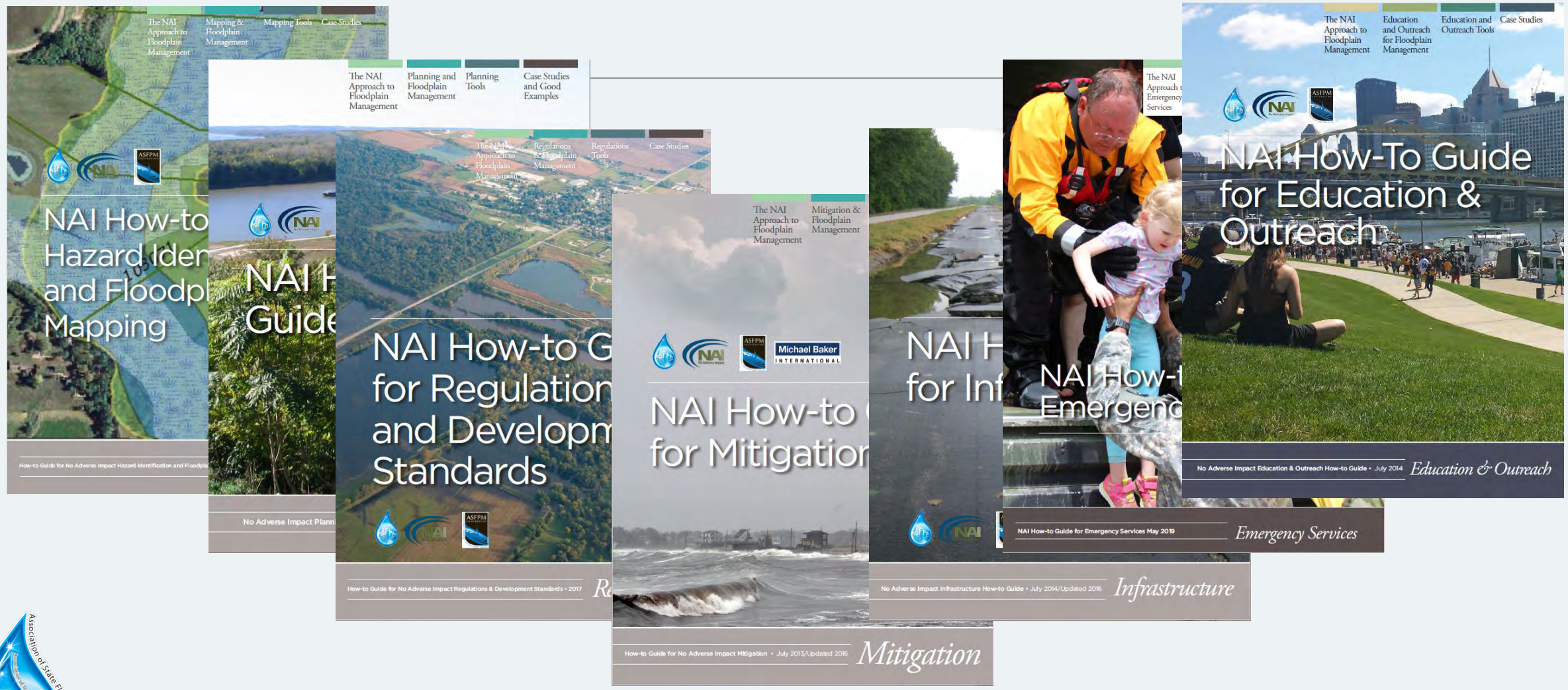
NAI Toolkit

Strategies are grouped by:

- **NAI** – Most effective ways to promote safety, protect everyone's property and prevent increased flood problems
- **Better** – More effective ways to manage flood risks
- **Basic** – Minimum requirements, standard practice



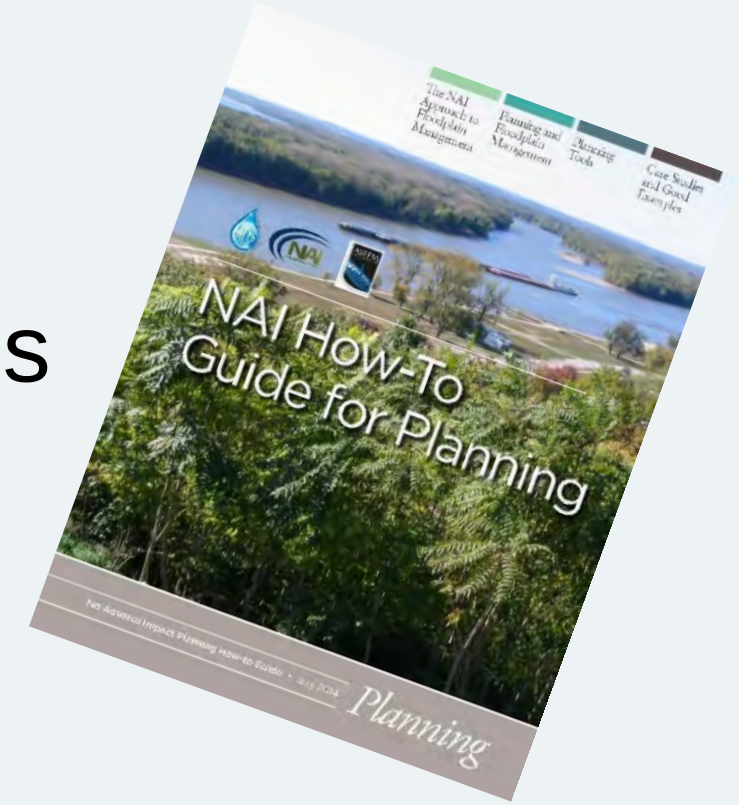
NAI How-to Guides



NAI How-to Guides

Each How-to Guide includes:

- Information about NAI
- Strategies for effective programs
- Tools
- Case studies
- Resources



NAI Legal Guide and Legal Resources

- NAI Legal Issues Guide
- Updated legal resources on the ASFPM website



***NAI How to Guides, the NAI Toolkit the NAI Legal Issues Guide, legal resources, and other valuable information are all available at**
www.floods.org – click on the NAI page

Floodplain Management & No Adverse Impact (NAI)

Building Blocks & Core Elements:

1. Flood Mapping (Hazard ID)
2. Education & Outreach
3. Planning
4. Regs & Standards
5. Mitigation
6. Infrastructure
7. Emergency Services



Flood Mapping: Why

Community interest in quality?

- Life and property
- Impacts sustainability & resiliency
- Communicate to residents



Uses for Flood Information

- Flood Insurance
- Guide New Development
- Public Safety & Response
- Flood Preparedness
- Planning & Mitigation
- And more…..

Hazards are non-stationary!

Flood Mapping: Alternate Floodplain Maps

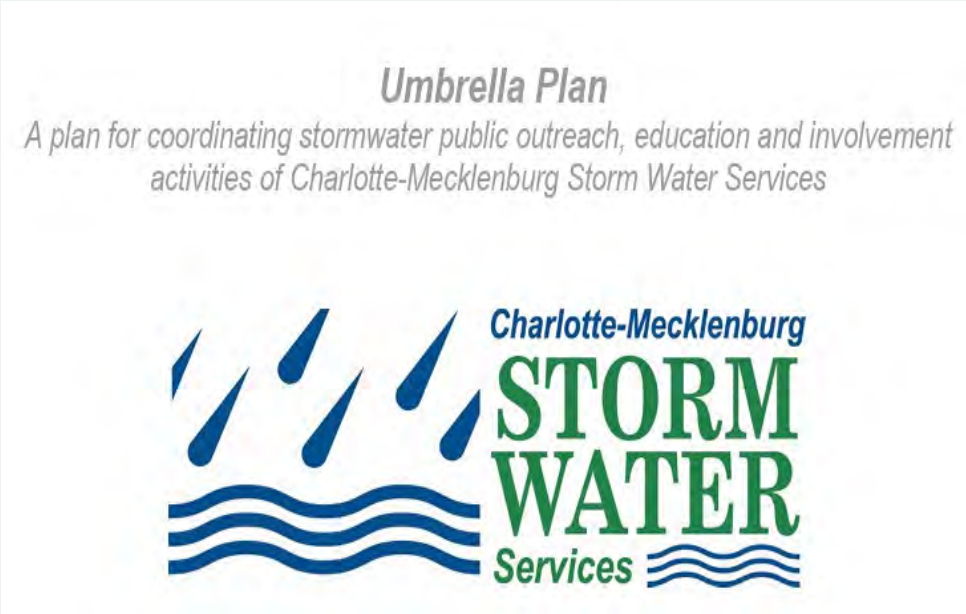
- Flood Insurance Rate Maps
- Current risk of other hazards

