



ASSOCIATION OF STATE FLOODPLAIN MANAGERS, INC.

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March 5, 2021

The Honorable Spencer Cox, Governor
State of Utah

RE: ASFPM urges veto of Utah H.B. 98

Dear Governor Cox:

The Association of State Floodplain Managers (ASFPM) is aware of yesterday's passage of HB 98 and urges you to veto this legislation as it significantly weakens the management of flood risk in Utah, puts many Utah home and business owners at increased financial risk, and increases community legal liability for flood losses related to unpermitted and third party inspected development.

ASFPM is a 20,000 member national non-profit organization dedicated to reducing flood losses and protecting the natural functions of floodplains. Our Utah Chapter, the Utah Floodplain and Stormwater Management Association (UFSMA), is also concerned about HB 98 as its implications. ASFPM would like to provide information for your consideration from a national perspective on the potential consequences of this legislation.

Participation in the National Flood Insurance Program (NFIP) is a significant benefit to Utah communities, business owners, and residents. The program makes any property owner or renter eligible to purchase NFIP flood insurance provided the community adopts and enforces NFIP minimum standards more fully described in 44 Code of Federal Regulations Section 60.3. By participating in the NFIP, Utah Communities are also assured continued access to a wide array of disaster assistance and hazard mitigation funding which can be quite significant. This past year, just two programs – BRIC and FMA made nearly \$750 million available to reduce flood and other hazard risk in communities nationwide.

First, state passage and approval of legislation or policies that do not allow communities to administer and enforce NFIP minimum standard through their ordinances will jeopardize the participation of all Utah communities in the NFIP and impact the eligibility of Utah communities for hundreds of millions of dollars in hazard mitigation and other disaster funding. **The minimum standards contained within the federal regulations for the NFIP specifically require**

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that the designated local floodplain administrator permit, conduct inspections, issue approvals, and carry out enforcement related to all development activities in mapped flood hazard areas. HB 98 directly conflicts and interferes with the ability of local floodplain managers to carry out these duties as required in their local ordinances and under the federal NFIP regulations. Specifically, provisions for allowing independent, third party inspectors hired by developers to inspect and issue certificates of occupancy, and for exempting construction project involving repairs to a building damaged by natural disasters (regardless of whether this is just limited to residential buildings) will not allow communities to fulfil their NFIP participation responsibilities.

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

1. Existing NFIP flood insurance policies are not renewed. There are currently about 4,000 NFIP flood policies in force in Utah. While there may be private flood insurance options available, they could be more expensive, have higher deductibles and actually increase the cost of housing.
2. New NFIP flood insurance policies are not available. Under the NFIP's "mandatory purchase requirement" banks require flood insurance in order to obtain a loan, so suspension from the NFIP ends up being very disruptive to real estate transactions and could necessitate obtaining a private flood insurance policy – if one is available.

Unlike the NFIP, private flood policies are not available in all locations – especially in areas of high flood risk, and private insurers can cancel the policy at any time, regardless of claims history. If a property owner, who is required to have flood insurance, cannot access an NFIP policy and cannot find a private policy, a lender may have no choice but to "call" a loan demanding full payment immediately because the mortgage conditions have not been met. This would be financially disastrous for home and business owners.

3. Federal mortgage guarantees (VA, FHA, USDA, SBA, HUD) may not be available for properties in the floodplain.
4. The state will not be eligible for certain types of federal disaster assistance, including federal pre- and post- disaster hazard mitigation grants. Often, eligibility for these programs is predicated in the community being in good standing in the NFIP. If all communities are suspended, they are not considered in good standing and will therefore be ineligible.

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ASFPM has witnessed the ramifications when laws in other states were changed resulting in the inability for local communities to comply with minimum NFIP standards and meet their NFIP participation responsibilities. Most recently, the State of Mississippi passed a law exempting hunting and fishing camps from local land use regulations, including floodplain management standards. The state's Attorney's General opined that communities could not enforce floodplain management requirements. As a result, FEMA had no choice but to threaten suspension of all communities in the state from the NFIP (including the availability of federal flood insurance), unless the state legislature passed a new law amending the law containing the new exemption. NFIP eligibility was only maintained by a last-minute reversal in state law. A similar situation also occurred in Florida after state law restricted the ability of local communities to follow the floodplain permitting process set forth in the federal regulations. Several years ago in Ohio, after a law preempting local communities from any regulation of manufactured home parks, the new commission that was established had to make after-the-fact changes to accommodate local floodplain management permitting requirements to avoid potential FEMA suspension of the state from the NFIP.

Second, ASFPM believes the aforementioned provisions of HB 98 will increase the legal liability of communities and negatively impact the fundamental public safety and welfare of Utahans. For example, what happens when an independent inspector issues a certificate of occupancy for a development that violates local codes? The independent inspector certainly is not duty bound to ensure the community's public health and safety, and when it comes to development in the floodplain, development inconsistent with locally adopted flood standards can result in financial losses, injury and death. Or, what happens when a homeowner repairs their flood damaged home by elevating it on a significant amount of fill which increases future flood risk to neighboring properties but because they were exempt from needing permits for repair it violated local flood standards? Compliance with local building and land use codes is inherently a community responsibility and communities will ultimately be held liable.

Today, this kind of liability is easy to determine by modeling the physical impacts on other properties resulting from physical changes in the floodplain and/or from an actual flood itself. These potential flood damages mean increased lawsuits based upon various legal theories: trespass, nuisance, negligence, riparian rights, surface water reasonable use doctrine, and "taking" without payment of just compensation. For the past 40 years, ASFPM has done extensive research on legal liability for activities occurring in floodplains, and these materials are free to the public from our website at www.floods.org.

Governor, please know that we do not express these concerns lightly, and although Utah is an arid state, there are areas of considerable flood risk. ASFPM has a unique historical perspective of understanding the ramifications of states passing laws that limit a community's ability to participate in the NFIP. And while not perfect, the NFIP is the nation's most widely adopted and accepted way for states and communities to manage flood risk. It is our understanding that March has been declared flood awareness month in Utah; please do not weaken Utah's


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flood loss reduction efforts by signing this bill into law during the very month you are trying to heighten the awareness of the state's flood risk.

Thank you for your consideration. Please do not hesitate to contact me at (608) 828-6338 or at chad@floods.org or Meg Galloway of my staff at meg@floods.org if you have any addition questions or concerns.

Respectfully,



Chad Berginnis, CFM
Executive Director

Cc: Evan Curtis, State Planning Coordinator, Utah Governor's Office of Management and Budget
Kris J. Hamlet, MBA, UCEM, Director, Utah Department of Public Safety Division of Emergency Management