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Honorable Chas Vincent, Chair  
Montana Senate Natural Resources Committee

February 28, 2017

Honorable Jeffrey Welborn, Vice Chair  
Montana Senate Natural Resources Committee

Honorable Jill Cohenour, Vice Chair  
Montana Senate Natural Resources Committee

**RE: AMFM written testimony on Opposition to Senate Bill 313**

Dear Senators,

The Association of Montana Floodplain Managers (AMFM) is aware of the hearing for Senate Bill 313, tomorrow, February 22nd and we ask that this letter be made part of the hearing record.

AMFM is a 250+ member non-profit organization of local floodplain administrators, private consultants, sanitarians, road departments, engineers and other flood mitigation specialists dedicated to reducing flood losses and protecting the natural functions of floodplains in Montana and other neighboring jurisdictions.

When this draft bill was forwarded to me, on behalf of the AMFM organization and discussed with the board members, the AMFM board was very concerned about language in the bill regarding stream restoration projects.

AMFM echoes the concerns of the Association of State Floodplain Managers (ASFPM) in the consequences that this piece of legislation, should it continue be enacted, can have on the possibility of legal liability on those undertaking such projects and impacts to insurance.

First, to speak to the liability issues that could arise. The language being used to exempt what are considered "stream restoration projects" from permitting requirements is vague and does not describe the standard practices for participation in the National Floodplain Insurance Program (NFIP). There are no measures to ensure activities do not cause substantial impacts upstream or downstream, such as a rise in elevation or velocity flow increases. As a result, SB 313 will put people or organizations at risk of legal liability if they construct projects under the exemption being sought.

ASFPM has done extensive research on legal liability for activities occurring in floodplains, such as, the potential of increased lawsuits based on various legal theories—trespass, nuisance, negligence, riparian rights, surface water reasonable use doctrine, and "taking" without payment

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of just compensation. This research is beneficial and used not only by AMFM, but by others, such as me, a local government Floodplain Manager, in describing to applicants the need for regulations and the benefits of having permitting requirements.

Second, and personally a concern for me being a floodplain manager for a county and multiple municipal agencies, is that SB 313 will affect the participation in the NFIP for the State of Montana, and its communities and inevitably it's residents, your constituents!

Communities that participate in the NFIP agree, at the time of joining the program, to comply with certain minimum standards in 44 CFR 60.3. In return, the NFIP makes reasonably priced flood insurance available in that community. **The minimum standards contained in the federal regulations specifically require communities to permit and regulate all development that occurs in 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. Local ordinances must be legally enforceable and uniformly applied within the participating community. If a community lacks the ability to legally enforce its floodplain management ordinance it is not in compliance with the NFIP;
2. 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;
3. There is no provision in the federal regulations providing for permit exemptions. Therefore, if signed into law, SB313 could prevent all Montana NFIP participating communities from being compliant with federal NFIP regulations because they would be unable to legally enforce the permit requirements of their local floodplain management ordinances.
4. New NFIP flood insurance policies are not available. Banks may require flood insurance before granting 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;
5. 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;
6. Federal mortgage guarantees (VA, FHA, USDA, SBA, HUD) are not available for properties in the floodplain;
7. The state will not be eligible for many types of federal disaster assistance and federal hazard mitigation grants, which will affect our Emergency Management partners. Note

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that there have been 71 disasters declared in Montana; my County being a currently declared flooding emergency.

There are several provisions in the Code of Federal Regulations requiring or involving the issuance of permits by the participating community. Chief among these are:

- 44 CFR 60.1 (b) CRITERIA FOR LAND MANAGEMENT AND USE: This subpart sets forth the criteria developed in accordance with the Act by which the Administrator will determine the adequacy of a community's flood plain management regulations. These regulations must be legally-enforceable, applied uniformly throughout the community to all privately and publicly owned land within flood-prone, mudslide (i.e., mudflow) or flood-related erosion areas, and the community must provide that the regulations take precedence over any less restrictive conflicting local laws, ordinances or codes.
- 44 CFR 60.3 (a)(1) – FLOOD PLAIN MANAGEMENT CRITERIA FOR FLOOD-PRONE AREAS: This subpart *requires permits for all proposed construction or other development in the community* so that the participating community may determine whether such construction or development is proposed within flood prone areas. “Development” is defined at 44 CFR 59.1 as any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment and materials.