- Future Hazard Mapping
  - State / Local Ownership
- Other Hazards & Natural Areas Protection
  - Post-wildfire storms
  - Erosion & Dam failure zones
  - Sea level rise



Education & Outreach

Annual Strategic Communications Plan



- Proactive vs reactive risk communication
- Adopted/Approved by advisory committee
- Relationships in media and community
- Community Rating System component

Planning: Future Events

- Comp Plan || Hazard Mitigation Plan

- Integrated plans
- Framework based on **pre-disaster planning** for rebuilding AND risk reduction
  - Greater Resources
  - More political willpower
  - Cost savings



Planning: A Community Vision

Floodplain Vision

- Identify Floodplain value/uses within the Community
- Support and buy-in
- Begin with the END in Mind



Regs & Standards



Perception is important

- ~~Rules~~
- ~~Restrictions~~
- ~~More Regulations~~
- ~~Bureaucratic Reviews~~

- Resilience Standards
- Partnership in safe building
- Public Health & Safety Enhancements
- Expedited Reviews

Regs & Standards: Resources





Regs & Standards: Resources

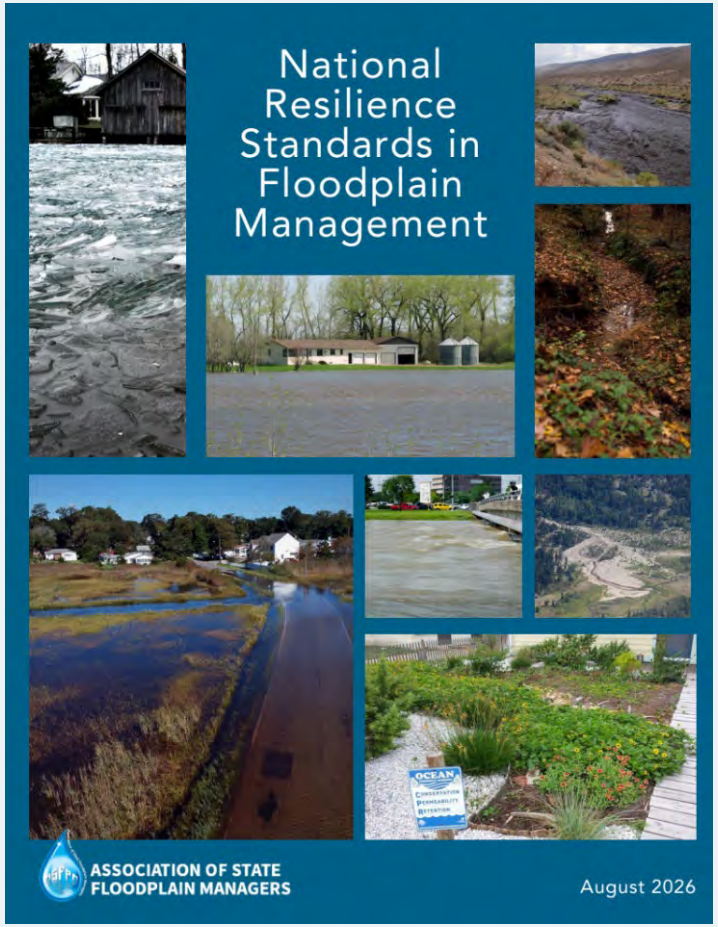


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Mitigation



Benefits:

- Less tax money spent:
  - Emergency rescues
  - Disaster relief
  - Lost business/tourism
- Safer housing stock
- Increased opportunities for recreation



Mitigation

- Structural projects || Flood Insurance
- Elevation / floodproofing

- Strategic buyouts/relocations
- Restore natural functions
- Watershed management
- Protect critical facilities



Infrastructure

- Repair after each flood
- Protect new construction
- Inspection & maintenance

- System/watershed design
- Future Conditions CIP’s
- Flood-safe development & infrastructure locations



Emergency Services

- All-hazard response plan || Dam/levee emergency plans
- Flood warning/response plans

Pre-planning & Testing emergency operations, recovery, & systems

- Flood Information & Notification System
  - ‘Smoke Detectors in Creeks’
  - 911 calls vs Advance Notification



Charlotte-Mecklenburg fins Flood Information & Notification System

What about Flood Risk Management in Montana?



- State and local policies & practices
- State specific regulations related to risk
- Current community liability issues

Morning Session

The Montana Perspective on Flood Risk Management

MONTANA Policies Practices and Regulations impacting risk and community liability

Missoula & Bozeman, Montana · September 2026

MONTANA DNRC

STATE FLOODPLAIN PROGRAM



FLOOD RISK MANAGEMENT-
A Montana Perspective



The Path to a National Flood Program

Damages from flooding has been a national issue that continues to take lives and cripple communities and property owners.

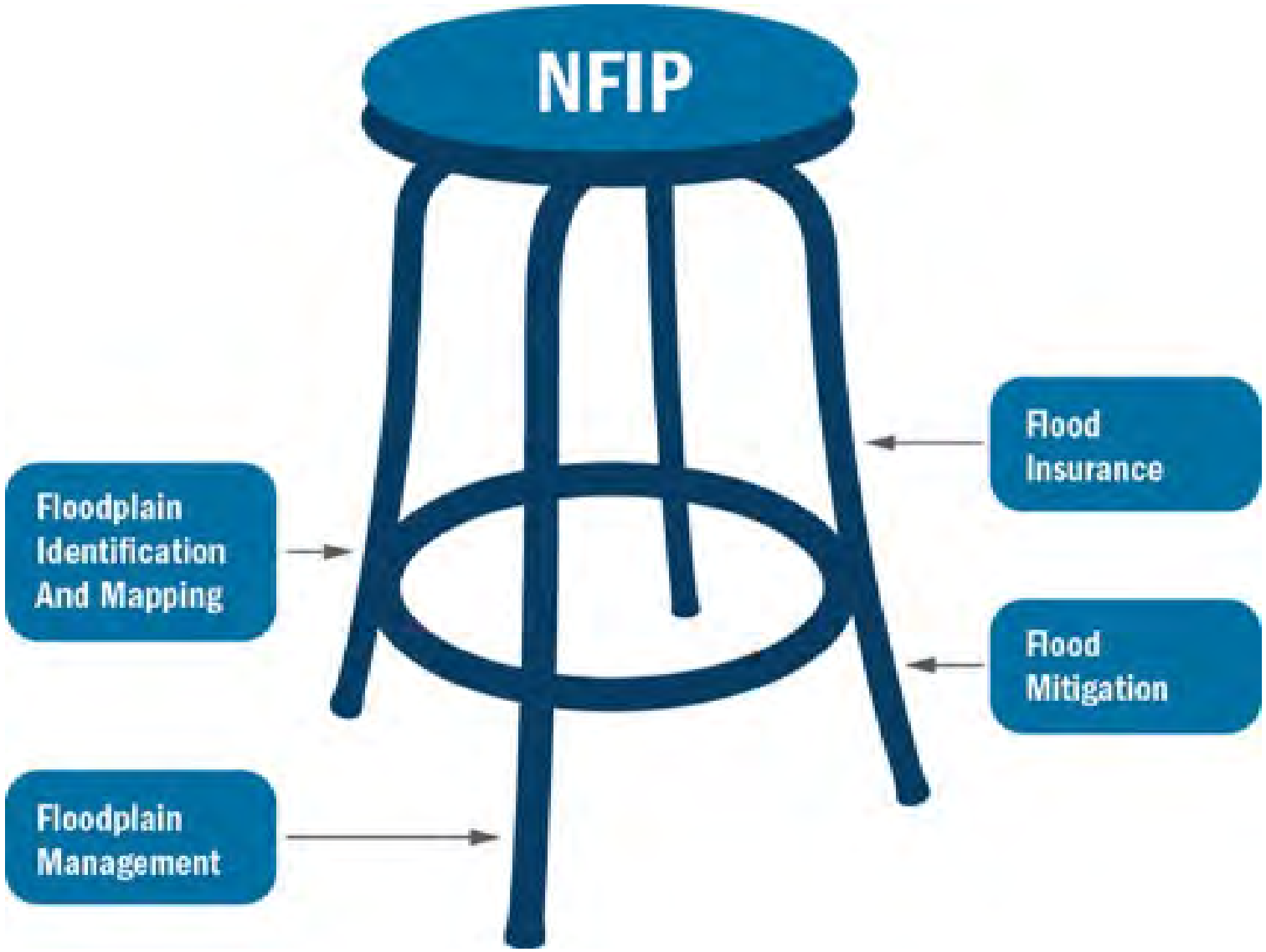
In 1929 it was recognized that Flood Control Structures only policies were not working to decrease risk and increased flood risk in certain areas.

