

**Building Thriving Community Resilience
and Sustainability: Floodplain Legal and
Sustainable Development Workshop
July 24, 2013**

Butte, Montana



Workshop Description

A special workshop will begin at 8:00 am GMT on July 24, 2013. This special workshop, sponsored by the Montana Department of Natural Resources & Conservation and the Natural Hazard Mitigation Association is designed for everyone involved in making community development decisions: Legal experts, community officials, developers, architects, engineers, government leaders, and floodplain managers are strongly encouraged to attend. The workshop, ***Building Thriving Community Resilience and Sustainability***, will focus on providing information and tools for local communities faced with a myriad of complex issues that affect the viability of communities economically and aesthetically, and provide a framework for leveraging private and public resources and information to achieve success.

This workshop will:

- a) explain the ancient legal roots of the National Flood Insurance Program and “No Adverse Impact”, or “Safe Development”;
- b) demonstrate how floodplain management and other forms of regulation designed to prevent harm can be structured to avoid much, if not all, of the uncertainty surrounding the “Takings” issue;
- c) explain how property rights principles support floodplain and other natural hazard regulations;
- d) demonstrate that local floodplain management designed upon the “Safe Development” or “No Adverse Impact” concept is not anti-development but rather protects everyone’s property rights,
- e) examine legal risks for areas protected from flooding by dams and levees;
- f) demonstrate how to successfully negotiate towards a safer community future; and
- g) explore opportunities for floodplain managers to work more closely with developers, architects, engineers and all others involved in community development to build a safer future for Montana and the entire Nation.

Agenda

Wednesday, July 24

| | |
|------------------|---|
| 8:00 – 8:30 AM | Arrivals and Registration |
| 8:30 – 8:45 AM | Welcome and Introductions |
| 8:45 - 9:30 AM | Law, Policy, Programs and Floodplain Management <i>Edward A. Thomas, Esq.</i> <i>Natural Hazard Mitigation Association</i> |
| 9:30 – 9:45 AM | Break |
| 9:45 – 11:10AM | Property Rights and Floodplain Management <i>Edward A. Thomas, Esq.</i> <i>Natural Hazard Mitigation Association</i> |
| 11:10 – 11:30 AM | After Koontz v. St. Johns River Water Management District: Negotiating Safe Development <i>Edward A. Thomas, Esq.</i> <i>Natural Hazard Mitigation Association</i> |
| 11:30 – 11:45 PM | Discussion: Steps in Establishing a Floodplain Legal and Regulatory Committee <i>Edward A. Thomas, Esq.</i> <i>Natural Hazard Mitigation Association</i> |
| 11:45 PM | Adjourn |

Speaker Biographies

Edward A. Thomas, Esq.

Ed Thomas is the President of the Natural Hazard Mitigation Association; and an elected member of the Council of the State and Local Government Section of the American Bar Association. He is also the Chair of the Hazards Sub-Committee of the Land Use Planning and Zoning Committee, of the ABA. In addition, Ed serves on the Advisory Committee of the Natural Hazards Center of the University of Colorado; and is an active member of both the American Planning Association and the American Geophysical Union.

He is a former board Member of the Association of State Floodplain Managers; and now serves as the Senior Liaison for that organization's on the No Adverse Impact Committee.

Ed retired from the Department of Homeland Security-Federal Emergency Management Agency after nearly thirty-five years of Public Service. During his time in government, he worked primarily in Disaster Mitigation, Preparedness and Response. He also was extensively involved in Community Development, during his nearly 10 years with the Department of Housing and Urban Development.

Ed worked on about two hundred disasters and emergencies, serving as the President's on scene representative, the Federal Coordinating Officer, dozens of times.

Ed is an Attorney, is a frequent lecturer on Emergency Management issues, especially the Constitutional and Legal Aspects of Floodplain Regulations. He has authored dozens of publications and articles on various Disaster related issues and regularly participates as a member of National Task Forces and other boards in developing National disaster-related and floodplain management policies.

