



Vol. 18, No. 4
August 2006

ASSOCIATION OF STATE FLOODPLAIN MANAGERS, INC.

CROSSROADS IN FLOODPLAIN MANAGEMENT: ANNUAL CONFERENCE REVIEW

Albuquerque, New Mexico, was the site of the 30th annual conference of the Association of State Floodplain Managers, held June 11-16, 2006. Attendance records again were broken, with over 1,200 participants from all over the United States and abroad enjoying a week of expert presentations, panel discussions, training, technical field trips, exhibits, and networking opportunities. The conference theme, "Floodplain Management Crossroads," aptly characterized the integration of the diverse floodplain management perspectives and areas of expertise brought by the professionals in attendance.

After a unique ceremonial welcome by Samuel Suina, Director of the New Mexico State University Tribal Extension Task Force, the opening plenary session jumped right into the topic that has captured so much attention, "Path of Destruction on American's Gulf Coast." Al Goodman, CFM, Mississippi State Floodplain Manager, and Shirley Laska, University of New Orleans, shared their experiences—personal and professional—from before, during, and after Hurricane Katrina, and the lessons they and their colleagues learned from the disaster. This issue was further explored in the second plenary session that morning, with a panel whose concerns span rebuilding and recovery efforts all along the Gulf Coast. Dan Hitchings, U.S. Army Corps of Engineers; Frank Pagano, FEMA Region VI; and Todd Davison, FEMA Region IV, discussed the many efforts of their agencies and others to ensure that post-hurricane reconstruction takes place in ways that minimize future risk and, where possible, improve community resilience to inevitable future storms.

At luncheon on Tuesday, keynote speaker New Mexico Governor Bill Richardson earned a standing ovation from the crowd with his insights into the coming impacts of climate change, his conviction that some places are simply too risky for development, and his reminiscences about former FEMA Director James Lee Witt's participation in Cabinet meetings.

The Wednesday morning plenary session was an opportunity for a look at the national scene and consider broad strategies for mitigation of and response to catastrophic floods. Ray Burby, University of North Carolina at Chapel Hill presented fresh suggestions for revamping the National Flood Insurance Program and described what he calls (only slightly tongue-in-cheek) our NID or "national disaster-inducement system." Bill Hooke, American Meteorological Society, questioned whether history will sculpt Hurricane Katrina into a Titanic-type icon and emphasized the need for a comprehensive approach to build sustainable, resilient communities. Pam Pogue, State of Rhode Island, recommended adoption of a No Adverse Impact approach by state and local players as a way to minimize inevitable future flood damage, and emphasized the connectivity of water resources and all other ecosystem processes.

That afternoon brought a plenary discussion of FEMA's Map Modernization initiative. Doug Bellomo, FEMA, provided updates on the status of the various aspects of the program, indicating that targets are being met

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from the Chair

Pamela Mayer Pogue, CFM

Usually in the weeks after the annual ASFPM conference there is time to slack off, catch up, slow down, and enjoy summer. Yet this year the activity and demands have exponentially increased and the frenzy has not abated. Within weeks of our conference I had the pleasure to attend the Natural Hazards Center's workshop in Boulder. For someone who was raised in Florida and then spent the last 23 years in Rhode Island where the highest "peak" is about 300 feet (our state landfill), Colorado was a treat. In addition to the interesting panels offered by the Hazards Center, the ASFPM members who attended met and are undertaking several challenging projects to be completed before next year's conference.

One of them, the ASFPM document, *National Flood Programs in Review—2000*, will be rewritten not only to reflect the changing national floodplain management policies in a post-Katrina world, but to also update the national trends that have emerged since this publication was last issued in 2000. This is a huge undertaking, but it is also very critical. Despite the challenges this task will pose, it is nonetheless very important as this publication is THE guide to the ASFPM policy positions on all national floodplain management issues. We will be tapping into the expertise of all of our ASFPM Policy Committees, Board members, and membership within the next eight months.

So, relaxing after Boulder? Not a chance. I had the pleasure to attend a bi-monthly Board meeting of the Colorado Association of Stormwater and of Floodplain Managers (CASFM). Although I was asked to speak and give an update on ASFPM activities, I know that by attending I got much more out of the deal than they did. Aside from the fact that I was treated to a spectacular view of several of Colorado's "14-ers" and the Continental Divide afterwards (remember I was born and raised at sea level), I also was able to see the second-largest floodplain management association at work. This is of particular value to me as the strongest take-home message I had from this year's annual conference is that the strength of the ASFPM lies in the dedication and work of our 24 Chapters and Associations. I learned a very valuable lesson from the folks at CAFSM. The ASFPM membership needs to work a bit harder this year to connect with our Chapters and Associations in order to convey to them how all of the hard work at the national level benefits them. It is very valuable to me to know what the Chapters are doing, particularly because we do not have a local Chapter in Rhode Island, or even New England as, sadly, NEFSMA is disbanding.

Okay, so here we are finishing up July and the beach chair and cooler still have not made it into my car, nor is the annual beach pass on my windshield. What is wrong with this picture? Well, several ASFPM members spent the last week of July in Washington, D.C., not only meeting with our federal partners, and representatives from the insurance industry, but also testifying on the Hill on the Stafford Act. Many thanks to Bill Brown (of Illinois, soon to be of South Carolina) for attending meetings with the National Service Provider on MapMod. I always know we will be in good hands when Bill goes to Alexandria. I also want to extend my appreciation again to Bruce Bender, Arizona, and also to Paul Osman, Illinois, for running a highly productive meeting with the insurance industry national representatives. Thanks to their hard work and especially to our friend and colleague, Bill Hooke from the American Meteorological Society, it looks as though the Capitol Hill Insurance Forums on NFIP Reform are about to become a reality.

On July 27th I testified on the Stafford Act before the Senate Committee on Environment and Public Works (written and oral testimony is available at <http://www.floods.org>). Please read the legislative report in this issue for substantive information about the testimony, because my next comments are of a strictly personal nature. As a pure policy wonk (I attended school down the road from the Hill and spent many college summers on the Hill, mostly delivering mail and coffee), it was a treat to be given the opportunity to testify before this Senate Committee. Unfortunately, my own Senator from the great state of Rhode Island, Lincoln Chafee (R-RI), was triple-booked that morning and was unable to attend the hearing. Senator Chafee and his staff were kind enough, however, to meet with us the previous afternoon for a briefing. It was very exciting, for me anyway,

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from the Chair (cont.)

to be able to explain the ASFPM's position and recommendations for improvements to the Stafford Act. The highlight for me was in answering Senator Hillary Clinton's (D-NY) questions about the value of Project Impact (Are you kidding me? Bring it back!) and the need for doing a better job at risk communication (Yes, high-quality maps and public outreach and education).

After the hearing, one of Senator James Inhofe's (R-OK) staff members came up to me and complimented us on the passion we have for floodplain management. This is not the first time I have heard someone comment on the fact that we floodplain managers are an intense group. We care very deeply about what we do and I am sure many of us have made many professional and personal sacrifices in order to work so hard to achieve what must be done. I later heard a similar comment from one of Senator Clinton's staff members and also personally from Senator Chafee.

The past 44 days since the ASFPM conference have flown by. I continue to be amazed and appreciative for the dedication of our ASFPM Executive Office staff. On a state and local level I am so impressed by the energy not only of the Colorado Chapter but also of the several state Chapters and Associations that have not only extended invitations to me to attend their annual meetings (South Carolina/North Carolina, New York, Maryland, Arizona, Texas, Montana, Florida, and Colorado). Also many thanks to you for your continued support to me as I muddle my way through establishing the Rhode Island Flood Mitigation Association (RIFMA).

August will be even busier. The dog days will bring a meeting in Charleston, South Carolina, at the Coastal Services Center of the National Oceanic and Atmospheric Administration to discuss national coastal policy, potential projects and programs; a meeting in Denver with FEMA and the insurance industry representatives to plan for next year's National Flood Conference, and a weeklong training session at the Emergency Management Institute on Advanced Concepts in Floodplain Management.

Who needs the beach? There is work to be done! Best wishes to you all for a safe and relaxing summer. ☼

ISO/CRS Specialist wanted for California

Insurance Services Office, Inc. (ISO) is the leading provider of information to the property/casualty insurance industry. ISO is seeking applicants for the position of ISO/CRS Specialist for California. The position involves visiting communities to collect flood information on behalf of the National Flood Insurance Program's Community Rating System and representing ISO at meetings with community officials.

Qualifications: Emergency Management Service experience and knowledge of the NFIP is desirable. Certification as a Certified Floodplain Manager (CFM) is a strong plus. General engineering experience with strong technical knowledge is also a plus. College degree desired but not required. Training will be provided. Excellent customer service, math, and verbal/written communication skills are essential. A strong knowledge of Microsoft Windows is required. Must be self-motivated, detail oriented, possess a strong work ethic and able to demonstrate the ability to work independently. The position requires a valid driver's license and overnight travel.

ISO offers a competitive salary; a solid benefits package with medical, dental, 401(k), ESOP; and a company car.

> > > To apply, send a resume by September 1, 2006, to Mr. Willie McDonald, Insurance Services Office, Inc., 545 Washington Boulevard, Jersey City, NJ 07310-1686, (201) 469-3001; wmcdonald@iso.com.

