



ASSOCIATION OF STATE FLOODPLAIN MANAGERS, INC.

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February 21, 2017

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Montana Senate Natural Resources Committee

Honorable Jeffrey Welborn, Vice Chair
Montana Senate Natural Resources Committee

Honorable Jill Cohenour, Vice Chair
Montana Senate Natural Resources Committee

RE: ASFPM written testimony on Montana Senate bill 313

Dear Senators:

The Association of State Floodplain Managers (ASFPM) has become aware of the hearing on Montana Senate bill 313 on 22 February and we ask that this letter be made part of the hearing record.

ASFPM is a 17,000 member national non-profit organization dedicated to reducing flood losses and protecting the natural functions of floodplains. Our Montana Chapter, the Association of Montana Floodplain Managers (AMFM), has been concerned about Montana Senate bill 313 related to stream restoration projects. ASFPM would like to also express its concern and provide information for your consideration from a national perspective on the potential consequences of such legislation in its current form.

First, ASFPM is concerned that the current text of Senate bill 313 specifically exempts "Stream Restoration" projects from the requirements for permits in the floodplain which could lead to legal liability for those undertaking such projects. The broad language describing what is included in the term stream restoration contained within the bill does not address the issues necessary for compliance with National Flood Insurance Program (NFIP) minimum standards. Nor will it ensure activities in the floodplain do not cause adverse impacts such as an increase in flood levels or flood velocities. As a result, this legislation will put people or organizations, including units of government, undertaking stream restoration in legal jeopardy if other properties are adversely impacted by their actions. Today, this kind of liability is easy to determine by modeling the physical impacts on other properties resulting from physical

Dedicated to reducing flood risk and losses in the nation.

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changes in the floodplain and/or from an actual flood itself. These potential flood damages mean increased lawsuits based upon various legal theories: trespass, nuisance, negligence, riparian rights, surface water reasonable use doctrine, and “taking” without payment of just compensation. ASFPM has done extensive research on legal liability for activities occurring in floodplains, and these materials are free to the public from our website at www.floods.org.

Second, Senate Bill 313 could jeopardize the participation of all Montana communities in the NFIP. Communities that voluntarily participate in the NFIP agree, at the time of joining the Program, to comply with certain minimum standards set forth in 44 CFR 60.3. In return, the NFIP makes reasonably priced flood insurance available within that community. **The minimum standards contained within the federal regulations specifically require communities to permit and regulate all development that occurs within flood-prone areas. This bill would create a scenario where communities will be legally prohibited from complying with the minimum standards of the NFIP.**

Communities that are noncompliant with the federal minimum standards are subject to suspension from the NFIP. Recent examples from other states have shown that, when state law forces communities to be noncompliant, the entire state is at risk for suspension from the NFIP. Suspension carries drastic consequences for families, businesses and lenders across the state, including:

1. Existing NFIP flood insurance policies are not renewed. There are currently about 5,000 NFIP flood policies in force in Montana, for a total coverage in force of about \$1 billion.
2. New NFIP flood insurance policies are not available. Banks require flood insurance in order to obtain a loan, so this is very disruptive to real estate transactions. It is important to remember that many NFIP policies are based on subsidized rates.
3. Lenders have the option to force-place private insurance or declare loans in default. If a lender chooses not to require private insurance or call the note, the collateral will be at risk for un-indemnified loss.
4. Federal mortgage guarantees (VA, FHA, USDA, SBA, HUD) are not available for properties in the floodplain.
5. The state will not be eligible for many types of federal disaster assistance and federal hazard mitigation grants. Note that there have been 71 disasters declared in Montana.

ASFPM has seen where laws in other states were changed resulting in the inability for local communities to regulate all floodplain development so they couldn't comply with minimum NFIP standards and meet their NFIP participation responsibilities. This usually occurs when the state wishes to exempt certain classes or types of developments from local standards. Unfortunately, in many of these cases no accommodation was made for floodplain management concerns, and even where a new state entity would preempt local law there was no provision to ensure that minimum NFIP standards were being followed. Most recently, the State of Mississippi passed a law exempting hunting and fishing camps from local land use regulations, including floodplain management standards. The state's Attorney's General opined that communities could not enforce floodplain management requirements. As a result, FEMA

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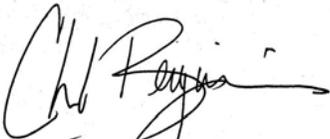
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had no choice but to threaten suspension of all communities in the state from the NFIP unless the state legislature passed a new law amending the law containing the new exemption. NFIP eligibility was only maintained by a last-minute reversal in state law. A similar situation also occurred in Florida after state law restricted the ability of local communities to follow the floodplain permitting process set forth in the federal regulations. Several years ago in Ohio, after a law preempting local communities from any regulation of manufactured home parks, the new commission that was established had to make after-the-fact changes to accommodate local floodplain management permitting requirements to avoid potential FEMA suspension of the state from the NFIP.

Lastly, we want to inform you that ASFPM is working with FEMA, Corps of Engineers and other federal agencies, as well as other national organizations (Association of State Wetland Managers, American Planning Association, Pew Charitable Trusts and others) to address these very concerns. We co-hosted a workshop entitled *"Overcoming Policy and Permitting Challenges to Implementing Natural Infrastructure Solutions"*. We share concerns that the existing process does not have clear direction for timely and efficient approval of projects with de minimis impacts, and reserving full analysis for projects that can result in adverse impacts. We invite Montana to join us in those conversations to add your voice and examples to the dialogue.

Thank you for your consideration. Please do not hesitate to contact me at cberginnis@floods.org or at 608-828-6338 if I can be of further assistance.

Respectfully,



Chad Berginnis, CFM
Executive Director