Ed has received numerous national and international awards including the nation's highest award for Floodplain Management: The Goddard-White Award from the Association of State Floodplain Managers. In addition, he received the Gulf of Maine Visionary Award from the International Gulf of Maine Council, for his efforts in helping develop the NOAA StormSmart Coasts Program; and their first lifetime achievement award from the Georgia Association of Floodplain Management.

He manages a private practice of Law, Edward A. Thomas Esq., LLC and lives with his wife in the floodplain of beautiful Marina Bay in Quincy, Massachusetts.

References

CNT (2010)

The Value of Green Infrastructure: Guide to Economic, Environmental and Social Benefits
Chicago IL: Center for Neighborhood Technology. 2010
www.americanrivers.org/library

CCAP (2011)

Kooshian, Chuck and Steve Winkelman
Growing Wealthier: Smart Growth, Climate Change and Prosperity
Washington, DC Center for Clean Air Policy (CCAP). 2011

EPA Green Infrastructure Library

EPA Municipal Handbook Series – Green Infrastructure
<http://cfpub.epa.gov/npeds/green> infrastructure

Lam, William M. C. (1986)

Sunlighting as Formgiver for Architecture
New York: Van Nostrand Reinhold

NFIP F-002

Myths and Facts about the NFIP – FEMA
NFIP Publication F-002
www.mmrs.fema.gov/rebuild/recover/nfip.shtm

Schwab, James, with Kenneth C. Topping, Charles D. Eadie, Robert E. Deyle, and Richard A. Smith. 1998.
Planning for Post-Disaster Recovery and Reconstruction. Planning Advisory Service Report No. 483/484.
Chicago: American Planning Association.

Schwab, James, Editor. 2010. *Hazard Mitigation: Integrating Best Practices into Planning*. Planning Advisory Service Report No. 560. Chicago: American Planning Association.

Topping, Kenneth. 2011. "Strengthening Resilience Through Mitigation Planning. *Natural Hazards Observer*, XXXVL [November 2011]: 1:18

Trout Unlimited (2012)

Williams, Jack E., Michael P. Dombeck, Christopher A. Wood
My Healthy Stream
Arlington, Virginia: Trout Unlimited and Aldo Leopold Foundation. 2012

Watson, Donald and Michele Adams (2011)

Design for Flooding Architecture, Landscape, and Urban Design for Resilience to Climate Change
New York: John Wiley and Sons

Selected Hazard Mitigation & Floodplain Management Legal Publications

- A) Planning and Building Livable, Safe & Sustainable Communities: The Patchwork Quilt Approach**
Authors: Edward A Thomas Alessandra Jerolleman, Terri Turner, Darrin Punchard, and Sarah Bowen,
Natural Hazard Mitigation Association, 2011.
Located at: http://stormsmart.org/uploads/patchwork-quilt/patchwork_quilt.pdf

A PowerPoint Presentation of the Patchwork Quilt Workshop as presented at the National Floodproofing Conference in New Orleans in November 2008 is located at:
http://www.floods.org/PDF/Patchwork_Quilt/Patchwork_Quilt_Floodproofing_Conference_10908.pdf

- B) Climate Change and Emergency Management: Adaptation Planning**, Authors: Edward A Thomas and Terri Turner, American Bar Association, Section of State and Local Government, State and Local Law and News, Vol. 34, No. 3, Spring 2011
Located at:
http://www.americanbar.org/content/dam/aba/publications/state_and_local_law_news/sl_34_3_tomas_turner.authcheckdam.pdf

A similar presentation on climate change and emergency management was delivered at the 2012 Hawai'i Water Law Conference. An expanded version was delivered at a national webinar sponsored by the Georgia Association of Floodplain Management and the Natural Hazard Mitigation Association. The webinar is available on line at: http://www.gafloods.org/nai_committee1.html

- C) Preventing Human Caused Disasters.** Authors: Edward A Thomas and Sarah Bowen, In the *Natural Hazards Observer*, November 2009, Volume XXXIV, Number 2, International Journal Article, explaining the concept of Patchwork Quilt as well as advocating the idea of the advantage of Hazard Mitigation preventing disasters from taking place.
Located at: http://www.colorado.edu/hazards/o/archives/2009/nov_observerweb.pdf

D) Mitigating Misery: Land Use and Protection of Property Rights Before the Next Big Flood.