Private insurance abandoned the coverage of flood losses in 1929.

Between 1946 – 1969, national discussions (with Gilbert White and other key stakeholders) on floodplain management were progressing to include the integration of human behavior and extreme natural events. A variety of proven standards were discussed based on historic flood events and existing mitigation practices.

- Standard for a flood elevation was determined. The 1 percent annual chance of flooding was a stakeholder compromise.
- Recommended no development in the floodway.
- ½ foot of floodway rise was strongly recommended, but a less conservative 1 foot rise was used for the NFIP.
- Freeboard at various levels was strongly recommended, but a less conservative standard of building just to the BFE was decided upon for the national program.

NATIONAL FLOOD INSURANCE PROGRAM



The NFIP was established in 1968 to protect lives, property and infrastructure by reducing flood losses and future flood damage. It is administered by the FEMA.

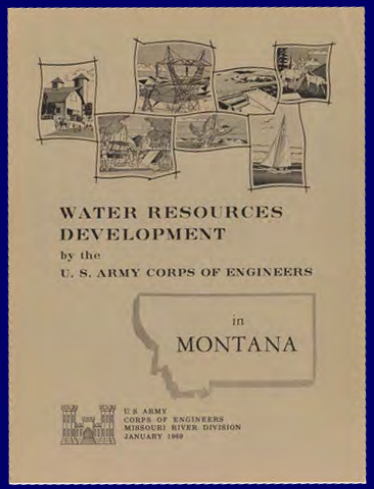
1964 Flood Facts
In and around Great Falls and the Blackfeet reservation

30 – Deaths and 350 Injuries
186- Businesses damaged
252 Residents rescued by Malmstrom air Force Base helicopters
300 Damaged farmsteads and rural residences
1,870 Homes damaged

62 million total damage in Montana



1969 USACE Study
1.4 Billion in Flood Control Structures
16.9 Billion protected from flooding







Swift Dam Failure



National Floodplain Program Problems

- NFIP allows increases to the flood heights up to a certain point.
- There are no criteria that addresses other adverse impacts, such as increases in velocities, loss of flood storage or damage to habitat.

Montana Floodplain Concerns (1971)

- Loss of Life
- Damage to Property
- Unsanitary Conditions



Montana Higher standards appear to be based on the extensive work, knowledge, and recommendations from floodplain management national and regional discussions between the years of 1945-1969.

Higher Standards

- The minimum federal standards would be based on compromised standards.
- The minimum standards would not reduce flood losses or even stop the increases in flood losses.
- Transferring costs of occupying a hazardous area to future residents and the local, state and national taxpayers.
- 62% of people in the US, live in communities with some freeboard standards.
- Development continues to increase flooding in local communities.
- Freeboard provides a margin of safety.
- Higher freeboard requirements have proven to be affective in flooding events.

MONTANA DNRC

MONTANA HAS HIGHER STANDARDS

NATIONAL FLOOD INSURANCE PROGRAM

FEMA

Administers and implements the National Flood Insurance Program

STATE OF MONTANA

- Community consultation, technical assistance, & training.
- Serve as liaison and coordinator.
- Establish authority for local floodplain management.

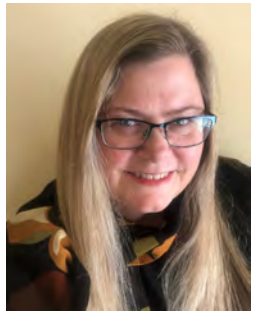
LOCAL COMMUNITIES

Establish, administer, and enforce minimum Federal NFIP and State Development Standards by adopting a local floodplain ordinance

DNRC FLOODPLAIN – COMMUNITY ASSISTANCE PROGRAM

CAP is the State coordinating agency tasked with:

- Providing technical assistance to communities
- Monitoring and evaluating the local floodplain program.



Traci Sears, CFM
Montana Department of Natural Resources and Conservation
State NFIP / CAP Coordinator

406.444.6654



Shylea Wingard
Montana Department of Natural Resources and Conservation
CAP Assistant/Floodplain Specialist

406.581.5254

WHEN WILL YOU WORK WITH US?

- **Floodplain questions or need help**
- **Processing floodplain permits**
- **Training Events**
- **Community Assistance Meetings**
- **Floodplain Map Updates**
- **Disaster Assistance**

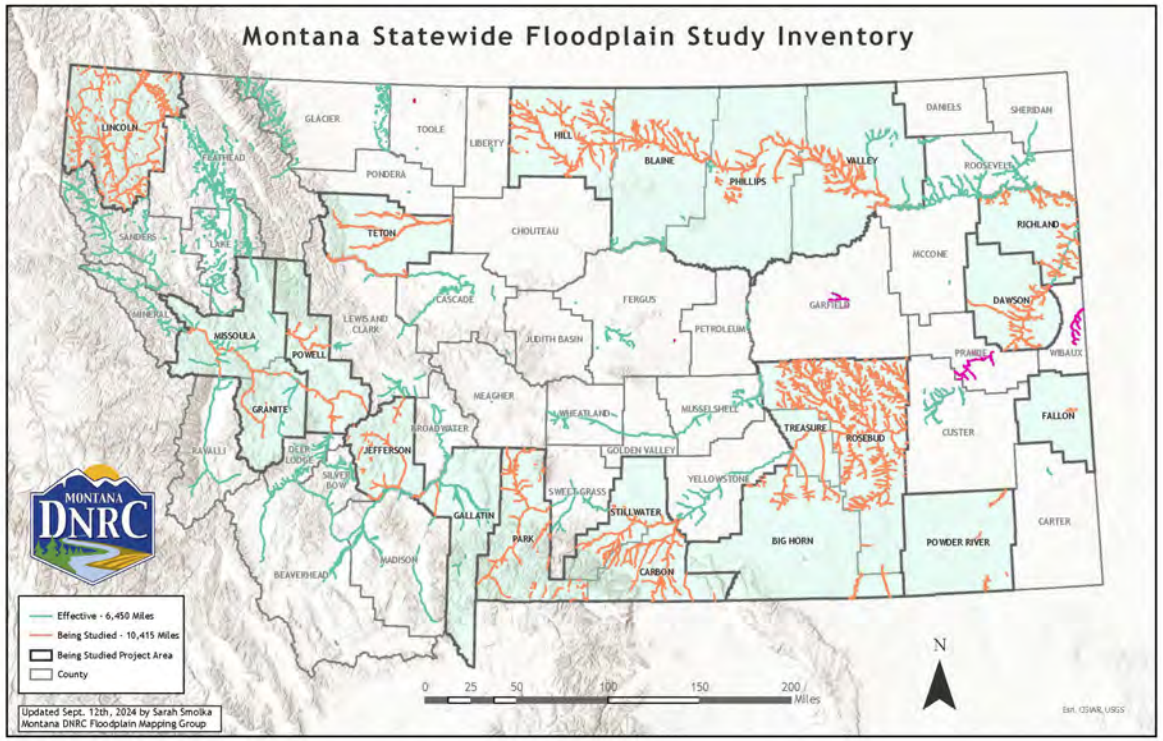
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Bridget Lee
Floodplain Engineer Intern