ASFPM's Brief Contributes to Favorable Floodway Ruling

Edward A. Thomas, Esq.
Michael Baker Inc.
"Challenge Us"

In the April 2006 *News and Views* we reported that an extremely unfortunate and unusual floodplain case had made its way to the New Jersey Supreme Court unbeknownst to anyone at the ASFPM. The case, *Mansoldo v. The State of New Jersey* (A-57-05, Decided June 5, 2006) involves a claimed "taking" of property in violation of the Fifth Amendment to the U.S. Constitution. It arose from the State of New Jersey's refusal to issue building permits for the construction of residences in a designated and mapped floodway. In an extremely confused opinion, the lower New Jersey court had determined that the denial of this permit was a taking, but no compensation was due to the plaintiff. We are unaware of any other court in this country that had reached such a conclusion, which could be of enormous detriment to floodplain management and to the fundamental principles of the National Flood Insurance Program.

Fortunately, the New Jersey Supreme court vacated the ruling of the lower court and sent the case back for further processing with clear and correct instructions as to what the U.S. Supreme Court had determined constituted a "taking." [See "Courts Issue Good News for Floodplain Management," a discussion of last year's Supreme Court ruling that set forth the parameters for a legal analysis of a claimed regulatory taking. It is posted in the NAI section of the ASFPM website at <http://www.floods.org>.]

In *Mansoldo*, the court took the extremely unusual step of essentially disagreeing with the arguments of both the plaintiff and defendant. Instead, the court essentially followed the arguments and analysis submitted in the *amicus* brief filed by the ASFPM with the Rutgers Law School Environmental Law Clinic and the Georgetown Environmental Law and Policy Institute. The members of ASFPM can take a great deal of pride that their Association was afforded this nearly unprecedented deference and respect by the New Jersey Supreme Court. In addition, the intervention by the ASFPM enabled the New Jersey Court to issue a ruling that does harm neither to the principles of No Adverse Impact Floodplain Management nor to a fundamental principle of the National Flood Insurance Program.

The ASFPM will monitor the progress of the case to determine if we can help the lower court and the state establish a really favorable ruling with respect to the nuisance aspects of construction in a floodway.

>>> Read the brief and the court's decision at <http://www.floods.org/TheOrganization/mansoldo.asp>.

What the *Rapanos* and *Carabell* Wetlands Decisions Mean to Floodplain and Stormwater Managers

Edward A. Thomas, Esq.
Michael Baker Inc.
"Challenge Us"

Water is the very basis of life as we know it. Increasingly, clean, drinkable water is scarce and likely to become dangerously inadequate in many areas of the world as population increases, ancient aquifers are drawn down to a point of diminishing returns, and existing water supplies become polluted. Yet at the same time, we are seeing a mounting toll of disasters caused by catastrophically too much water in places in which humans have created a built environment.

In the United States, the folks who are concerned with reducing the misery caused by floods on the human environment do not usually have a close relationship to those who protect our nation's wetlands and its water quality. But more and more, we are finding that activities designed to protect humans from flood disasters also can help protect wetlands and contribute to the work being done to

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Rapanos and Carabell Wetlands Decisions (cont.)

protect and restore water quality. Recently the U.S. Supreme Court issued a strange and confusing opinion that can be understood as a call for coordination among all those concerned with water: stormwater, floodplain, and wetland managers alike.

On June 19, 2006, the U.S. Supreme Court handed down its decision in a case known as *Rapanos-Carabell*, involving the geographic extent of the area that the federal government may regulate as “wetlands” under the Clean Water Act of 1972. The two cases at issue are consolidated under the single decision *Rapanos et ux., et al. v. United States*, U.S. (2006) Nos. 04-1034 and 04-1384, 2006 WL 1667087 (U.S.). Both cases involve persons who filled areas that the U.S. Army Corps of Engineers had determined were “wetlands” subject to the regulations promulgated to enforce the Clean Water Act. (The Corps has the authority under Section 404 of the Clean Water Act to issue permits for filling wetlands.) In one case (*Rapanos*), the plaintiffs had refused to request a permit as required by the Corps; in the other case (*Carabell*), the Corps denied the Section 404 permit but the plaintiff proceeded nonetheless. The plaintiffs claimed that the land areas in question were not properly subject to the jurisdiction of the Corps under our federal system of government.

The issue is, essentially, what is a “water” of the United States and, consequently, what is the geographic extent of the wetlands that may be regulated by the federal government pursuant to the Clean Water Act?

The Supreme Court opinion is rather complex, filled with bitter, angry barbs tossed back and forth between and among the Justices. The Justices essentially voted 4-1-4: four to uphold the previous ruling, one to return the case to the lower court, and four to overturn it.

Four Votes to Sustain Lower Court’s Ruling

Writing for four Justices, Justice Stevens, who was joined by Justices Breyer, Ginsburg, and Souter, said that the Corps had jurisdiction over the wetlands in question, and the decisions of the Corps and lower courts should be sustained. This group of Justices indicated that “...the proper analysis is straightforward. The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation’s waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, AND REDUCING DOWNSTREAM FLOODING BY ABSORBING WATER AT TIMES OF HIGH FLOW. The Corps’ resulting decision to treat these wetlands as encompassed within the term ‘waters of the United States’ is a quintessential example of the Executive’s reasonable interpretation of a statutory provision” [emphasis added]. Justice Stevens cites a previous case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Four Votes to Overturn Lower Court’s Ruling

Justice Scalia, who was joined by Chief Justice Roberts as well as Justices Thomas and Alito, said that, in our federal system of government, land use in these particular areas was a state/local concern, and that the opinion of the lower courts should be overturned. Justice Scalia clearly thought that the Corps’ assertion of federal jurisdiction was far too broad. Specifically, he indicated that

- the phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams,” “oceans, rivers, [and] lakes;”
- the phrase “waters of the United States” does “not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps’ expansive interpretation of that phrase is thus not “based on a permissible construction of the statute.” Like Justice Stevens, Justice Scalia also cites the *Chevron* case.
- “...establishing that wetlands such as those at the *Rapanos* and *Carabell* sites are covered by the Act requires two findings: First, that the adjacent channel contains “waters of the United States,” (i.e., a relatively permanent body of water connected to traditional interstate navigable waters);

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— A LETTER TO THE EDITOR —

Toward a Comprehensive National Levee Policy

Editor:

It is refreshing to see the amount of discussion that has been going on about levees and how they should be treated by the National Flood Insurance Program. It should be noted that much of the topic has been discussed before.

In 1982, I had the pleasure of meeting General Gerry Galloway (then a Colonel) when we both served on the National Research Council's Committee on a Levee Policy for the National Flood Insurance Program. Then, as now, the Federal Emergency Management Agency (FEMA) was wrestling with how to map areas protected by levees and what would be appropriate requirements for development and insurance in those areas. The Council's committee noted that there are six dimensions to the problem.

The design protection level appropriate for recognition depends on whether the application is for 1) reduction in insurance rates, 2) easing land occupancy regulations, 3) eliminating flood insurance purchase requirements, 4) permitting siting of critical facilities, 5) removing requirements for notifying occupants of the hazard, or 6) eliminating warning and evacuation programs.

I am not privy to the latest deliberations or the recommendations that the levee study group proposes for FEMA. However, I have heard some of the discussion by various parties. It seems that there is (and always has been) a great deal of focus on the structural standards for recognizing whether a levee can be deemed to protect an area from the 100-year flood. The traditional approach is that if a levee meets certain standards, it is "certified" by someone to be a 100-year flood levee and all land use and insurance requirements in the protected area are removed, just as if the area were higher than the base flood elevation.

This all-or-nothing approach neglects the risk to which the area is still exposed. Recently, there has been discussion about requiring the purchase of flood insurance in levee-protected areas, so there seems to be a move away from the simplistic approach of relying on mapping and toward a broader view of levees and their impact.

I would hope that those making recommendations and decisions on a "national levee policy" recognize that the policy needs to include more than levee standards. A program that captures all the dimensions needs to address

- The condition and height of the levee;
- Identification of areas at most risk from internal drainage, overtopping, and failure;
- How well the levee has been and will be maintained;
- Flood warning and response activities to be implemented by the owning agency, including drills to close openings and patrolling during high water (if it's not a question of *if* the levee will be overtopped someday but *when*, then the policy must address how prepared the community is for that occasion);
- Whether the affected property owners, businesses, and residents are aware of the hazard and what they should do to protect their lives and property;
- Appropriate development requirements for new construction; and
- Appropriate flood insurance rates and purchase requirements.

The 1982 report recommended that FEMA map levee-protected areas as AL or BLP zones, depending on whether the levee provided 100-year protection. I submit that all levee-protected areas should be designated AL Zones. By declaring them "Special Flood Hazard Areas," the mandatory flood insurance purchase requirement will be in effect. FEMA can issue Part 60.3 regulations that set appropriate construction standards and can determine appropriate premium rates for AL Zones. All this can be done without special statutory authorization.

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A NATIONAL LEVEE POLICY (CONT.)

Once a levee is recognized as providing a certain level of protection, there must be mechanisms to ensure that the regulations are enforced, the public is made aware of the hazard, the emergency response system is tested and updated, and the structure is maintained. Regulatory enforcement can be monitored via the Community Assistance Visit process, although visits should be more frequent than they typically are these days.

I offer the Community Rating System as a tool for monitoring the other aspects. In fact, the CRS currently has a “Levee Safety” element that requires annual maintenance reports and annual inspections and drills of a levee failure emergency response plan. The CRS also credits outreach projects and other programs that inform the public about the hazards and appropriate protection measures. Although the CRS criteria are limited to certain types of levees, it could be expanded to be a requirement for all situations where communities want the protection provided by their levees to be recognized by the NFIP’s insurance rates and regulatory requirements.

