

RESPONSE TO COMMENTS AND SUGGESTIONS

2013 MODEL REGULATIONS

September 3, 2013 version

Montana Department of Natural Resources and Conservation

February 24, 2013

A comment was to use consistently, either the one or two word version of floodplain or flood plain. (Gallatin, Bozeman, MACo/JPIA) The two word version is used in the Montana statute as passed in 1971 and the one word version is used throughout the Administrative Rules implementing the statute. The one word version is also used in the Code of Federal Regulations detailing the National Flood Insurance minimum standards for community regulations. The conventional use is sometimes two words and most of the time is used as one word and there is no difference in meaning when using one or two words for "floodplain". The conventional use of one word floodplain is now used throughout these regulations instead on the two word version in earlier drafts of these model regulations.

A comment was that some counties must adopt regulations and not ordinances. (MACo/JPIA) A change to use of "regulations" was incorporated in the Model as well as adding an advisory statement on page 3 that the community determine the appropriate vehicle for these land use regulations, be they are ordinances, regulations, or resolutions when adopting their local requirements.

A comment was that the title of **Section 1** should be "Title, Purpose and Authority" and split out subsections 1.6 and after to "General Provisions" on page 4. (Dawson Co) Rather than split the section the title was amended to "Title, Purpose, Authority and General Provisions" to catch it all.

Section 1.3.1, Findings of Fact is not accurate (Gallatin). The statement is intended to cover either instance of a DNRC determination or a DNRC order. When FEMA takes the responsibility to develop and adopt of a Special Flood Hazard Area, DNRC rather makes a determination that FEMA has met the substantive requirements of the state statutory requirements for reasonable hydrologic certainty as well as notice and adoption, ie Part 1 through 4 of Title 76, Chapter 5 of Montana Code Annotated. Section 76-5-201, MCA provides that the State does not have to duplicate with a DNRC notice and adoption process.

The finding of **Section 1.3.2** becomes obsolete when a change is made to the Model Regulations (Gallatin). The finding is valid for the local regulations adopted at the time. It is true that if the State or Federal minimum requirements change in the future, the regulation become obsolete and would have to be amended.

A comment says that **Section 1.3**, Finding of Fact should rather be in the ordinance/resolution that adopts the attached regulations. (Dawson) Those jurisdictions needing to separate the Finding of Fact can easily do so since the Model regulations are a model or guide for the local community to incorporate the requirements by the appropriate ordinance, resolution or regulation or combination thereof.

A comment was to insert the appropriate jurisdiction into **Section 1.6** and these regulations. (Dawson) Inserting the appropriate jurisdiction, ie “Dawson County or City of Baker” is unnecessary since the regulations are local regulations and apply to no other jurisdiction. However, the jurisdictional name can be easily added when drafting local land use regulations.

A comment to **Section 1.6**, assumes that if FEMA has adopted a Special Flood Hazard Area, then DNRC had no role. (Gallatin) DNRC is required by statute to delineate and designate the floodplain and floodway by order except where FEMA meets the state requirements including notice and adoption are substantively met by FEMA’s actions, then DNRC instead makes a determination that the substantive requirements of the State requirements are met. Section 1.6 was reworded for clarification.

Edits made to **Section 1.7, 1.10, and 1.13** based on suggested edits (Bozeman, Dawson).

An informational box was added to **Section 1.17** as a reminder to consider a companion regulation in the local subdivision regulations (Dawson, Gallatin).

Section 1.14 clearly states the requirements for DNRC approval and FEMA acceptability for the regulations to meet the minimum state and federal requirements as well as any amendments (Gallatin). The local adoption process has to include the steps and time to accommodate the review and approvals of DNRC and FEMA.

Section 1.17 should state that a permit is required for any repair or reconstruction not just substantial improvement (Gallatin). Clarification was added that a floodplain permit is necessary if the repair and reconstruction requires an alteration or substantial improvement as defined in these Model regulations. Communities may adopt higher standards and could require floodplain permits for any repair or reconstruction.

A comment was to add dilapidated or deteriorating buildings to **Section 1.17** (Miles City). The issue should rather be addressed in some other regulation or ordinance related to health or safety since the issue is only remotely related to flood hazard management.

In **Section 2**, the definition of alteration is confusing when the term the statement “See Substantial Improvement” is added (Bozeman). Maybe there is confusion, so will remove it.