DNRC FLOODPLAIN

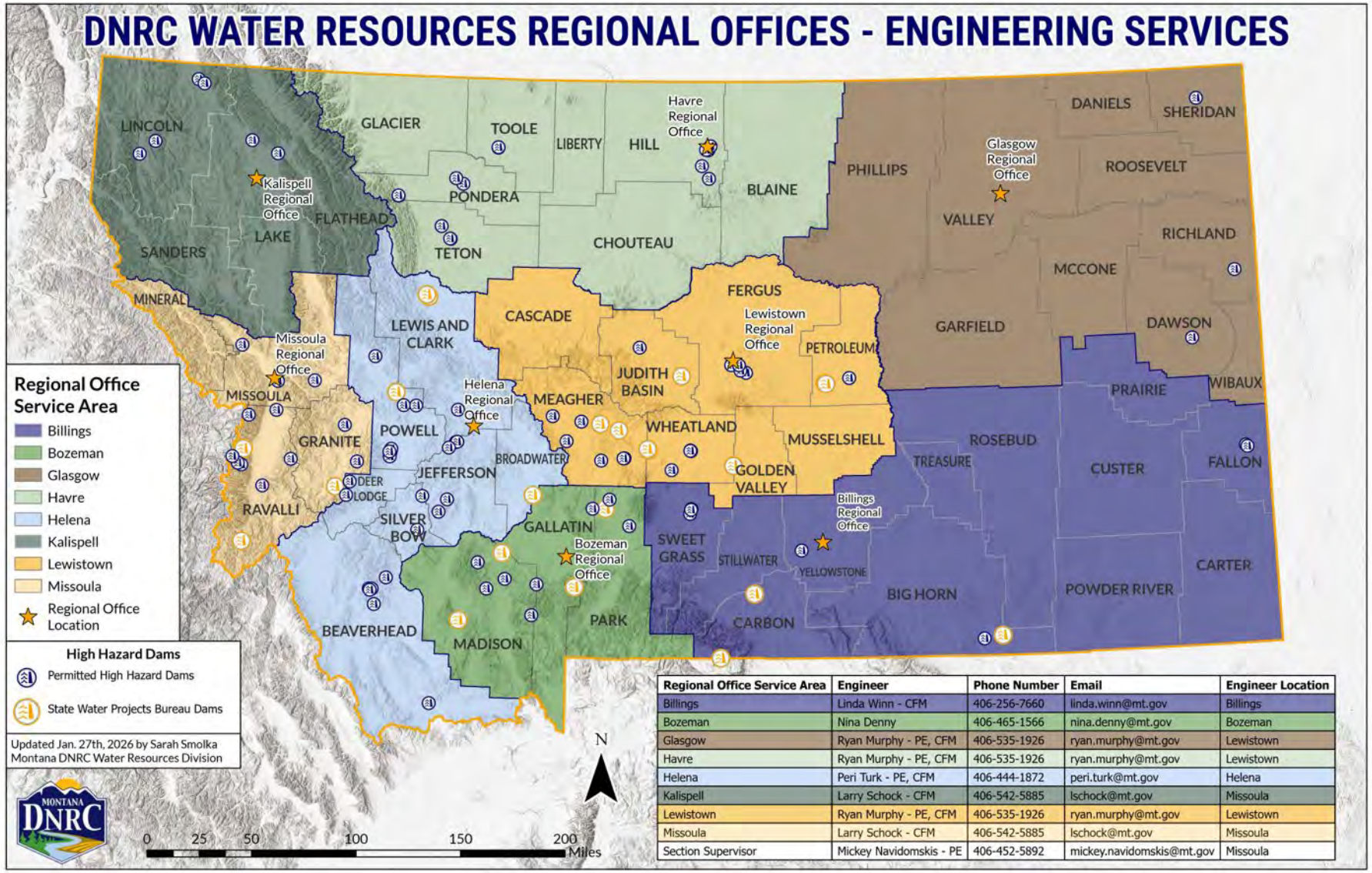
Douglas Brugger, PE
Interim Bureau Chief
(406) 444-1300

Amanda Peterson
Administrative/CAP Support
(406) 444-0862

- Integral FEMA partner to deliver flood-risk information.
- Coordinates new flood studies and updates flood maps to help communities administer/manage local floodplain program(s).
- Collaborates with Montana communities to prioritize mapping projects in developed areas.

DNRC FLOODPLAIN REGIONAL ENGINEERS

- Provide technical and program support
- Assist local FPA's with review of permit applications
- Will NOT replace the need for floodplain permit applicants and property owners to have engineered designs/projects.
- Montana is 1 of 2 states in the U.S. to offer regional floodplain engineer assistance



Regional Office Service Area	Engineer	Phone Number	Email	Engineer Location
Billings	Linda Winn - CFM	406-256-7660	linda.winn@mt.gov	Billings
Bozeman	Nina Denny	406-465-1566	nina.denny@mt.gov	Bozeman
Glasgow	Ryan Murphy - PE, CFM	406-535-1926	ryan.murphy@mt.gov	Lewistown
Havre	Ryan Murphy - PE, CFM	406-535-1926	ryan.murphy@mt.gov	Lewistown
Helena	Peri Turk - PE, CFM	406-444-1872	peri.turk@mt.gov	Helena
Kalispell	Larry Schock - CFM	406-542-5885	lschock@mt.gov	Missoula
Lewistown	Ryan Murphy - PE, CFM	406-535-1926	ryan.murphy@mt.gov	Lewistown
Missoula	Larry Schock - CFM	406-542-5885	lschock@mt.gov	Missoula
Section Supervisor	Mickey Navidomskis - PE	406-452-5892	mickey.navidomskis@mt.gov	Missoula