In short, I hope we move away from thinking about a levee policy that just looks at levees as structures and instead develop a levee system policy that addresses all the critical dimensions—structural, emergency management, regulations, insurance, and public information and safety. In doing so, the policy should look at the risky shades of gray and get away from thinking only in the black-and-white terms of 100-year flood protection. ☐

French Wetmore, CFM
French & Associates, Ltd.
Park Forest, Illinois

Comments wanted on Benefit/Cost Analysis Position Paper

At its meeting in June, the ASFPM Board of Directors adopted as a discussion draft a White Paper addressing the use of benefit/cost analyses in flood mitigation programs. It has been posted on the ASFPM website so that floodplain managers with interest and experience in this matter can review and provide comments before a final version is produced.

The paper, “Use of Benefit/Cost Analysis for FEMA Programs,” explains how the components of the analysis required from FEMA by the Office of Management and Budget differ from those required from the Corps of Engineers—often to the detriment of mitigation and other nonstructural flood loss reduction projects. The paper describes the differing discount rates, damage curves, and benefits that are permitted under the existing OMB guidelines. The paper also discusses the difficulties that have been encountered in use of Hazard Mitigation Technical Assistance Program (HMTAP) funds for conducting benefit/cost analyses. It ends with a series of thoughtful recommendations for making benefit/cost analyses for FEMA programs more reflective of the true value that would accrue from flood mitigation projects, improving guidance on the conduct of benefit/cost analyses, establishing a national committee on benefit/cost analyses, and other pertinent issues.

>>> See the paper and the link for providing comments under “Other” on the website at <http://www.floods.org> or send comments directly to the Executive Office at memberhelp@floods.org.

FLOODPLAIN MANAGEMENT AWARDS

These outstanding individuals, projects, and programs in floodplain management were honored at the ASFPM's annual conference in Albuquerque, New Mexico.

The Goddard -White Award

The ASFPM's highest award was conferred upon **Edward A. Thomas, Esq.**, of Michael Baker, Inc., in recognition of more than 30 years of exemplary leadership in floodplain management. Thomas, who holds a bachelor's degree from Fordham University, a master's from Boston University, and a law degree from the New England School of Law, has played many roles throughout his career. The expertise he demonstrates today combines background in environmental sciences, response and recovery, emergency management, policymaking, and the law.

Thomas's lengthy tenure in public service included various high-level management positions within the Federal Emergency Management Agency, primarily in Region I in Boston, Massachusetts. He was also involved with construction and management of housing developments while with the Department of Housing and Urban Development in Boston.

Over the years Thomas worked on over 100 disasters and served as the Federal Coordinating Officer more than 50 times.

Thomas has been published extensively since 1975, and has written and lectured throughout the U.S. on topics related to the National Flood Insurance Program, floodplain management, and disaster recovery and response.

Upon his retirement from FEMA in 2004, Thomas joined Michael Baker Jr., as National Flood Insurance Program senior policy advisor and manager for mapping partnerships.

He has become a knowledgeable and vocal proponent of No Adverse Impact floodplain management, and is the designer and driving force behind a series of workshops held over the last few years through which public-sector and private-sector attorneys receive instruction on the Constitutional and legal aspects of floodplain management and the implications of an NAI approach.

The inscription on the plaque awarded to Thomas reads "for Outstanding Leadership to Reduce Disaster Impacts through Mitigation, Education, and Partnerships." However, had he been consulted, he might have asked that it read ". . . leadership to reduce disaster MISERY . . ." because, as counselor and mentor to many of his colleagues in the field, he often states that the avoidance of flood-caused misery—in all its pervasive forms—is the primary mission of all floodplain managers. His dedication to that cause has been unremitting.

The Larry R. Johnston Local Floodplain Manager Award

Stephen Mitchell of the City of Pascagoula, Mississippi was named Local Floodplain Manager of the Year. Although he had only been in his job since 2001, he has instituted policies and procedures to improve the city's compliance with the National Flood Insurance Program, including revising the building permit process, integrating floodplain management procedures, and improving enforcement of floodplain management ordinances. He persuaded local officials to adopt higher flood protection standards and resolved concerns about previous violations and program deficiencies. When Hurricane Katrina hit Pascagoula, 7,000 of the community's 8,500 structures were damaged, and Mitchell provided superb leadership in implementing an extensive damage assessment process that resulted in 900 of the 1,100 structures in the Special Flood Hazard Area being declared substantially damaged—all within one week of the storm. He then convinced local officials to adopt and enforce the higher advisory base flood elevations issued by FEMA. On this wave of achievement, for which Mitchell is largely responsible, the City plans to apply for a CRS Class 6 rating this year.

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FLOODPLAIN MANAGEMENT AWARDS (CONT.)

The James Lee Witt Award for Local Excellence in Floodplain Management

Hillsborough County, Florida, has re-mapped almost the entire unincorporated area of the county and when the staff realized that there would be significant changes to the flood maps, they engaged stakeholders early in forming an advisory group composed of insurance companies and agents, real estate agents, surveyors, community officials, and homeowners associations. This group's expertise helped the county devise a plan and schedule for outreach efforts to keep the media and the public informed about the map production process and help spread understanding about the flood risk conveyed on the new maps. FEMA and FloodSmart used the outreach material to develop a template for other community outreach projects.

Media Awards

(Three Media Awards were made this year.)

The New Orleans *Times-Picayune* was honored for its coverage of the 2005 Hurricane Katrina disaster. The newspaper's efforts (for which it also won a Pulitzer Prize) provided a valuable and exceptional service to south Louisiana and the Mississippi Gulf Coast in keeping them informed, explaining complicated issues, and producing a series of in-depth articles that helped people understand the complex nature of the hurricane and flood risk and the even-more-complex system for coping with it. Thanks in part to the *Times-Picayune*, Gulf Coast residents and officials are better armed with the knowledge to rebuild smarter, stronger, and safer communities.

The *Sun Herald*, serving Biloxi, Gulfport, and Pascagoula, Mississippi, received a Media Award for its performance during the 2005 hurricane season. Although hurricane damage shut down the paper's press, it had a business continuity disaster plan in place and had an alternate printer available so was able to keep publishing in the immediate aftermath of the storm. Staff were sent to the relief centers to distribute free newspapers to help keep people informed. The *Sun Herald* has continued to provide exceptional ongoing coverage of the response, recovery, and rebuilding processes.

A Media Award was presented to "**Flash Flood Alley**," a Public Broadcasting System movie and educational DVD that is part of a flood safety education project in Texas. The carefully researched, insightful program has been seen by tens of thousands of television viewers and is now being used in classrooms across the state. The project was coordinated with a dozen media partners and supported by 10 agencies and non-profit groups in Texas. The program was produced by Marshall Frech of Boulder, Colorado.

The John R. Sheaffer Award for Excellence in Floodproofing

The Sheaffer Floodproofing Award was presented to the **Huntington District of the Corps of Engineers** for its long-term efforts to improve the science and practice of floodproofing. The District's work constitutes the largest floodproofing program in the country, and includes the well-known Tug Fork Valley Project that spans the border between West Virginia and Kentucky. The District has helped numerous people with serious flooding problems while also keeping communities together. The District has been a fruitful source of lessons on techniques and programs and represents the integration of nonstructural and structural flood protection, with a focus on the community. Its Tug Fork Valley project was the subject of a technical field trip at the last National Floodproofing Conference.

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FLOODPLAIN MANAGEMENT AWARDS (CONT.)

Award for Meritorious Achievement in Floodplain Management

This new award recognizes individuals other than local officials who have achieved success in a significant aspect of floodplain management. **Christy Miller**, CFM, Alaska State Floodplain Manager, was the first recipient of this award, in tribute to her 25 years as the main (sometimes only) voice for the wise use of Alaska's floodplains and her accomplishments toward the advancement of safe development in that state. Her ability to build relationships with business community leaders has formed an effective bridge between the private sector and flood hazard concerns, with a special focus on land use planning. Miller has been a continuously active contributor to the work of the ASFPM as well, serving as an officer and most recently as a member of the NAI Steering Committee and leader of the production of the "NAI for Small Communities" brochure. Her career-long dedication to floodplain management and her hard work over the long term have resulted in noticeable advances in flood loss reduction.

FEEDBACK WANTED ON FEMA'S FLOOD MAP MODERNIZATION PROGRAM PRODUCTS/SERVICES

FEMA's Flood Map Modernization program is a multi-year effort to make National Flood Insurance Program maps more reliable, more available, and easier to use and update. Over the next several years, many communities will be getting new Flood Insurance Rate Maps (FIRMs). Most of these will be digital maps that can be incorporated into a geographic information system (GIS). The updated data and the maps will be accessible to all through a web-based portal called the Mapping Information Platform (MIP) on FEMA's website (<https://hazards.fema.gov/wps/portal>).