In **Section 2**, enclosure definition edited for efficiency of words (Gallatin).

In **Section 2**, edits suggested for the definition of Flood Plain (Gallatin). Left as is since it is worded as per the state statute.

In **Section 2**, comments and edits suggested for the Letters of Map Change (Bozeman). It is wise to not remove a structure within the Regulated Flood Hazard Area when fill is placed pursuant to a permit and LOMR-F elevating the structure above the Base Flood Elevation. Placement of a structure with a basement or insufficient elevation to the living floor may be subject to flood damage hazards that would be avoided with proper building standards imposed by a floodplain permit. The word “amendment” changed to “alteration” to be consistent with the Model regulations definition in the wording in Conditional Letter of Map Revision paragraph.

In **Section 2**, comments have been made about the misunderstanding and confusion of various terms Special Flood Hazard Area and Regulated Flood Hazard Area (Gallatin, Bozeman). Regardless of the term used to describe the flood prone area by FEMA or DNRC, the area is not regulatory until adopted by the local ordinance. A FEMA Special Flood Hazard Area is not by itself a regulatory area for local regulations without local adoption by local ordinance or regulation.

Several edits were suggested to **Section 3**. Forms and Fees (Gallatin). Edits were considered and mostly incorporated.

Comments to **Section 4.1** are about the impracticability to amend the Regulated Flood Hazard Area in the local regulation when a LOMC is approved by FEMA (Gallatin, Bozeman). Protecting landowner rights and giving proper notice of the change to the area affected by local land use regulation is the democratic process set out by our statutes and regulations. Also, the FEMA Community Acknowledgement form that accompanies the communities Conditional Letter of Map Revision to FEMA requires that the community attest to amending the local ordinance regulatory area if the changes are more than 0.00 feet increase to the Base Flood Elevation in a Floodway or a cumulative increase of more than 1.0 feet to the Base Flood Elevation of the Flood Plain per 44 CFR 65.12(7)(b) and 44 CFR 60.3(c)(10).

Suggestions for minor edits for **Section 4.2.3, 4.2.5, and 4.2.6** were made (Gallatin, Bozeman). The edits considered and incorporated where needed.

Comments to **Section 4.3** recommend minor edits and involve a new understanding of the state and federal requirements for alterations to the Regulated Flood Hazard Area as well as when it coincides with a FEMA Special Flood Hazard Area (Bozeman, Gallatin). The response is the same as given for comments to Section 4.1. There will need to be development of procedures between FEMA, DNRC and the community during an alteration of a Regulated Flood Hazard Area as well as training to incorporate the required procedures. Some minor editing for clarifications made in Section 4.3.

A comment to **Section 5.1.8** is that a reference should be added to address fences in Section 10 (Miles City). A phrase that references Section 9.11 is added.

Comments to **Section 6** express the need to clarify that existing artificial obstructions or existing nonconforming uses established before land use regulation were adopted are not prohibited (Gallatin, Bozeman). Clarification added as well as to Section 5.

Comment to **Section 7.1.2** says that a permit cannot be issued for a nonconforming use (Gallatin). If a project is completed according to a permit it is not a nonconforming use. That is correct; nonconforming is removed from Section 7.1.2.

A concern for **Section 7.1.2** is that a use would have to be deemed similar to an authorized use listed in Section 9 and 10 in order to issue a permit and a section is needed that authorizes the interpretation (Gallatin). Section 7.1.2 says that a permit is required for any use not listed in Section 9 or 10 and does not identify the specific development criteria as the listed uses do. An exhaustive list or process would be excessive and impractical. Judgment would have to be applied as to the building requirements that would apply and part of the analysis would be to

appropriately select or devise building requirements of similar listed artificial obstruction or development as well as meet the general requirement in Sections 9.2 and 10.2.