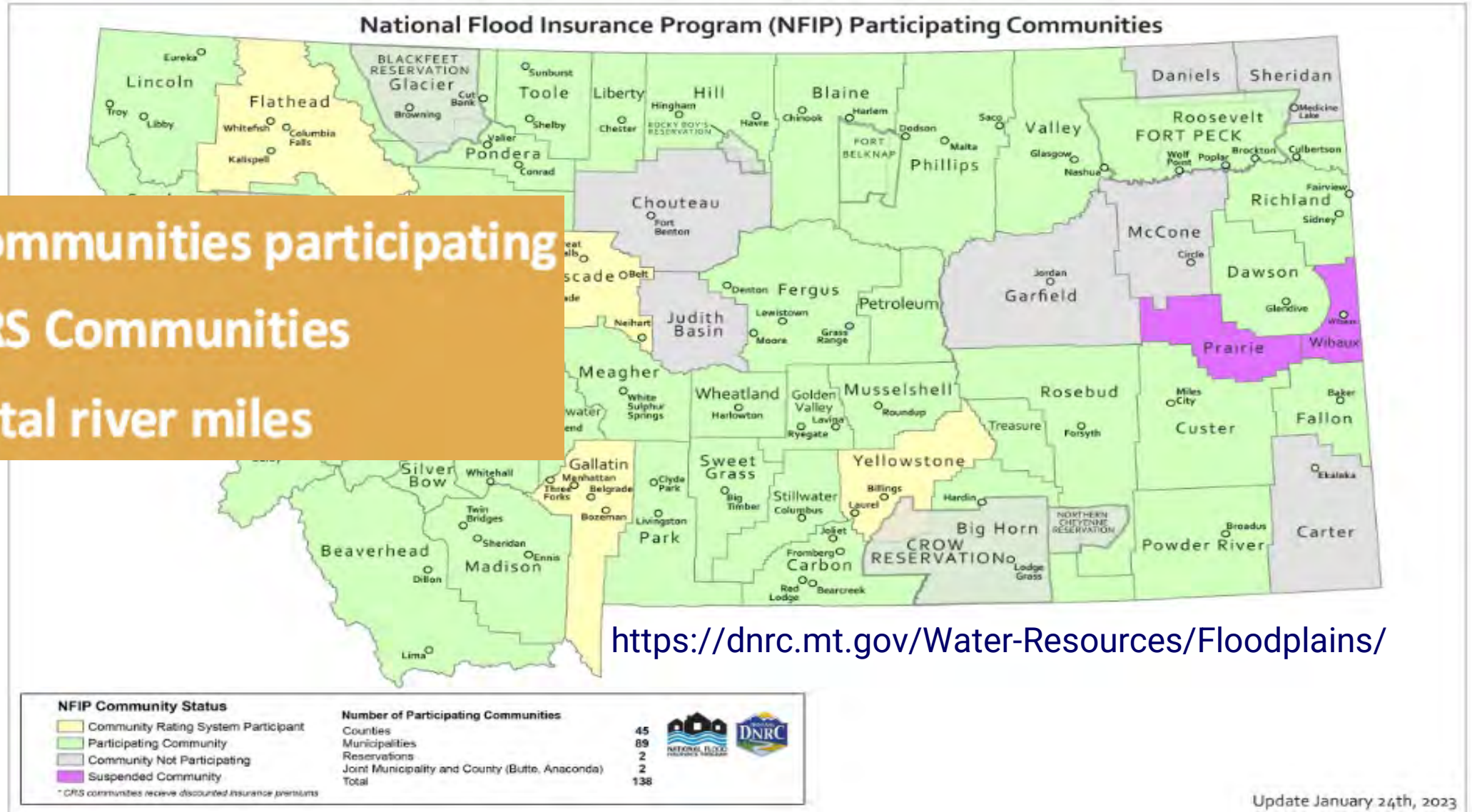
TECHNICAL SUPPORT

Montana's NFIP Profile

138 Communities participating

10 CRS Communities

73,000 Total river miles



REGULATING FLOODPLAINS – A LOCAL RESPONSIBILITY

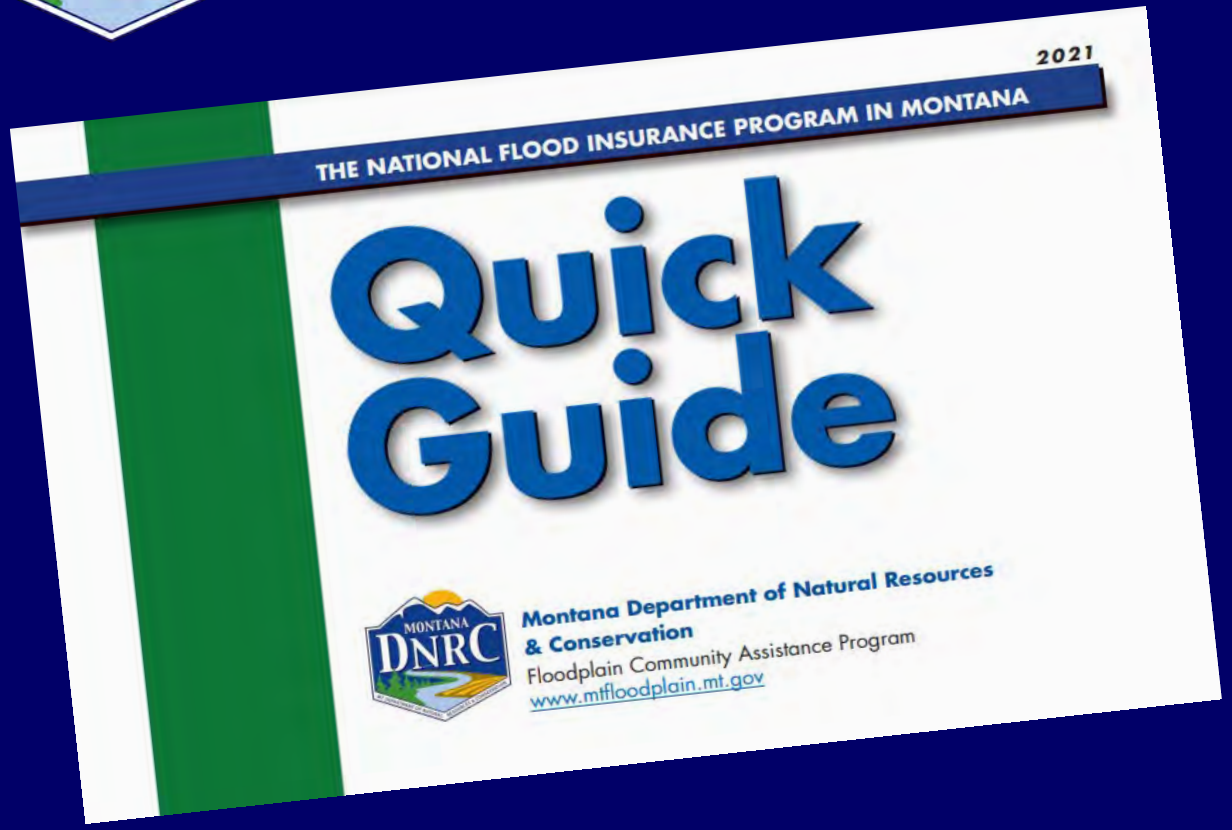
Local officials have adopted local ordinances:

- People
- Property
- Floodplains

Local officials enforce **local** ordinances.



MONTANA DNRC





COMMUNITY REGULATIONS: State Model

- The State has a model floodplain ordinance available that is based upon the CFRs, MCAs, and ARMs to guide communities when updating or adopting local regulations.
- Most of the State's NFIP participating communities have adopted the model.
- Some communities have adopted regulations that exceed both NFIP and State regulations.
- To download or review the Model Ordinance, go to:

https://dnrc.mt.gov/Water-Resources/Floodplains/Permitting-and-Regulations

FEDERAL STANDARD 44 CFRs Parts 59-67	MONTANA STANDARD MCA 76-5 and ARM – Chapter 15
Lowest Floor Freeboard (MCA 76-5-402)	
At Base Flood Elevation	2 feet above Base Flood Elevation
Floodway Encroachment (ARM 36.15.502)	
1 foot surcharge	½ foot surcharge
Habitable Structure Location (MCA 76-5-403)	
Allowed in floodway	Prohibited in floodway
Mobile Homes	
May be elevated 3 feet above adjacent grade	Requires elevation to the freeboard protection level like all residential structures
Septic Systems (DEQ Regulation)	
Allows systems within the floodplain	Systems must be located 100 feet beyond the floodplain

The NFIP allows for structures to be built in the floodway, but Montana's higher standard prohibits new structures in the floodway. *(Check with local FPA for exceptions regarding existing structures.)*