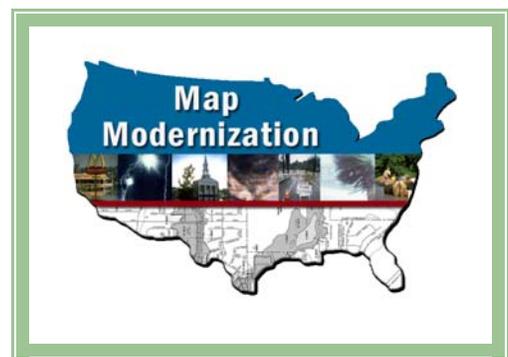
For some FEMA-provided products and services on the MIP, end users may need training and enhancements also may be required to fully meet user requirements. Accordingly, FEMA has contracted with a Systems Engineering and Technical Assistance (SE&TA) services contractor to assess the effectiveness of the Map Mod program's products and services from the perspective of the end users, particularly state and local floodplain managers.

The SE&TA contractor has drafted a series of questions to obtain feedback related to the users' view of the accuracy, utility, and ease of use of the Map Mod products. The ASFPM is looking for volunteers from communities that have recently received Digital Flood Insurance Rate Maps (DFIRMs) to supply feedback on these questions.

Persons interested in participation in this effort should contact French Wetmore at FrenchAsoc@aol.com. French will pass the information on to FEMA's SE&TA contractor. The SE&TA contractor will select a representative sample of the volunteers and e-mail them a copy of the questions developed for obtaining user feedback. Subsequently, a telephone interview will be scheduled at the volunteer's convenience. It is expected that the interview will take 30-45 minutes.

This process for obtaining user feedback will continue as new maps are published for the various communities. Interviewees later may be asked to update their responses to help measure whether the program has made improvements reflecting user input.

If you are interested in helping FEMA improve its Map Mod products and services, including the DFIRMs and the MIP, please volunteer for this end-user feedback effort. ☐



Washington Report

WATER RESOURCES DEVELOPMENT ACT 2006 PASSED BY SENATE

After being stalled for more than four years, the Senate finally took up and passed the omnibus Water Resources Development Act of 2006 (S.728) on July 19th. The WRDA legislation, usually (at least) initiated in Congress every two years, generally carries both policies and authorizations of programs, projects, and studies for the U.S. Army Corps of Engineers. The last bill enacted was WRDA 2000, which included the landmark Comprehensive Everglades Restoration program. The House passed bills in 2002 and 2003, but Senate action did not follow. Difficulties in resolving differences between the House and Senate versions held up the bills introduced in 2004 and 2005 [see *News & Views*, April 2005, p. 10].

To complicate matters, the House passed a WRDA bill in July of last year and the Senate Committee on Environment and Public Works had reported out a WRDA in the spring of 2005. Neither of those bills had been crafted to take into account the lessons learned from the hurricanes that devastated much of the Gulf Coast in the fall of 2005. The House Transportation and Infrastructure Committee began work on a post-Katrina levee safety bill in December and reported the bill from Committee on July 28th. Because the Senate Environment and Public Works Committee had not yet surfaced a levee safety bill, the managers of the WRDA bill included their own version of levee safety legislation in a floor “managers amendment” that includes a levee inventory and safety program. The measure is modeled on the dam safety program, but differs somewhat from the levee safety program being developed in the House [see *article on page 15 of this issue*].

Corps Reform Measures Included

In a dramatic landmark Senate decision, a floor amendment to the WRDA bill offered by Russ Feingold (D-WI), John McCain (R-AZ), Tom Carper (D-DE), Joseph Lieberman (D-CT), Jim Jeffords (I-VT), and Susan Collins (R-ME) passed by a vote of 54 to 46. It provides for independent peer review of Corps projects that are to cost over \$40 million. It also provides for other means by which a project can be referred for peer review and specifies the independent structure for such reviews. An alternative amendment offered by EPW Committee Chairman James Inhofe (R-OK) and Christopher “Kit” Bond (R-MO) was defeated 51 to 49. It would have provided for peer review but largely within a Corps framework. The ASFPM had expressed strong support for the Feingold-McCain amendment in a letter to Senator Feingold (available on the ASFPM website).

The newly passed Senate version of WRDA 2006 incorporates long-needed shifts in water resources policies as implemented by the Corps. For years, several groups and Members of Congress working on Corps “reform” have maneuvered to include policy and procedural revisions in new WRDAs. Thus the incorporation in WRDA 2006 of independent review of Corps projects culminates years of public debate over a mechanism to include external review and commentary on Corps plans early enough in the process to avoid delays and also provide useful direction and improve accountability.

Revision of Principles and Guidelines

An equally remarkable achievement in the underlying bill is that it directs the President to establish a new Cabinet-level council called the Water Resources Planning Coordinating Committee, composed of the Secretaries of Interior, Agriculture, Health and Human Services, Housing and Urban Development, Homeland Security, Transportation, Energy, and Commerce; the Administrator of the Environmental Protection Agency; and the Chair of the Council on

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Washington Report (cont.)

Environmental Quality. The Committee is charged with responsibility to revise, within two years, the 1983 *Principles & Guidelines* and other related documents that guide Corps planning. Among the considerations the Committee is directed to make in revising the guidelines are

- Eliminating biases and disincentives that discourage the use of nonstructural approaches to water resources development and management, and fully accounting for the flood protection and other values of healthy natural systems;
- Promoting environmental restoration projects that reestablish natural processes;
- Assessing and evaluating the impacts of a project in the context of other projects within a region or watershed;
- Requiring the use of modern economic principles and analytical techniques, credible schedules for project construction, and current discount rates as used by other federal agencies;
- Analyzing and incorporating lessons learned from recent studies of Corps programs and disasters such as Hurricane Katrina and the Great Midwest Flood of 1993; and
- Encouraging wetlands conservation.

The WRDA bill is expected to go to Conference in September to resolve differences between it and the House bill, and many of these provisions are sure to be the subject of negotiations as the final bill is formulated. In addition, conferees will endeavor to consolidate the provisions of the House-passed levee safety bill (on which the ASFPM has testified) with the measures included in the Senate WRDA.

>>> The text of the WRDA bill, including amendments, can be accessed by going to <http://thomas.loc.gov> and searching for bill number H.R. 2864.EAS.

THE RUNUP TO CONGRESSIONAL RECESS

The Congress was in session for only three weeks in July due to the Fourth of July recess. Those three weeks were particularly busy ones because Members of Congress were eager to go home to campaign during the August recess.

As a quick snapshot, the Senate actually passed the WRDA bill (Water Resources Development Act) with a newly added section on levee safety [*see article on page 15 of this issue*]. The Senate Homeland Security and Governmental Affairs Committee (HSGAC) introduced, marked up, and reported out its bill to restructure FEMA and to amend the Stafford Act. The Senate Environment and Public Works Committee held a hearing on recommendations for changes to the Stafford Act (at which Pam Pogue, ASFPM Chair, testified). The Senate passed the Appropriations bill for the Department of Homeland Security, and many Senate Appropriations Subcommittees marked up their versions of appropriations bills for FY 2007. A subcommittee of the House Committee on Transportation and Infrastructure held a hearing on the Dam Safety Rehabilitation and Repair Act, HR 1105.

When Congress returns in September, it is likely that the Senate floor schedule will be filled with appropriations bills as the end of the fiscal year approaches along with the October recess to campaign. It is quite likely that the Senate HSGAC bill dealing with FEMA's structure and with Stafford Act amendments will be scheduled for the Senate floor during the week of September 10th. It is now assumed that there will be a lame duck session after the election.

So, suspended somewhere in mid-air are several measures of interest to floodplain managers, some of which are discussed below.

National Flood Insurance Program Reform

The status remains the same as just before the Fourth of July recess: the House has passed its bill (H.R. 4973) and the Senate Banking Committee reported out its bill (S. 3589).

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Washington Report (cont.)

During July, several “holds” on the Senate bill delayed its being brought to the floor for a vote. Some of the holds related to concerns about the provision to forgive the more than \$20 billion borrowed from the U.S. Treasury to pay flood insurance claims. Those Senators are seeking assurances that the bill also takes significant steps toward actuarially sound premium rates and toward financial stability. Some are expressing concern that it might not be possible to bring the bill to the floor until the lame duck session in November.

Because there is so much interest in these bills among floodplain managers, a list of the main similarities and differences between the House and Senate bills is provided below.

Similarities in the House and Senate NFIP Reform Bills

Although there are some relatively small differences, both bills include provisions to

- Allow the maximum annual premium increase to go from 10% to 15%;
- Increase insurance rates to actuarial on new and reinstated policies for pre-FIRM structures;
- Increase civil penalties on lending institutions for violations of the mandatory flood insurance purchase requirement;
- Include some provision for FEMA participation in non-binding mediation of claims issues when there are multiple claims for the same property;
- Amend the Real Estate Settlement Procedures Act (RESPA) to create a requirement for notice that purchasers in areas of elevated flood risk outside of the 100-year floodplain are made aware of the risk and given an opportunity to purchase flood insurance;
- Re-establish the Technical Mapping Advisory Council;
- Expand the flood map modernization effort to include mapping the 500-year floodplain and areas of residual risk behind levees and below dams, include incorporation of relevant data from other federal agencies and additional data, and provide additional appropriations. The House bill provides a total of \$300 million and the Senate bill provides \$400 million; and
- Reiterate requirements of the 2004 Flood Insurance Reform Act and call for a number of studies.