Comment letters expressing the need for FWP, DEQ and DNRC to meet and better understand the issues and concerns. (FWP, DEQ) The requirement of **Section 7.2.1.4** for a floodplain permit application and Section 8.3.3 for permit criteria envision a unified process for various agency permits. Having the floodplain permit issued only after all other permits are issued is a FEMA standard if the community wants to participate in the National Flood Insurance Program. Although it seems to be an onerous process, in the end it is the same, the project has to be designed in such a way that it meets the agency permitting requirements in a unified fashion. Members of the agencies met and discussed the interaction of various permitting requirements of the various agencies and came away with a better understanding of the various requirements and modifications made during the drafting process. Most projects take several permits from several agencies. The applicants should pursue a parallel application process involving each agency rather than a sequential process with each agency and would avoid permit requirements from several agencies that may conflict. Although agencies can make that recommendation to the applicant, it is up to the applicant how they proceed. Certainly when building a project such as a house, electrical wiring plans have to take into account the requirements for placement and function of plumbing and other building requirements. In the end, each separate requirement for electrical and plumbing has to be integrated in order to finally function in a unified fashion. Getting a permit from one agency without regard to other requirements of other permit requirements is an irresponsible design. Members of the agencies involved now understand the concept.

A comment to the requirement of **Section 7.2.1.4**, is that when multiple permits are involved for a project that the permits be processed simultaneously, with the floodplain permit simply not issued until others are in hand. (Flathead Conservation District) It is agreed.

Suggestion to use a consistent terminology in **Section 8.1**, correct and complete, insufficient, applicable elements are all used (Gallatin). The inconsistency was edited.

Edits suggested to **Section 8.3.1**(Gallatin). Edits incorporated.

A comment to **Section 8.3.2** acknowledges the conditional nature of any DNRC Alteration that is similar to the FEMA CLOMR and LOMR process. An amendment of the Regulated Flood Hazard Area should not be made until a final LOMR is approved. A permit can only be issued under a variance in the mean time (Gallatin). Any DNRC Alteration of the designated flood plain or floodway or amendment to the Regulated Flood Hazard Area would be conditional on a permitted project being completed. The Regulated Flood Hazard Area would be amended on a conditional basis as well. Once DNRC, FEMA and local amendments are made conditionally, a flood plain permit may be issued.

Comment to **Section 8.3.3** by Miles City adds local permits as required as well (Mile City). A higher standard is acceptable, the requirement by FEMA standard in 44 CFR 60.3(a)(2) is Federal and State law.

Comments to **Section 8.5.1.2** assumes that a flood plain permit would be closed out when the development is completed (Gallatin). The section is reworded to clarify that the permit continues to remain with the artificial obstruction perpetually. The section is amended to specify that the development associated with the flood plain permit shall be completed within one year of time set.

Comment to **Section 8.5.1.3** suggests it would be better to require the permittee to record some sort of notice to successors as a condition of approval (Gallatin). Suggestion added.

Clarify **Section 8.5.1.8** that the report is for a period of time or in perpetuity (Gallatin, MDOT). Clarification made to set the period to 5 years or a time specified.

A comment to **Section 9.2** is that there are inconsistent definitions for encroachment analysis (MACo). The inconsistency was corrected.

Edits suggested to **Section 9.2.2.1 and 9.2.2.2** (MACo). Edits incorporated.

A comment to **Section 9.2** is that requiring an encroachment analysis is impracticable and politically infeasible for every project (Gallatin). Both Federal and State minimum standards require that any project show the affect on the Base Flood Elevation where a Floodway is designated. The allowable increase to the Base Flood Elevation is 0.00 by Federal standards. It is likely that increased flood elevations as a result of an inappropriately designed and constructed project is expensive when affected landowners sue for damages and is politically damaging as well.

Comment to **Section 9.2**, when people perceive that an extreme amount of engineering needs to be done to support an agency permit application, the appropriate permit applications are not made causing an increasing enforcement workload. (Flathead Conservation District) Agencies have to consider the cost of compliance balanced against the statutory permit requirements. Most permit requirements where engineering and design is required, is to assure that injury does not occur to others. In most case the cost of engineering and design is far smaller than the cost of injury and the expense of a lawsuit in defense.

Question on **Section 9.4 and 9.5**, does it include driveways (Gallatin)? Yes, clarification added.

Recommends that **Section 9.5.4** that involves mitigation for natural stream function, be removed since the Flood Plain Administrator lacks the expertise to make the determination and there is no correlation to a flood plain permit (MDOT). Agreed, and it usually addressed in other Federal and State permits.

What are the standards for distribution lines as opposed to transmission lines in **Section 9.5** (Gallatin). Distribution lines are transmission lines and transmission lines are distribution lines. No change needed.