Authors: Edward A. Thomas Esq. and Sam Riley Medlock JD. *Vermont Journal of Environmental Law*, Vol. 9, 2008.

Law Review Article on the National Flood Insurance Program and the concept of No Adverse Impact Floodplain Management.

Located at: http://www.floods.org/PDF/Mitigation/ASFPM_Thomas&Medlock_FINAL.pdf

E) No Adverse Impact and The Courts: Protecting the Property Rights of All,

Authors: Dr. John Kusler Esq. and Edward A. Thomas Esq. ,Edition of November 2007

Located at: http://www.floods.org/PDF/ASFPM_NAI_Legal_Paper_1107.pdf

F) A Perfect Storm of Opportunities to Establish and Fund a Program to Reduce Misery and Protect Water Resources

Author: Edward A. Thomas Esq., in *Louisiana Coastal Law*, Vol. 89, April 2008.

Article for the Louisiana State University, Sea Grant Law and Policy Program, which discusses why we should develop a unified program to treat water as a precious resource.

Located at: http://www.lsu.edu/sglegal/pdfs/lcl_89.pdf

G) “Significant Nexus” and Clean Water Act Jurisdiction.

Authors: Jon Kusler Esq., PhD, Patrick Parenteau, Esq., and Edward A. Thomas Esq. Discussion paper for the Association of State Wetland Managers, March 2007.

Located at: http://www.aswm.org/pdf_lib/significant_nexus_paper_030507.pdf

H) A California Challenge Flooding in the Central Valley: A Report From An Independent Review Panel to the Department of Water Resources, State of California

Authors: Gerald Galloway, Edward A. Thomas, *et al.*

Located at: <http://www.water.ca.gov/news/newsreleases/2008/101507challenge.pdf>

I) Liability for Water Control Structure Failure Due to Flooding

Author: Edward A. Thomas, Association of State Floodplain Managers, 2006.

Located at: http://www.floods.org/PDF/NAI_Liability_Failure_Facilities_0906.pdf

J) Failed Dams and Levees: Examining Engineering Liability.

PowerPoint for a Web-Cast for American Council of Engineering Companies May 2007.

Located at: http://www.acec.org/advocacy/pdf/may07_thomas_presentation.pdf

K) Brochure Titled: Property Rights and Community Development: A Legal Framework for Managing Watershed Development, an ASFPM staff developed document based on materials developed by Wes Shaw and Edward A. Thomas Esq., and others for the Massachusetts Coastal Zone Management Agency's StormSmart Coasts Program.

Available at:

http://www.floods.org/NoAdverseImpact/NAI_Legal_Framework_Watershed_Development_2007.pdf

L) Massachusetts Coastal Zone Management Agency Storm Smart Coasts Materials, a series of brochures developed based on materials developed by Wes Shaw and Edward A. Thomas Esq., and many others:

1.) StormSmart Coasts Fact Sheet 1, Introduction to No Adverse Impact (NAI) Land Management in the Coastal Zone, available at:

http://www.mass.gov/czm/stormsmart/resources/stormsmart_nai.pdf

2.) StormSmart Coasts Fact Sheet 2, No Adverse Impact and the Legal Framework of Coastal Management, available at:

http://www.mass.gov/czm/stormsmart/resources/stormsmart_legal.pdf

3.) StormSmart Coasts Fact Sheet 3, A Cape Cod Community Prevents New Residences in Floodplains available at:

http://www.mass.gov/czm/stormsmart/resources/stormsmart_chatham.pdf

M) *Smart Growth in Dumb Places: Sustainability, Disaster, and the Future of the American City*, author: Lisa Grow Sun, Brigham Young University Law Review, 2011 B.Y.U.L. Rev. 2157(2011)