Some Differences between the House and Senate NFIP Reform Bills

- The Senate bill expands mandatory purchase to residual risk areas behind levees and below dams; the House bill requires a study of the regulatory, financial, and economic impacts of doing so.
- The Senate bill sets up a Catastrophe Reserve Fund totaling 1% of NFIP loss exposure to be created from premium income over a 10- year period; the House bill has no comparable provision.
- The Senate bill forgives the NFIP debt to the Treasury from the 2005 catastrophic losses and reduces borrowing authority to \$1.5 billion; the House bill increases borrowing authority to \$20.775 billion, and does not forgive the debt.
- The Senate bill says FEMA may adjust rates after map revisions; the House bill has no such provision.
- The Senate bill requires FEMA to include catastrophic loss years in calculation of the average loss year; the House bill does not.
- The House bill reduces the waiting period from 30 days to 15 days; the Senate bill does not.
- The House bill provides for increases in coverage to \$335,000 and \$670,000 for residential and non-residential properties, respectively, and an increase in contents coverage; the Senate bill does not.
- The House bill provides for optional coverage at actuarial rates for living expenses, business interruption, and basement and contents replacement cost coverages; the Senate bill does not.
- The House bill provides the FEMA Director with authority to require use of advisory (interim) elevation data for purposes of the NFIP; the Senate bill does not.
- The House bill provides for use of “demolish and rebuild” as a mitigation option under Flood Mitigation Assistance (floor amendment by Bobby Jindal (R-LA)); the Senate bill does not.

Recent Issues

The ASFPM has expressed concern about the overall impact on the NFIP of moving so many categories of policy holders toward actuarial rates at the same time as increases that would be required to create the catastrophe reserve fund of about \$9 billion over a 10-year period.

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Washington Report (cont.)

Language in the Senate bill calling for actuarial rates on new policies on pre-FIRM structures at the time of sale, unless the property has a flood insurance policy in effect, as well as language in a House floor amendment (by Scott Garrett, R-NJ) providing for actuarial rates on all new policies on pre-FIRM structures are particularly worrisome. In a House floor statement, Earl Blumenauer (D-OR) raised questions about potential unintended consequences on lower income owners and on community participation in the NFIP, especially in areas with a large stock of older housing. Overall economic impacts and the effect on the program are not well understood. In response to a request for comments on S. 3589, the ASFPM sent a letter to the Chairman and Ranking Minority Member of the Senate Banking Committee. (The letter is posted on the ASFPM website, along with Pam Pogue's testimony before the Senate Banking Committee in February and Chad Berginnis' testimony before the House Committee on Financial Services last November.)

Stafford Act Amendments

There are several approaches under consideration to address changes in the Stafford Act. Since FEMA was folded into the Department of Homeland Security, it has not been entirely clear which Senate committee has jurisdiction over the Stafford Act programs (Disaster relief, Pre-Disaster Mitigation (PDM) and the Hazard Mitigation Grant Program (HMGP)). The Environment and Public Works Committee (EPW) held a hearing on July 27th to examine the status of mitigation programs at the present time and to explore improvements to the Stafford Act. The Homeland Security and Governmental Affairs Committee (HSGAC) marked up and reported out its bill dealing with both FEMA's structure and amendments to the Stafford Act. The House Committee on Transportation and Infrastructure has been drafting a bill to make changes in the Stafford Act, but committee action has been postponed.

ASFPM Chair Pam Pogue testified at the July 27th EPW hearing on a panel with the National Emergency Management Association and the American Red Cross. The first panel included witnesses from FEMA, the Corps of Engineers, the Task Force on Emergency Preparedness, and the Environmental Protection Agency. The second panel was particularly interesting in that the testimony and discussion largely focused on the key importance of mitigation and its apparent demotion now that FEMA is a part of DHS. This hearing was a thoughtful examination of what the Stafford Act should be accomplishing, how it could do better, and how its functioning is affected by the structural changes affecting FEMA. The ASFPM testimony is on its website and the other testimony can be found by going to <http://thomas.loc.gov>, then to Senate committees, then to Environment and Public Works, then to the date of the hearing.

Also on July 27th, the Senate HSGAC marked up its bill, which deals not only with the FEMA structure, but also with Stafford Act amendments. Those changes are largely associated with problems that emerged after Hurricanes Katrina and Rita. S. 3721, the Post-Katrina Emergency Management Reform Act of 2006, emerged from the recommendations of the Committee's investigative report on the problems that followed Hurricane Katrina. It largely puts FEMA back together again by returning the preparedness function, various grant programs, and state and local coordination. It provides FEMA with considerably greater autonomy (similar to that of the Coast Guard) and specifically states that DHS may not utilize FEMA funds without Congressional approval. Although the FEMA Director would be given a direct advisory role to the President, he or she would still report to the Secretary of DHS. The draft bill had called for renaming FEMA the U.S. Emergency Management Authority, but an amendment to retain the current agency name passed during mark-up.

S. 3721 would make a very important change in the formula used to determine how much HMGP funds will be available. It would restore HMGP to the 15% formula "for the amounts spent up to \$2 billion, 10% for amounts between \$2 billion and \$10 billion, and 7.5% for amounts spent between \$10 billion and \$35.3 billion."

[continued on page 15]

Washington Report (cont.)

The bill also establishes a section of the Stafford Act focused on catastrophic disasters involving some authorities for the President including waivers of caps and cost shares. The full text of the large bill (more than 200 pages) as reported is not yet available online, but should be within a few days.

FEMA and DHS

The latest developments on this front have taken place in the Senate. As described above, Chairman Susan Collins (R-ME) and Ranking Minority Member Joseph Lieberman (D-CT) introduced S. 3721, which would substantially restore FEMA's previous areas of responsibility and add some relating to human-made disasters. The bill was marked up and reported out of the HSGAC on July 27th. The amended text as reported should be available shortly.

Meanwhile, Collins offered an amendment on the Senate floor to the DHS Appropriations bill (H.R. 5441), which included substantially the same provisions for restructuring FEMA and its relationship with DHS. The amendment was adopted by a vote of 87 to 11. A subsequent amendment offered by Hillary Clinton (D-NY) to restore FEMA's independent status was defeated.

On the House side, there seems to be a stalemate. The two bills reported out of three committees had been scheduled for House floor consideration and then postponed. H.R. 5316 would take FEMA out of DHS and H.R. 5351 would somewhat restore FEMA's responsibilities, but keep it within DHS. Based on the ASFPM Board's 2004 adoption of a resolution calling for restoration of FEMA's independent agency status, ASFPM has expressed support for H.R. 5316. The issue could also be addressed by a House-Senate Conference Committee on DHS appropriations.

Levee Safety and WRDA

The Senate passed WRDA, S.728. This action is important not only for specific projects, programs, and studies to be authorized, but also because EPW Committee Chairman James Inhofe (R-OK) had insisted that other important measures such as levee safety not be acted on as stand-alone bills, but as part of WRDA [*see article above*].

The bill includes some important policy and program components. A floor amendment by Senators Feingold (D-WI) and McCain (R-AZ) provides for independent peer review of projects over \$40 million. It also provides for other means by which a project can be referred for peer review and specifies the independent structure for such reviews.

The Managers' Amendment (a major amendment offered by the Chairman and committee, often as a substitute bill) included a levee inventory and safety program. It is modeled on the dam safety program, but differs somewhat from the levee program being developed in the House.

The House Levee Safety bill, H.R. 4650, was reported out of the Transportation and Infrastructure Committee on June 28th. It too authorizes a national inventory of levees and their general condition, as well as a safety program modeled after the dam safety program. ASFPM Chair Pam Pogue testified before the Committee's Subcommittee on Water Resources in April. That testimony is on the website and has led to further discussions with the committee staff as the bill has developed.

Appropriations

The House has passed 11 of its 12 regular appropriations bills (all except Labor/Health and Human Services/Education). During June and July, the Senate Appropriations Committee marked up most of its appropriations bills, but only Homeland Security has passed the Senate. Most of the remainder are expected to be brought to the Senate floor in September with House-Senate Conferences to follow, resolving differences. The probable exception is the Labor/HHS/Education Appropriations bill, which many expect will be held over until the lame duck session in November.

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Washington Report (cont.)

A few newer developments on the appropriations bills are noted here.

Department of Homeland Security/FEMA—H.R. 5441 passed the Senate on July 13th with the Collins amendment to restructure FEMA. Additionally, an amendment by Trent Lott (R-MS) provides for investigation by the FEMA Inspector General of the wind vs. flood issue in settlement of insurance claims.

Energy and Water—The Senate version was reported out of the Appropriations Committee on June 29th. It tracked the House version in not approving the Administration's request for \$20 million in FY '07 to continue the levee inventory initiated with \$30 million in the third Supplemental Appropriations bill passed for FY '06. This is a concern because of the importance of understanding the size and scope of the levee safety problem. In an effort to address needs for technical assistance and levee assessment, the Senate bill does significantly increase funding for the Flood Plain Management Services (FPMS) program.

Interior and Environment—The Senate bill tracks the House bill in providing the additional \$2 million requested for the National Streamgange Information Program (NSIP) and adding \$2 million to restore the cut requested for the Cooperative Streamgange program. All funds requested throughout the USGS budget for the Multihazards Initiative were denied.

The Interior bill includes funds for EPA, the National Park Service, and the Fish and Wildlife Service. The bill number is HR 5386 accompanied by H. Rept. 109-465 and S. Rept. 109-275.

Science, State, Justice, Commerce/NOAA—The House bill reduces funding for NOAA by \$300 million below the budget request for FY '07 and by \$500 million below the FY '06 funding level. The Senate bill, however, would fund NOAA at \$535 million above the FY '06 level and at \$753 million over the budget request. The Senate report accompanying the bill cites the importance of ocean policy reform and of implementation of the Joint Ocean Commission's recommendations. The bill number is HR 5672, accompanied by H. Rept. 109-520 and S. Rept. 109-280.