MONTANA HAS HIGHER STANDARDS

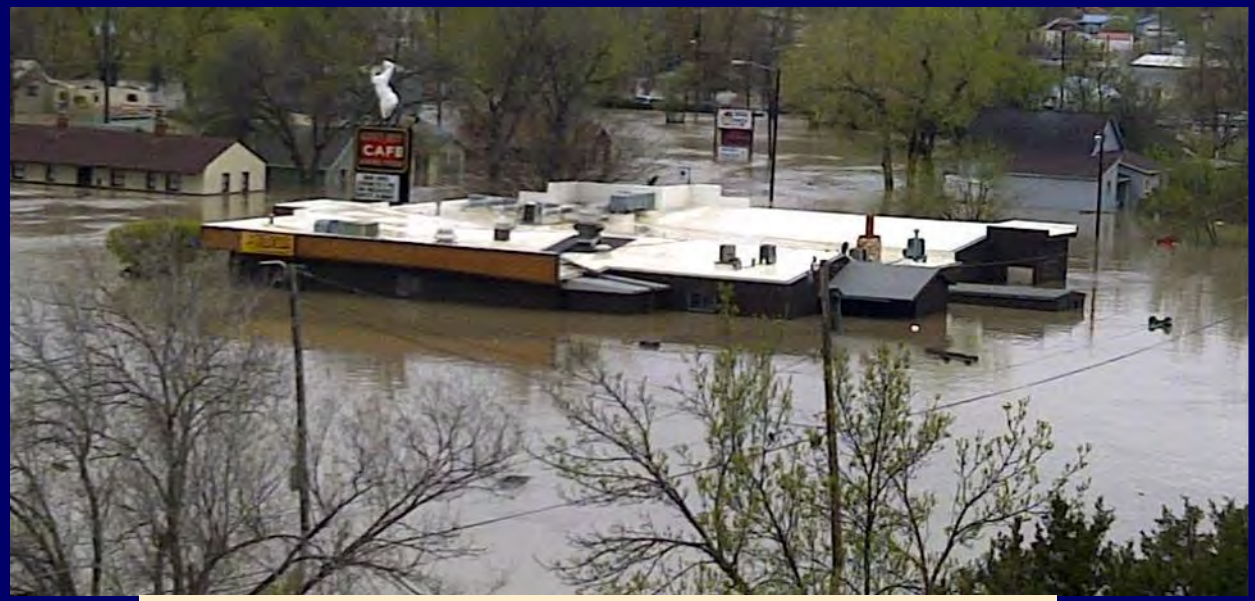


2008 Gallatin Flood Event



2018 Missoula Flood Event

Montana structures built to higher standards
Vs.
Structures built prior to floodplain regulations



(Roundup 2011) – Structure built prior to floodplain regulations

Unique State Floodplain Requirements

- State is not exempt from local regulations for any State-owned property.
- Local communities are required to forward the following documents to the state –
  - Permits
  - Variances
  - Appeals
  - Enforcement issues
  - Regulations
  - Mapping – studies and changes
- State approval is needed for –
  - Ordinance adoption
  - Mapping updates
  - Variances

Flood Risk Management Wrap-up

- You have Lots of Tools
- Lawyers will train you on how do you use them without smashing your fingers!





~ Break ~

Legal Training on Flood Risk Management for Local Communities



Morning Session

A LEGAL FOUNDATION FOR FLOOD RISK MANAGEMENT

The National Legal Landscape

Where community liability actually comes from, and the cases every floodplain manager should know.

Missoula & Bozeman, Montana · September 2026

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Two things to hold onto

1 Procedure, not takings

Communities get sued on **how they act** (permitting, variances, enforcement) far more than on the regulation itself.

Takings claims get the attention. The day-to-day exposure is procedural, and that is the part the community controls.

2 Usually right, lost on the record

The local administrator is normally **right on the merits**. Outcomes turn on documentation, and on whether the local attorney or insurer has the appetite to defend.

A defensible record beats a strong legal argument made after the fact.

Where we're headed

			MIN
1	**Two theories of exposure**	Substantive vs. procedural: the map for everything after	6
2	**Regulatory takings**	The four anchors, plus two floodplain wins: Chatham and Columbia Venture	10
3	**Exactions in permitting**	The Nollan / Dolan line through Sheetz (2024)	4
4	**The public trust doctrine**	A second source of authority, and a shield against takings	4
5	**The NFIP floor**	Minimums are a floor, not a safe harbor	3
6	**Lawsuits & venue**	Who sues, and where the case lands	2
7	**Hand-off to Montana**	The state picture, and the seam we share	1

Two theories of exposure

SUBSTANTIVE

Attacks the regulation itself

"The rule goes too far."

- It's a taking
- It exceeds the community's authority
- It's unconstitutional on its face

PROCEDURAL

Attacks how a valid rule was applied

"You applied it wrong."

- Arbitrary or capricious decision
- Inadequate notice or no hearing
- No record to review
- Unequal treatment of like applicants

Most losses arise from procedural missteps.

Four anchors of the doctrine

1978

Penn Central *The default test*

Ad hoc balancing: economic impact, investment-backed expectations, character of the government action. Property judged as a whole.

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)

1992

Lucas *The categorical line*

A regulation wiping out all economically beneficial use is a per se taking. Floodplain rules rarely go this far.

Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)

1987

First English *Temporary still counts*

Even a temporary regulatory taking requires compensation for the period it was in effect.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)

2005

Lingle *What the inquiry asks*

Takings analysis measures the burden on the owner, not whether the regulation is good policy.

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)

TEACHING CASE

A floodplain win: the Chatham case

Gove v. Zoning Board of Appeals of Chatham

444 Mass. 754, 831 N.E.2d 865 (Mass. 2005)

The claim

An owner denied a permit to build a home in Chatham's coastal conservancy district sued, bringing both a total-takings (Lucas) claim and a Penn Central claim.

Why the town won

Under Lucas: the bylaw barred new houses, but the parcel kept economically beneficial use, so no total taking.

Under Penn Central: a legitimate flood-safety purpose, and no reasonable investment-backed expectation to build. The flood restriction predated the purchase agreement.

✓

The answer to "won't we get taken to the cleaners?"

A community that adopts higher standards for a real public purpose, and documents it, defends them successfully.

Pairs with the afternoon's "sued either way, so follow the regs."

The record mattered: ***T****he town put in evidence of the danger floods pose to first responders and neighbors. The court was persuaded and cited that evidence in the opinion*

Higher standards, upheld: Columbia Venture

Columbia Venture, LLC v. Richland County

413 S.C. 423, 776 S.E.2d 900 (S.C. 2015)

The claim

A developer planning a $1 billion project on the Congaree River sued after the county's floodway restrictions, stricter than FEMA's minimums, blocked construction. It claimed a flowage easement, an exaction, and a regulatory taking.

Why the county won

Under Penn Central: the developer's investment-backed expectations were unreasonable given the known floodway risk, and the county's health-and-safety purpose outweighed the economic injury. No taking of any kind.

The SC Supreme Court echoed salient points from ASFPM's amicus brief in supporting the county's authority to hold the line above the federal minimum.

Two months later, the Congaree River burst its banks and flooded the entire parcel.

When a permit condition becomes a taking

Condition a permit on the applicant giving up land, money, or work, and two tests apply:

Nollan
1987

Essential nexus

The condition must connect to a legitimate government interest.

Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987)

→

Dolan
1994

Rough proportionality

It must be roughly proportional to the project's actual impact.

Dolan v. City of Tigard, 512 U.S. 374 (1994)

→

Koontz
2013

Money & denials too

Extends both tests to monetary demands, and to permit denials, not just approvals.

Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013)

→

Sheetz
2024

No legislative escape

A fee set by ordinance gets the same scrutiny as one demanded at the counter.

Sheetz v. County of El Dorado, 601 U.S. 267 (2024)

For Floodplain Managers: Attaching a condition to a floodplain permit? Write the nexus and the proportionality into the permit file.