The hierarchy of the floodplain management world includes minimum requirements established at both the state and federal levels. The local community's floodplain management ordinance must comply with both the minimum federal requirements and the minimum state requirements. These ordinances contain development standards and a process to review proposed projects within the 100-year floodplain to ensure these projects do not exacerbate flood hazards from what is documented in the flood insurance study. This review process applies to all projects within the 100-year floodplain that have the potential to impact flood hazards, whether the project is a county road bridge, a private residence, a bank stabilization project, or a so called “stream restoration” project.

Some regulation is necessary for the protection of citizens from the well intentioned, but potentially harmful actions of others. Passage of this bill would negate that protection, possibly increase costs, and cause a great deal of difficulty for prospective home owners and lending institutions.

Some other concerns I have with SB 313 are set forth below:

- Local governments do not have the ability to identify specific properties with flood insurance. This information is protected to provide for individual privacy. (Page 1, Line 29)
- The bill establishes terms such as “aquatic resource”, “aquatic resource area”, and “aquatic resource functions” that are neither defined in Title 76, Chapter 5 MCA or measurable by practitioners or regulators. (Page 3, Lines 10 - 18)

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- The proposed definition of “stream restoration” is simply too vague to have consistent and objective application by practitioners and regulators. (Page 3, Lines 10 - 18)
- “Restoring” a stream to natural or historic function may not be appropriate, especially in urbanizing watersheds where runoff patterns have changed and streams must convey more flow than they did historically. (Page 3, Lines 17 – 18)

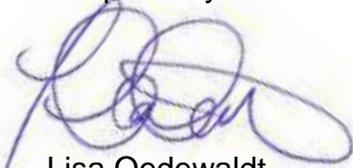
SB 313 creates a categorical exemption that would remove “stream restoration” projects from the review and permitting requirements of floodplain management ordinances. This is inconsistent with the minimum federal requirements and therefore local communities will be unable to satisfy the demand of having an ordinance that complies with both federal and state requirements. The result of this action could be devastating. Please understand that flood insurance is required for any federally backed mortgage on property in the 100-year floodplain. The worst-case scenario is that insurance through the NFIP would no longer be available in Montana. This is incredibly important because homeowners in communities like Three Forks or Miles City where large portions of the community are within the floodplain would lose their NFIP flood insurance. This could in turn require banks to call loans on these properties, causing financial harm to the individual property owners and economic instability within the community.

SB 313 speaks of goals—goals with no permitting, or what entity decides if the goal is reasonable, realistic, achievable, or impacting to other property owners? Can we afford this?

In closing, I will note that “stream restoration” is a young and continuously involving field. If you asked practitioners around Montana you find plenty of examples of projects that were installed a decade or two ago that were cutting edge and either failed physically or that failed to meet resource objectives. Many of these projects are being redone. Since rivers and streams are a public resource, we may be sympathetic to the intent of “stream restoration” projects, but these projects deserve the same review and scrutiny as other projects to ensure they do no harm to others residing in the floodplain.

A “yes” vote on SB 313 essentially passes the cost of analyzing the impacts of “stream restoration” projects on to other residents in the floodplain. As I’ve explained above, this cost, the potential loss of flood insurance, is likely a larger cost than most residents can bear. Please vote “no” on SB 313. Thank you for your time and consideration.

Respectfully Submitted



Lisa Oedewaldt  
AMFM Chairman  
Lincoln County Floodplain Manager  
Lincoln County Deputy Director DES

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