—Meredith R. Inderfurth, Washington Liaison
Rebecca Quinn, CFM, Legislative Officer

— All referenced legislation and committee reports —
can be viewed at <http://thomas.loc.gov>.

ASFPM AWARDS

At the 2006 Annual Conference, the ASFPM recognized several people for their work in furthering professionalism in floodplain management and for contributions to the ASFPM.

■ The Jerry Louthain Service to Members Award was presented to **Dale Lehman**, URS Corporation, in recognition of his long-time membership, service on the Board of Directors, and participation in numerous committees dealing with the ASFPM's internal and financial operations. Lehman has been a strong supporter of the ASFPM Foundation since its inception, serving as a Trustee since 2002 and chairing the corporate fundraising committee. He continues to provide knowledgeable input on corporate issues and internal operations.

■ The John Ivey Award for Superior Effort in Certification was presented to **Anita Larson**, ASFPM Certification Program Coordinator, for her unflagging efforts in managing and administering the ASFPM's Certified Floodplain Manager program. Her careful attention keeps not only the ASFPM program but also the accredited certification programs of Illinois and North Carolina running smoothly. Larson continually contributes to the Certification Board of Regents useful ideas for improving the application, the examination, and the renewal and reporting procedures.

■ Honorary Lifetime Membership was conferred on **Roy Sedwick**, Lower Colorado River Authority, in tribute to his endless work to foster floodplain management professionalism in Texas. He founded the Texas Floodplain Management Association in 1988, serves as its Executive Director, has conducted all the TFMA conferences, and was the local host for the ASFPM's national conference when it was held in Austin in 2000. Sedwick helped start the Texas certification program, which is now accredited by the ASFPM and has issued more than 600 certifications. □

CONFERENCE (CONT.)

for yearly goals of funding distribution and map production. He indicated the agency's intention to make a "seamless" transition from map modernization to map maintenance. Jim Williams, Nebraska Department of Natural Resources and Co-Chair of the ASFPM Mapping and Engineering Standards Committee, was complimentary in describing the great strides made in Map Mod to date, and particularly the needed shifts that were announced in the Mid-Course Adjustment report issued earlier this year. However, he noted, there is still a need at state and local levels for a holistic plan for digital data use—the modernized maps will be far more effective if they are integrated with other tools.

On Thursday, the final gathering of the entire group focused on levees. Peter Rabbon, Corps of Engineers, noted both the need and prospects for coordination among all levels of government in addressing levee safety: the states and localities understandably look to the federal government for funding assistance and legislation establishing standards so that they can carry out assessments, certification, and other programs. Tom Waters, Corps of Engineers, described deliberate efforts to incorporate into levee design, construction, and maintenance some of the lessons learned from Katrina about resiliency, margins of safety, redundancy of engineered structures, using a systems approach, and the possible shortcomings in engineering standards and guidelines being used today. David Maurstad, FEMA, discussed the opportunity presented by the momentum from Katrina to make progress in establishing integrated policy, procedures, and legislation for levees. He indicated as well that all levee-related information needs to feed into the production of Digital Flood Insurance Rate Maps, and that FEMA will work with the Corps on a the creation of a national levee database to support decisionmaking.

Interspersed with these plenary presentations were dozens of small-group panel sessions exploring erosion problems; coastal issues; No Adverse Impact floodplain management; mapping; floodplain delineations with GIS; integrated watershed management; the use of modeling and other technology; public outreach projects; mitigation success stories; the National Flood Insurance Program; political and ethical concerns; and many others.

The ASFPM annual membership and committee meetings were held, as is customary, and new Board members were elected [*see back panel of this issue*]. Again the Certified Floodplain Managers examination was administered. The exhibit halls provided a place to get acquainted both with other people and with new activities, products, and programs in all aspects of floodplain management. The ASFPM Foundation had a successful silent auction fundraiser. Regions, chapters, and state associations held breakfast gatherings to exchange news and ideas, and there were also early-bird roundtables centered on coastal issues; floodplain management standards in other countries; subsidence, map maintenance, and training. At the Thursday luncheon annual awards were presented [*see articles on page 8 and page 16*].

Training workshops were held before, during, and after the conference, including the ever-popular Floodplain Management 101; coastal storm surge modeling; teaching floodplain management; several sessions on various aspects of Flood Insurance Rate Maps; repetitive loss verification; producing mitigation grant applications; using the elevation certificate; No Adverse Impact in the coastal zone; implementing Disaster Mitigation Assistance grants; and others. Technical field trips examined the stormwater projects, flood control measures, and floodplain management techniques that are effective in an arid climate. The annual golf tournament and other chances to socialize and network rounded out the week.

For an updated participant list, photos, and other information, see <http://www.floods.org>. The technical papers presented at the conference will be released as proceedings this fall. ❧

The ASFPM offers grateful thanks to the volunteers responsible for making this huge event successful. Appreciation is due the Conference Host, the New Mexico Floodplain Managers Association (led by Grant Pinkerton, CFM; Wendy Blackwell, CFM; Paul Dugie, CFM; Joan "Bet" Lotosky, CFM; Chris Nobes, CFM; Elvidio Diniz, CFM; Bill Borthwick, CFM; Mike Rudloff, CFM; Mike Czosnek, CFM; Les Bond, CFM; and Estelle Bond); Program Chair Valerie Swick, CFM; Standing Conference Committee members Dan Accurti, Rod Emmer, and Dan Sherwood; and the ASFPM staff.

***Rapanos and Carabell* Wetlands Decisions (cont.)**

and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

■ “...the [Clean Water Act] confers jurisdiction only over relatively permanent bodies of water. Traditionally, such “waters” included only discrete bodies of water.”

One Vote to Return to Lower Court for Re-hearing

Finally, Justice Kennedy said that the matter should be returned to the lower courts for re-processing in accordance with revised instructions. Kennedy indicates that

■ The lower courts may well find that the Corps appropriately had jurisdiction over the *Carabell* and *Rapanos* wetlands;

■ The lower courts must clarify concerns expressed by the Corps in defending its determination that the areas in question were in fact “wetlands of the United States.” Kennedy specifically points to stated conclusions by the Corps that the fill requested in the Section 404 permit would result in “major concerns about water quality” as needing further elucidation as to the nature of that “major concern.”

■ The Corps should establish a clear nexus between federal concerns with respect to the “waters of the United States” and the particular land to be regulated. Justice Kennedy appears to desire some sort of quantification of what impacts will occur to “waters of the United States” from filling or otherwise disturbing the land in question.

■ Because the Sixth Circuit applied an insufficiently clear standard to determine whether the wetlands at issue are covered “waters,” and because of the paucity of the record, the cases are remanded for further proceedings.

Result

As a matter of federal jurisprudence, the Kennedy opinion seems to me to be the “controlling opinion” in this matter both in terms of reality (*de facto*) and as a matter of law (*de jure*). In any case, the cases have been returned to the lower courts to reprocess in accordance with Justice Kennedy’s controlling opinion. Perhaps asking and answering a few questions will help in understanding this complex case.

Does this case mean that the Court has somehow disapproved of either floodplain or wetland regulation?

No, no! Quite the contrary! Four Justices believe that the Corps of Engineers has stretched federal jurisdiction far beyond the statutory intent of Congress. That is, that the federal government is interfering with what are properly the land use prerogatives of state and local government. There is no indication whatsoever from any of the Justices that wetland and floodplain regulation is anything other than a perfectly appropriate activity of government. The disagreement among the Justices concerns which level of government is the appropriate one to make land use decisions about wetlands that are not physically linked by water to “waters of the United States” on an ongoing basis. Four Justices think that the wetlands in question can be properly regulated by our federal government based on the Corps’ interpretation of the Clean Water Act as that Act is written. The controlling opinion by Justice Kennedy requires the lower courts to determine if there are additional facts that will establish a nexus between the wetlands and the “waters of the United States.”

What in the world is a NEXUS?

“Nexus” is a legal term that means a connection or link between two things. Sometimes the Supreme Court uses the term “nexus” in the context of a test to determine whether there is an extremely close, precise, and definite fit, as when it is evaluating whether the actions of a private

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Rapanos and Carabell Wetlands Decisions (cont.)

individual should be considered to be the responsibility of another seemingly unrelated party. See *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). On the other hand, in cases analyzing whether a government action is an unconstitutional “taking” of property in contravention of the Fifth Amendment of the U.S. Constitution, the Court uses the term “nexus” to determine whether a claimed relationship between an articulated government interest and the exaction imposed on a development permit seeker has any reality whatsoever. [See the discussion of *Nollan vs. California Coastal Commission*, 483 U.S. 825 (1987); and *Dollan vs. Tigard*, 512 U.S. 374 (1994) contained in “Courts Issue Good News for Floodplain Management,” found at the ASFPM website at <http://www.floods.org>.] So, as Justice Kennedy uses the term “nexus,” it means either (a) a very tight relationship, or (b) more than an ephemeral relationship. Or, it may mean something in between. Take your pick. My legal analysis is that Kennedy most likely means “nexus” as the term is used in the *Nolan* and *Dollan* cases; that is, a relationship that is real, and not a clever falsehood. Justice Kennedy also seems to want to see something more specific and tangible than an unsubstantiated conclusion that there is a “major effect” by one thing on another.