N) *Disaster Mythology and the Law*, author: Lisa Grow Sun, Cornell Law Review, 96 Cornell L. Rev. 1131(2011)

O) Thomas, Edward. (2012) *Natural Hazards and the Law*, in Jerolleman, Alessandra & Kiefer, John (eds.) Natural Hazard Mitigation. CRC Press

P) Conrad, David & Thomas, Edward. (2013). *Reforming Federal Support for Risky Development*.
http://www.hamiltonproject.org/papers/reforming_federal_support_for_risky_development/

The following is reprinted, with permission from the August 2007 edition of the ASFPM publication News & Views

Oklahoma Teaches Us All A Few Tricks for Enforcing Substantial Damage

In the Arid West one of the more vexing problems Floodplain Managers face is the need to enforce flood program regulations in the midst of a drought, which can often be followed by abrupt and catastrophic rainfall. Oklahoma faced such a problem recently and has developed an interesting approach to local officials to encourage enforcement of required safe building regulations.

In early July, Oklahoma and Texas were absolutely hammered by floods. One of the worst hit areas was the City of Miami in Ottawa County, Oklahoma. Some seven hundred homes have been damaged in this small county, many of which suffered substantial damage with several being hit by over 88 inches of floodwater.

Unfortunately, several of these structures have flooded as many as 21 times over the past 50 years, and historically, local officials in the City of Miami and Ottawa County have allowed devastated flood victims to rebuild as soon as possible, disregarding all locally adopted National Flood Insurance requirements for safe and proper rebuilding of substantially damaged buildings.

This time, however, the new slate of officials in place had a different view about rebuilding after a flood, but they wanted to make sure that they were on solid ground to take strong action and break the cycle once and for all. The primary power was City Attorney Erik Johnson. He was very concerned about inverse condemnation and the taking issue if the city did not allow folks to rebuild and go back into their flooded homes. General Counsel for the Oklahoma Water Resources Board, Dean Couch, consulted with ASFPM legal experts and contacted Mr. Johnson early on in this process, explaining the role of the floodplain administrator and the justification for performing the substantial damage determinations.

The State NFIP Coordinator's Office sent OWRB employees Gavin Brady, State Coordinator, and long time floodplain manager, Ken Morris, to provide technical support and guidance to local officials. Brady and Morris immediately called FEMA Region 6 for support and help in obtaining trailers to house the disaster survivors while a safe rebuilding process takes place. Brady and Morris also appealed to ASFPM Headquarters in Madison to provide legal and technical support to bolster the State efforts to ensure proper and safe rebuilding. ASFPM asked Ed Thomas, an Attorney, and Floodplain Manager, currently employed by Michael Baker Inc., to help with some quick talking points for state officials to use.

Ed replied with the following suggestions:

A) Give people a simplified summary of the situation, explaining how the municipality will be at legal and Flood Program risk for failing to fully enforce their regulations unless proper and safe rebuilding is enforced.

B) Instead of helping folks, ignoring regulations and allowing them to rebuild in the same old flood-prone way would facilitate a time bomb of misery for the residents and multiple future generations.

C) Each and every municipality and individual who does not enforce regulations is putting themselves at individual and even personal risk for liability from future damages.

D) Failure to enforce floodplain regulations puts the entire community at risk for probation and/or suspension from the NFIP, thus endangering the entire recovery process.

E) A “Patchwork Quilt Approach” to funding would be an appropriate and beneficial way to rebuild this area safely and properly without undue hardship on the residents. (More information on the “Patchwork Quilt Approach” is available on the ASFPM web site at: http://www.floods.org/PDF/Post_Disaster_Reconstruction_Patchwork_Quilt_ET.pdf.)

Morris and Brady presented these materials to the City at a large Public Meeting, and the City was convinced to continue to enforce their existing floodplain regulations. Morris summed up this ongoing success story up by indicating that success was due to the leadership of local officials with the help of the OWRB. **“I also believe the Patchwork Quilt document and Ed's words were overwhelmingly convincing,” says Morris.**