The public trust doctrine

The core idea

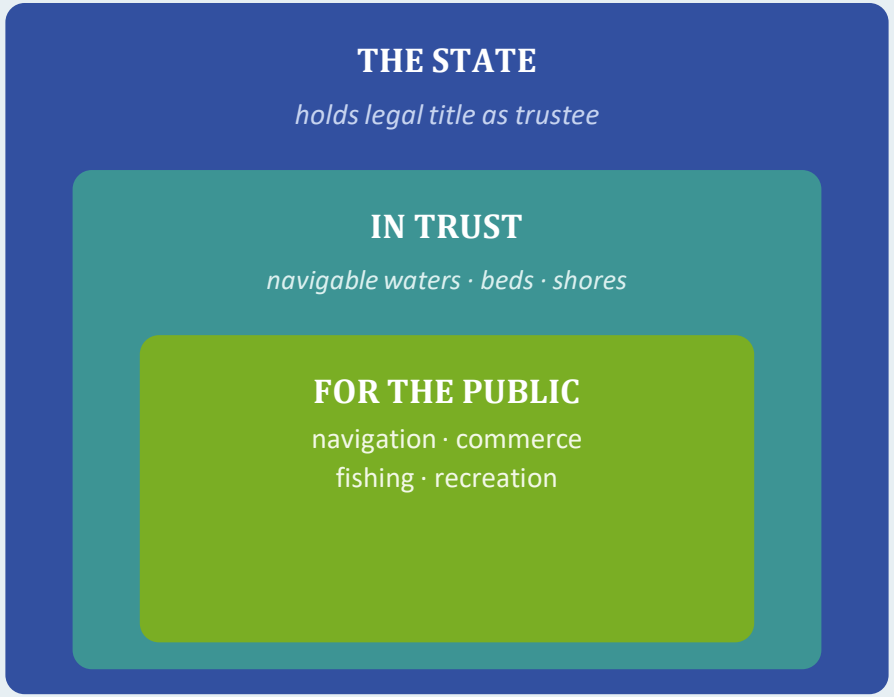
Certain lands and waters, the beds of navigable waters, the shores, the flow itself, are held by the state **in trust for the public**. The state is trustee; the public is beneficiary.

Where it comes from

Roman and English common law, carried into American law and made a fixture by *Illinois Central Railroad Co. v. Illinois* (U.S. 1892): a state cannot abdicate its trust over public waters. It is chiefly a matter of **state law**, so its reach varies from state to state.

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892)

Title held in trust



Why it matters here: *the doctrine supports a community's authority to regulate development affecting public waters, and it is a distinct source of that authority alongside the police power.*

Public trust as a takings shield

*Where the public trust applies, an owner's title was **always subject to the public's pre-existing interest**. Regulation protecting that interest takes nothing the owner ever had.*

1 Lucas sets a trap

A regulation that wipes out all economic value is a per se taking, with one escape hatch.

Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)

2 The escape hatch

No taking if the regulation merely restates "background principles" of the state's property and nuisance law that already limited the title.

Id. at 1029

3 Public trust qualifies

The public trust doctrine is a recognized background principle for navigable waters and adjoining land. The limit was baked into the title all along.

The irony

Lucas is remembered as a property-rights win. In practice, courts read the total-wipeout test narrowly, and the background-principles defense has become **fertile ground for governments.**

! Reach varies by state

How far public trust extends, and how strong the shield is, is a state-law question for the Montana session.

The NFIP minimum is a floor, not a safe harbor

The myth

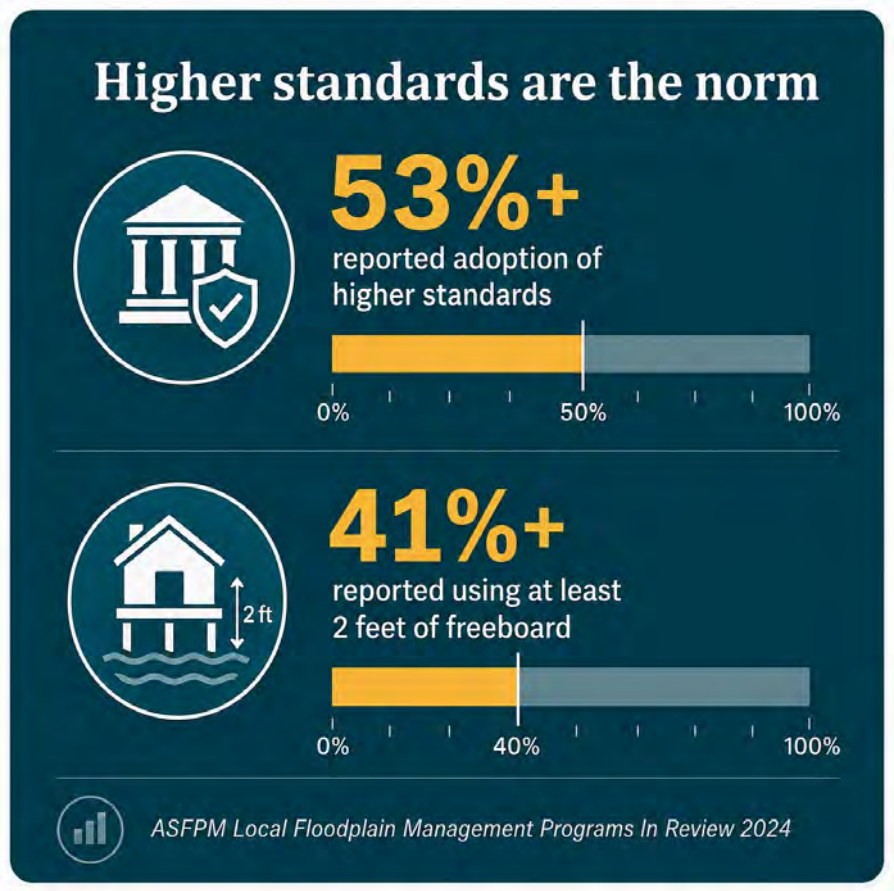
"We meet the NFIP minimums, so we're covered."

The reality

Meeting the minimums satisfies **program participation**, but it does not immunize the community from liability.

FEMA regulations explicitly encourage states and local governments to adopt higher standards, which take precedence over the federal minimums.

44 C.F.R. § 60.1(d)



Anyone can sue. Most threats are bluster.

Who sues

Developers

Most visible, including the well-resourced SLAPP-style nuisance suit.

Neighbors

Adjacent owners opposing a proposed development.

Permit applicants

Denied, delayed, or conditioned: the everyday source.

Where it lands

§ State courts

Most land-use and procedural challenges

§ Federal district court

Federal-question and NFIP-related claims

§ Court of Federal Claims

Takings claims against the United States

! **Most "I'll sue" threats are bluster meant to intimidate.** A frivolous filing carries its own consequences: Rule 11 sanctions, fee-shifting, and anti-SLAPP statutes that let a community recover costs. Don't let the threat drive the decision. Engage counsel early – at the first suggestion of potential litigation.

From the national frame to the Montana picture

The Montana session carries

- **State enabling authority**
- **Montana case law**
- **The specific local cases:**
- the challenged higher-standard ordinance
- the glamping-site permit
- the variance / appeals matter

The shared seam

Public trust & **enabling authority** sit on the line between our two sessions.
Hold them lightly in the national talk; let the state segment do the work.

Morning Session

A LEGAL FOUNDATION FOR FLOOD RISK MANAGEMENT

The Montana Legal Landscape

Montana state law, legal considerations and challenges associated with community flood risk management

Missoula & Bozeman, Montana · September 2026

MONTANA DNRC

STATE FLOODPLAIN PROGRAM



State Legal Foundation:

MONTANA FLOODPLAIN MANAGEMENT

Montana Floodplain Management-History

Montana has been committed to sound floodplain management, risk reduction and community resilience for a long time.