As water managers know, quantitative analysis of many water quality effects may not always be possible. However, using flood and stormwater hydrology and hydraulics, quantitative numerical indications of the effect the wetland in question would have on flooding of the “waters of the United States” should be feasible, and would seem to be a great place to start developing an analysis of the potential effect of a proposed development. This suggestion that the effect of development on the wetland in question is a starting point for an analysis of whether there is a relationship between the land in question and “waters of the United States” is bolstered by language in Justice Scalia’s opinion, when he indicates that, in the context of the Clean Water Act,

The nexus required must be assessed in terms of the Act’s goals and purposes. Congress enacted the law to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. §1251(a), and it pursued that objective by restricting dumping and filling in “waters of the United States,” §1311(a), §1362(12). The rationale for the Act’s wetlands regulation, as the Corps has recognized, is that wetlands can perform critical functions related to the integrity of other waters—such as pollutant trapping, FLOOD CONTROL, AND RUNOFF STORAGE. 33 C.F.R. §320.4(b)(2). ACCORDINGLY, WETLANDS POSSESS THE REQUISITE NEXUS, AND THUS COME WITHIN THE STATUTORY PHRASE “NAVIGABLE WATERS,” IF THE WETLANDS, ALONE OR IN COMBINATION WITH SIMILARLY SITUATED LANDS IN THE REGION, SIGNIFICANTLY AFFECT THE CHEMICAL, PHYSICAL, AND BIOLOGICAL INTEGRITY OF OTHER COVERED WATERS UNDERSTOOD AS NAVIGABLE IN THE TRADITIONAL SENSE. WHEN, IN CONTRAST, THEIR EFFECTS ON WATER QUALITY ARE SPECULATIVE OR INSUBSTANTIAL, THEY FALL OUTSIDE THE ZONE FAIRLY ENCOMPASSED BY THE TERM “NAVIGABLE WATERS” [emphasis added].

What does this case mean for floodplain and stormwater managers?

This case presents an enormous opportunity for floodplain and stormwater managers to further develop win-win relationships with wetland managers, as well as all others concerned with water quality. Stormwater and floodplain managers are increasingly aware of the enormous flood protective qualities of our precious wetlands. Destruction of wetlands can and has had severely deleterious effects on flooding in this nation. We now can offer help to beleaguered wetland managers as they try to protect areas that can help prevent catastrophic flooding.

When one is seeking to quantify the impact of filling a wetland, floodplain/stormwater hydrology and hydraulics are invaluable analytical tools. As set forth in great detail in the publication *No Adverse Impact Floodplain Management and the Courts* (found on the ASFPM website), courts have historically been extremely sensitive to protecting public safety by supporting fair and proper regulation of development so that it does not cause harm (including flooding) to others. Or, as the ASFPM summarizes the concept: courts are quite prone to accept a No Adverse Impact analysis. I suggest that the *Rapanos* and *Carabell* cases offer significant opportunities for

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***Rapanos and Carabell Wetlands Decisions* (cont.)**

stormwater and floodplain managers to help wetland managers as they define the quantitative impacts on flood depths and velocities that occur when wetlands are filled.

Specifically, floodplain and stormwater managers can help wetland managers understand and quantify the fundamental fact that “today’s floodplain is not tomorrow’s floodplain.” When we have wetland loss, loss of natural valley storage, as well as loss of permeable surface area, we have documented that flood heights can increase dramatically. In actual calculations using future-conditions hydrology and hydraulic modeling in North Carolina, it was determined that even when communities comply with the minimum standards of the National Flood Insurance Program, flood heights may increase by nearly six feet as wetlands and floodplains are developed.

This sort of quantitative analysis will help determine whether some proposed activity in wetlands, “alone or in combination with similarly situated lands in the region” (Justice Scalia helpfully points out that cumulative impacts should be considered) has a nexus to the “waters of the United States.”

Are there any wetland, stormwater, or floodplain managers who need to be particularly concerned about specific aspects of this decision?

Yes, those whose responsibilities include areas of intermittent or occasional flows in streams, creeks, or arroyos. The Scalia opinion indicates that “...establishing that wetlands such as those at the *Rapanos* and *Carabell* sites are covered by the Act requires two findings: First, that the adjacent channel contains a “water of the United States,” (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

If the majority of the Court were to go along with this concept, than huge areas of the nation that contain intermittent streams and creeks, in the arid West in particular, apparently would not be covered by the protections currently afforded by the Clean Water Act. Fortunately Justice Kennedy’s controlling opinion gives us an opportunity to show that there is indeed a “nexus” between these intermittent bodies of water and “the waters of the United States.”

So, where do we go from here?

Wetland managers will find the expertise of floodplain managers and stormwater managers of considerable value in beginning the process of defining the nexus between activities that affect wetlands and floods on the “waters of the United States.” Floodplain and stormwater managers need to support the actions of wetland managers as those water stewards restore, protect, and nurture the wetlands we floodplain and stormwater managers find so valuable in reducing and preventing the awful misery that floods cause on developed property.

In my opinion, the water managers of this nation need to work together better than we have in the past. Let us—all of us floodplain and stormwater managers—reach out to the wetland and water quality community and offer help, support, and technical advice.

>>> An enormous amount of additional information on wetlands in general, as well as the *Rapanos* and *Carabell* cases, can be found on the excellent and informative website of the Association of State Wetland Managers (ASWM) at <http://www.aswm.org>.

Ed Thomas is a floodplain manager and disaster relief specialist who is also an attorney. The opinions expressed are the author’s, and do not reflect approval by any organization.

This is an opinion piece based on general principals of law. It is not legal advice. For legal advice see a licensed attorney in your jurisdiction.

Michael Baker Inc. provided the funding for the research and development of this article.

Publications, Software, AV & the Web

Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal reports that in the last two years 1,797,000 acres of wetlands have been restored, created, protected, or improved. The figure includes 588,000 acres of created wetlands that did not exist in 2004. This is in response to a goal set by the President on Earth Day 2004 to move beyond "no net loss" of wetlands and attain an overall increase in the amount and quality of wetlands in America. The report also describes the contributions of key government agencies to wetlands protection, and outlines the requested budget and plans for 2007. Council on Environmental Quality. 2006. 57 pp. Available at http://www.whitehouse.gov/ceq/wetlands_200604.pdf.

Calendar

See more flood-related meetings, conferences, and training at
<http://www.floods.org/Conferences,%20Calendar/calendar.asp>.

August 11–13, 2006: GOVERNOR'S RECOVERY EXPO: PRESERVING OUR PAST, BUILDING OUR FUTURE, Biloxi, Mississippi. Sponsored by Governor Haley Barbour's Office of Recovery and Renewal. See <http://www.governorbarbour.com/recovery/>.

August 14–17, 2006: NATIONAL FLOOD INSURANCE PROGRAM COMMUNITY RATING SYSTEM (E278), Emergency Management Institute, Emmitsburg, Maryland. Contact (800) 238-3358 or see <http://www.training.fema.gov/EMIweb/>.

August 14–17, 2005: ADVANCED HAZUS-MH FOR FLOOD (E172), Emergency Management Institute, Emmitsburg, Maryland. Call (800) 238-3358 or see <http://www.training.fema.gov/EMIweb/>.

August 21–25, 2006: RETROFITTING FLOODPRONE RESIDENTIAL BUILDINGS (E279), Emergency Management Institute, Emmitsburg, Maryland. Contact (800) 238-3358 or see <http://www.training.fema.gov/EMIweb/>.

August 22–24, 2006: MONTANA HYDROLOGY CONFERENCE, Helena, Montana. Sponsored by the Great Falls Office of the National Weather Service. Contact Gina Loss at gina.loss@noaa.gov.

August 26–27, 2006: ENGINEERING ESSENTIALS FOR WETLANDS AND WETLAND REGULATIONS (NCES 8271), Denver, Colorado. Sponsored by the University of Colorado at Denver Continuing Engineering Education Center. Call (303) 556-4907 or see <http://www.cudenver.edu/engineer/cont>.

August 27—September 1, 2006: INTERNATIONAL DISASTER REDUCTION CONFERENCE 2006, Davos, Switzerland. Contact Conference Secretariat, IDRC Davos 2006, SLF, Fluelastrasse 11, CH-7260 Davos Dorf, Switzerland; +41 (0)81 417 02 25 or see <http://www.davos2006.ch/1stannouncement.html>.

August 28–31, 2006: ADVANCED FLOODPLAIN MANAGEMENT CONCEPTS (E194), Emergency Management Institute, Emmitsburg, Maryland. Contact (800) 238-3358 or see <http://www.training.fema.gov/EMIweb/>.

September 3–8, 2006: THIRTIETH ANNUAL INTERNATIONAL CONFERENCE ON COASTAL ENGINEERING, San Diego, California. Sponsored by the American Society of Civil Engineers. Contact the ICCE Conference Secretariat, Diane Dennell, BETA, Inc., (805) 965-6210 or info@icce2006.com or see <http://www.icce2006.com/>.

September 5–9, 2006: ANNUAL CONFERENCE OF THE FLOODPLAIN MANAGEMENT ASSOCIATION, Coronado, California. See <http://www.floodplain.org>.

September 6–8, 2006: ANNUAL MEETING OF THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, San Antonio, Texas. Contact NAFSMA at 1301 K Street NW, Eighth Floor East Tower, Washington, D.C. 20005, (202) 478-1734 or see http://www.nafsma.org/Meetings/meetings_upcoming.htm.

September 10–14, 2006: DAM SAFETY 2006, Boston, Massachusetts. Sponsored by the Association of State Dam Safety Officials. Contact Susan Sorrell at ASDSO, 450 Old Vine St., Lexington, KY 40507, (859) 257-5146, sasorrell@damsafety.org or see <http://www.damsafety.org>.

September 13–15, 2006: CONFERENCE OF THE INDIANA ASSOCIATION FOR FLOODPLAIN AND STORMWATER MANAGEMENT, Nashville, Indiana. Contact Maria Cisco at (317) 306-9883, info@inafsm.net or see <http://www.inafsm.net/Conference06.htm>.

September 18–20, 2006: SIXTEENTH ANNUAL FALL CONFERENCE OF THE OKLAHOMA FLOODPLAIN MANAGERS ASSOCIATION, Norman, Oklahoma. Contact OFMA, P.O. Box 8101, Tulsa, OK 74101-8101; or see <http://www.okflood.org>.

September 18–21, 2006: NATIONAL FLOOD INSURANCE PROGRAM COMMUNITY RATING SYSTEM (E278), Emergency Management Institute, Emmitsburg, Maryland. Contact (800) 238-3358 or see <http://www.training.fema.gov/EMIweb/>.

September 24–27, 2006: ANNUAL FALL CONFERENCE OF THE ARKANSAS FLOODPLAIN MANAGEMENT ASSOCIATION, Hot Springs, Arkansas. Contact (501) 682-3969 or see <http://www.arkansasflood.com>.

September 25–28, 2006: TRAIN-THE-TRAINER: MANAGING FLOODPLAIN DEVELOPMENT THROUGH THE NFIP (E270), Emergency Management Institute, Emmitsburg, Maryland. Contact (800) 238-3358 or see <http://www.training.fema.gov/EMIweb/>.

September 27–29, 2006: ANNUAL CONFERENCE OF THE COLORADO ASSOCIATION OF STORMWATER AND FLOODPLAIN MANAGERS, Glenwood Springs, Colorado. Contact David Bennetts, Urban Drainage & Flood Control District, 2480 W. 26th Ave., Suite #156B, Denver, CO 80211, (303) 455-6277, bennetts@udfcd.org or see <http://www.casfm.org/>.

October 3–4, 2006: GREAT LAKES DUNE CONFERENCE: DEVELOPING A NATIONWIDE COALITION FOR RESEARCH, MANAGEMENT AND EDUCATION, Traverse City, Michigan. Sponsored by the U.S. Environmental Protection Agency, National Fish and Wildlife Foundation, New York Sea Grant, and numerous others. See <http://www.nysgdunes.org>.

October 11–13, 2006: NATIONAL BEACHES CONFERENCE, Niagara Falls, New York. Sponsored by the U.S. Environmental Protection Agency and the Great Lakes Beach Association. See http://www.tetrattech-ffx.com/beach_conf2006/.

October 23–26, 2006: 2006 WATERSHED INSTITUTE, Columbus, Ohio. Sponsored by the Center for Watershed Protection. Contact Rebecca Winer, Center for Watershed Protection, (410) 461-8323; rrw@cwpp.org or see <http://www.cwpp.org/WI06/wi06info.html>.

- October 26–27, 2006:** ADVANCED TOPICS IN FLOODPLAIN MANAGEMENT, Denver, Colorado. Sponsored by the University of Colorado Department of Continuing Engineering Education. Call (303) 556-4907 or see <http://www.cudenver.edu/engineer/cont>.
- October 26–27, 2006:** SECOND ANNUAL CONFERENCE OF THE NEW JERSEY FLOODPLAIN MANAGEMENT ASSOCIATION, Somerset, New Jersey. Contact Cleighton Smith at (856) 802-0843 x 3107 or Cleighton.smith@dewberry.com.
- November 2–3, 2006:** ECOSYSTEMS: RESTORATION & CREATION, Plant City, Florida. Sponsored by Hillsborough Community College. Call (813) 253-7523 or see <http://www.hccfl.edu/depts/detp/ecoconf.html>.
- November 2–3, 2006:** FALL MEETING OF THE ARIZONA FLOODPLAIN MANAGEMENT ASSOCIATION, Douglas, Arizona. See http://azfma.org/page/qldr/Fall_Meeting_2006.html.
- November 6–9, 2006:** ANNUAL MEETING OF THE AMERICAN WATER RESOURCES ASSOCIATION, Baltimore, Maryland. See <http://www.awra.org/meetings/Baltimore2006/>.
- November 8–10, 2006:** MAKING CONNECTIONS—PEOPLE, LAKES, WATERSHEDS. 26TH ANNUAL SYMPOSIUM OF THE NORTH AMERICAN LAKE MANAGEMENT SOCIETY, Indianapolis, Indiana. Hosted by the Indiana Lakes Management Society. See <http://www.nalms.org/symposia/indianapolis/home.htm>.
- November 12–15, 2006:** GOING ALL THE WAY . . . PUTTING PLANS INTO ACTION: ANNUAL CONFERENCE AND EXHIBIT OF THE INTERNATIONAL ASSOCIATION OF EMERGENCY MANAGERS, Orlando, Florida. For more information, contact IAEM at 201 Park Washington Ct., Falls Church, VA 22046 or see <http://www.iaem.com>.
- December 9–13, 2006:** FORGING THE NATIONAL IMPERATIVE: THIRD COASTAL AND ESTUARINE HABITAT RESTORATION CONFERENCE, New Orleans, Louisiana. Sponsored by Restore American Estuaries. For more information, see <http://www.estuaries.org/conference>.
- December 2006:** FIRST TRIENNIAL FLOOD MITIGATION WORKSHOP, Gulf Coast site to be determined. Sponsored by the Association of State Floodplain Managers, Inc. See <http://www.floods.org>.
- February 21–23, 2007:** 10TH ANNUAL CONFERENCE OF THE MICHIGAN STORMWATER-FLOODPLAIN ASSOCIATION, Grand Rapids, Michigan. See <http://mi.floods.org/conferences.htm>.
- March 13–14, 2007:** ANNUAL CONFERENCE OF THE ILLINOIS ASSOCIATION FOR FLOODPLAIN AND STORMWATER MANAGEMENT, Springfield, Illinois. Contact IAFSM at (708) 747-5273 or see <http://www.illinoisfloods.org/>.
- June 3–8, 2007:** 31ST ANNUAL CONFERENCE OF THE ASSOCIATION OF STATE FLOODPLAIN MANAGERS, Norfolk Virginia. See <http://www.floods.org>.
- June 11–14, 2007:** 7TH CONFERENCE AND EXPOSITION OF THE NATIONAL HYDROLOGIC WARNING COUNCIL, Savannah, Georgia. Sponsored by the ALERT Users Group, Southwestern Association of ALERT Systems, ALERT-Flows East Coast Users Group, and the U.S. Geological Survey. See <http://www.alertsystems.org>.
- September 11-15, 2007:** ARID REGIONS CONFERENCE, Breckenridge, Colorado. Sponsored by the Colorado Association of Stormwater and Floodplain Managers and the Association of State Floodplain Managers. See <http://www.casfm.org/> or <http://www.floods.org>.
- May 18–23, 2008:** 32ND ANNUAL CONFERENCE OF THE ASSOCIATION OF STATE FLOODPLAIN MANAGERS, Reno, Nevada. See <http://www.floods.org>.



ASSOCIATION of STATE FLOODPLAIN MANAGERS

2809 Fish Hatchery Road, Suite 204

Madison, WI 53713

(608) 274-0123 fax: (608) 274-0696

asfpm@floods.org

<http://www.floods.org>

News & Views is published six times each year by the Association of State Floodplain Managers, Inc., and is paid for by membership dues.

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Items for publication and other editorial matters should be directed to:

Jacquelyn L. Monday

Editor, *News & Views*

1026 So. Johnson St.

Lakewood, CO 80226

(303) 985-3141 fax: 303-985-5181

email: jacki.JLM@comcast.net.

Deadline is the 18th day of odd-numbered months.

For address changes and member services, contact the ASFPM Executive Office at the address in the box above.

**ASSOCIATION OF STATE FLOODPLAIN MANAGERS
BOARD OF DIRECTORS**

CHAIR

Pam Pogue, CFM
State Floodplain Manager
Rhode Island Emergency Management Agency
645 New London Ave.
Cranston, RI 02920
(401) 946-9996
fax: 401-944-1891
pam.pogue@us.army.mil

VICE CHAIR

Al W. Goodman, Jr., CFM
State Floodplain Manager
Mississippi Emergency Management
Agency
P.O. Box 5644
Pearl, MS 39208
(601) 933-6605
fax: 601-933-6805
agoodman@mema.ms.gov

SECRETARY

Collis O. Brown, CFM
State Floodplain Manager
Georgia Department of Natural Resources
7 Martin Luther King Dr., Ste. 440
Atlanta, GA 30334
(404) 656-6382
fax: 404-656-6383
collis_brown@dnr.state.ga.us

TREASURER

Greg Main, CFM
State Floodplain Manager
Indiana Department of Natural Resources
402 W. Washington St., Rm. W264
Indianapolis, IN 46204
(317) 234-1107
fax: 317-233-4579
gmain@dnr.in.gov

EXECUTIVE DIRECTOR

Larry Larson, CFM
ASFPM Executive Office
larry@floods.org