Montana initiated its management of floodways when it created statutory framework in 1965 for -

- Water Conservation and
- Flood Control Projects

Intervening Federal developments

- National Flood Insurance Act (1968)
- The “Unified Program”

Montana expanded the role of floodplain management in 1971 by adopting the Montana Floodplain and Floodway Act. (The ACT). MCA Title 76, Chapter 5

Montana Floodplain and Floodway Act (1971)

Findings – 76-5-101, MCA

- (1) recurrent flooding of a portion of the state's land resources causes loss of life, damage to property, disruption of commerce and governmental services, and unsanitary conditions; all of which are detrimental to the health, safety, welfare, and property of the occupants of flooded lands and the people of this state; and

- (2) the public interest necessitates management and regulation of flood-prone lands and waters in a manner consistent with sound land and water use management practices which will prevent and alleviate flooding threats to life and health and reduce private and public economic losses

Overview of the Montana Floodplain and Floodway Act

1. Uses - restrictions and standards

2. Initial mapping process

3. Local rules, permitting, enforcement

4. Agency oversight (DNRC)

1. Uses - restrictions and standards

- See Title 76, Chapter 5, Part 4.
  - 76-5-401 Permissible open-space uses
  - 76-5-402 Permissible uses within floodplain but outside floodway
  - 76-5-403 Prohibited uses within floodway
  - 76-5-404 Artificial obstructions and nonconforming uses
  - 76-5-405 Variance for obstruction or nonconforming use
  - 76-5-406 Criteria to be considered in connection with variance request

2. Initial mapping process

- DNRC initiated comprehensive mapping process
- Consultation with affected political subdivisions
- Orders establishing designated floodplains, floodways

Communities can create maps - HB 129(2009)

76-5-201(3), MCA “Nothing in this part precludes a political subdivision from designating by ordinance or resolution, without prior state designation, flood plains and floodways as designated by the United States federal emergency management agency and as necessary for compliance with the national flood insurance program if the department determines the designation is in compliance with parts 1 through 4 of this chapter.”

3. Local rules, permitting, enforcement

The Act describes the role of local government in floodplain management.

- Authority to adopt ordinance or regulations
- Some detail on minimum standards for
  - Permissible Uses
  - Variances
- Local government authority is the primary means by which permits are issued for high-risk areas.

4. State agency oversight (DNRC)

- Information to local communities
- Technical support for permit processing
- Establish minimum standards that communities must meet or exceed
- Review local mapping decisions to ensure compliance with the ACT
- Etc.

ARMs (Adopted in 1974)

- Local regulation and enforcement – ARM 36.15.201
  - If community adopts regulations that **meet or exceed** the minimum standards
- Rule Requirements -- ARM 36.15.204
  - May include zoning, building codes, and subdivision regulations
  - Permit must be required prior to new “construction, substantial improvement or alteration” of any “**artificial obstruction**”. See definition in ARM 36.15.101(3).
  - Notice provisions for proposed actions and adoption of regulations to:
    - department
    - adjacent property owners
    - the public (newspapers)
  - Variances must be reviewed and approved by DNRC
  - Granted permits must be sent to DNRC
  - Mandatory disclosure requirements (for property owners selling land in designated floodplain or floodway)

MONTANA DNRC

STATE REGULATIONS – ARM 36.15

ARMS (Continued)

- Permit processing – ARM 36.15.216
  - Is proposed use consistent with the Act and minimum standards in these rules?
  - Additional factors -
  - “granted” within 60 days after receipt of application, unless community notifies applicant that more information/time is needed
- Emergency exceptions to permitting – ARM 36.15.217
- Variances – ARM 36.15.218
  - May be granted only if… [conditions]
- Minimum standards based on location (see definitions section ARM 36.15.101)
  - Designated floodway - ARM 36.15.601 -- 606
  - Flood fringe – ARM 36.15.701 – 703
  - Designated floodplain only minimum standards – ARM 36.15.801
- Flood proofing requirements – ARM 36.15.901- 903

Highlights: As established in statute and rule –

- Floodplain Management in Montana is administered at the local level

- Regulations adopted by a local political subdivision may include zoning, building codes, and subdivision regulations, etc.

- Local regulations must include:
    - Permitting process
    - Variances
    - Notification process (Transparency)
        - Legal notice in newspaper
        - Mailings to adjacent landowners for both permitting and mapping projects.
        - Disclosure requirements for property owners and their representatives.
    - Floodplain regulations requirements and adoption process.
    - Uses – allowed without permits, with permits, and those that are prohibited
    - Floodway restrictions
    - Mapping process and requirements

Highlights (continued)

- State is not exempt from local regulations for any State-owned property.

- Local communities are required to forward the following documents to DNRC
    - Permits
    - Variances
    - Appeals
    - Enforcement issues
    - Regulations
    - Mapping – studies and changes

- State approval is needed for –
    - Ordinance adoption
    - Mapping updates
    - Variances

Community Regulations – State Model Ordinances



- The state established a model floodplain ordinance based upon –
  - CFRs
  - MCAs and
  - ARMs
- Most of the NFIP participating communities have adopted this model ordinance.
- Some communities have also adopted ordinances that exceed both NFIP and State Regulations.
- To view the Model Ordinance go to:
  - www.mtfloodplain.mt.gov

Regulations Discussion: 44 CFR 60.1(d) – Higher Standards

44 CFR 60.1(d): Any community may exceed the minimum criteria by adopting more comprehensive floodplain management regulations.



Courtesy of Mitch Paine

- 44 CFR 60.3 sets minimum standard required to participate in NFIP
- States or communities may add higher standards
- States/communities that rely on IBC have higher standards

44 CFR 60.1(d) *The criteria set forth in this subpart are minimum standards for the adoption of flood plain management regulations by flood-prone… communities. Any community may exceed the minimum criteria under this Part by adopting more comprehensive flood plain management regulations utilizing the standards such as contained in Subpart C of this part. In some instances, community officials may have access to information or knowledge of conditions that require, particularly for human safety, higher standards than the minimum criteria set forth in Subpart A of this part. Therefore, any flood plain management regulations adopted by a State or a community which are more restrictive than the criteria set forth in this part are encouraged and shall take precedence.*

HIGHER STANDARDS

FEDERAL STANDARD 44 CFRs Parts 59-67	MONTANA STANDARD MCA 76-5 and ARM – Chapter 15
Lowest Floor Freeboard (MCA 76-5-402)	
At Base Flood Elevation	2 feet above Base Flood Elevation
Floodway Encroachment (ARM 36.15.502)	
1 foot surcharge	½ foot surcharge
Habitable Structure Location (MCA 76-5-403)	
Allowed in floodway	Prohibited in floodway
Mobile Homes	
May be elevated 3 feet above adjacent grade	Requires elevation to the freeboard protection level like all residential structures
Septic Systems (DEQ Regulation)	
Allows systems within the floodplain	Systems must be located 100 feet beyond the floodplain

Permitting and enforcement issues: A case study

Hamlin Construction case. (First Judicial District Court - Cause No. ADV-2020-105)

- Construction company sought permit for subdivision
- DNRC provided technical assistance to local community processing the permit
- Dispute over reasonable projected flow rate for a 100-year flood event in the drainage area
- DNRC recommended to the County a different methodology be used based on updated regression equations
- Construction company filed suit against DNRC (Takings and Due Process violations) for requiring the company to construct a detention pond on the property as a condition for obtaining a floodplain permit
- DNRC argued that it provides information and technical expertise –
  "provide state coordination and technical assistance to local units in management of floodway areas" 76-5-102, MCA
- DNRC motioned for dismissal on grounds it was not the decisionmaker/not the permitter

Motion to dismiss – GRANTED

"When a local political subdivision, such as the County, **has enacted and is enforcing permit issuance** and land use ordinances, regulations, or **resolutions that meet or exceed DNRC' minimum standards**, federal regulations and state law establish **DNRC's duty is to oversee local floodplain management and offer advisory assistance**, Hamlins do not dispute the County has done so. Because **the County is the responsible political subdivision**, a permit from DNRC is not required and **DNRC plays an oversight role** in the County's floodplain management…"

***

"The **County was the entity with the power to deny or approve** Hamlins' applications and who actually did so, which Hamlins acknowledge in their Complaint, not DNRC. Therefore, Hamlins **cannot establish the element of causation**, or but for DNRC's actions, Hamlins would not have suffered an alleged taking or exaction. **The County was free to choose** whether to follow DNRC's recommendations or choose another course of action in their determination of Hamlins' request. While DNRC's actions assisted the County its decision-making, its actions were not the but-for cause of Hamlins' alleged injury."

~ Lunch ~

Legal Training on Flood Risk Management for Local Communities

Lunch Sponsored By:



ASSOCIATION OF Montana FLOODPLAIN MANAGERS