Section 9.8.6 requires a check valve at the building entry, what if the well is outside the floodplain and the building is in the flood plain (Gallatin)? The concept is that the check valve is to keep flood water from going into the supply line as well as the well water. It is recommended that the Flood Plain Administrator use a degree of judgment for situations that may be too numerous to cover in these regulations. If the Base Flood Elevation is higher than

the water line to the well a check valve would be advisable. Most people would agree and not want dirty old flood water in the domestic water supply.

Section 9.9 seems to require the Flood Plain Administrator to make a determination if the facility meets the sanitary requirements (Gallatin). Agreed, reworded that the applicant demonstrate compliance by submittal of Montana Department of Environmental Quality, local health and sanitation permits or approvals as part of the application.

Section 9.11 should include fences that require permits from Section 5.1.8 (Miles City). Use should be added to Section 9.11 (Gallatin). Done as suggested.

For **Section 9.11**, would an encroachment analysis be required for structures that are accessory or appurtenant and is there some size for a shed in the floodway (Miles City)? Regardless of the size, if the application meets the criteria for permitting, it can be issued. A shed in the floodway would have to be darn small to meet the criteria of not causing injury to others downstream.

What is large scale clearing in **Section 9.11.10** (MDOT)? Agreed, removing “large scale clearing” since any clearing would likely have an effect on the Base Flood Elevation.

It appears the engineering requirement in **Section 9.13.5** would be required as per Section 10.1 for projects in flood zone (Gallatin). Yes, both Federal and State minimum standards require that any project show the affect on the Base Flood Elevation where a Floodway or Flood Plain is designated. The allowable increase to the Base Flood Elevation is 0.00 to the Floodway by Federal standards and 0.5 feet by State standards. It is likely that increased flood elevations beyond the allowable limits as a result of an inappropriately designed and constructed project is expensive when affected landowners sue for damages and is politically damaging as well.

A comment to **Section 9.13**, was to find a middle ground for small stabilization or restoration projects utilizing vegetative components and should develop standard designs (Flathead Conservation District) The consideration are in Section 9.13 and 9.14 and allow the consideration of the components mentioned.

A levee that causes an increase to the Base Flood Elevation of the Floodway would be subject to the alteration requirements in Section 4.3, so the criteria following Section 9.13.1.4 is unnecessary (Gallatin). Agreed, change made.

Delete the requirement of **Section 9.13.2.5, 9.13.2.6, 9.13.4.3, and 9.14.5** since the issues are appropriately covered under the Clean Water Act Section 401 and 404 with regulatory oversight by the Corps of Engineers (MDOT, Miles City, and Yellowstone County). Agreed, deleted.

For **Section 9.14**, how is the “no rise” requirement applied (Gallatin)? A reference to Section 9.2 added for clarification.

Applicants for a flood plain permit for stream restoration projects cannot be required to perform an encroachment analysis required in **Section 9.14** (MACo). Any development in the Floodway requires an encroachment analysis per Federal standards for communities that want to participate in the National Flood Insurance Program to assure a 0.00 impact to the Base Flood Elevation. All communities would want some assurance that any development including a stream restoration does not increase the Base Flood Elevation and does not cause injury to

others. Clearly a stream restoration project is an artificial obstruction as defined in Section 76-4-101(1), MCA and any artificial obstruction in the Floodway or Flood Plain require a permit per Section 76-5-405 and meet the criteria of Section 76-5-406, MCA.

Section 9.15 should include substantial improvement (Bozeman). Agreed, suggestion added.

Section 10.2.1 requires a determination of a Base Flood Elevation, it is not practical or necessary when replacing an old rusted out culvert that is in the flood fringe (Bozeman). A phrase was added to provide the discretion in such a situation.

In **Section 10.2.13.1**, shouldn't the 15 feet of fill around a structure start at the Base Flood Elevation at the house and slope away (Mile City)? If the fill has to be at or above the BFE for the 15 feet around the structure, if the material is sloped for runoff, it would have to start higher at the house and end at the BFE 15 feet away.

Shouldn't item 6 replace item 1 in **Section 10.2.13** (Dawson)? If the higher standard is the selected criteria, then item 6 would replace item 1.

Section 10.2.13.7 requires mitigation for lost flood storage capacity, doesn't the Corps of Engineers require this already for certain size projects (Yellowstone County)? Agreed, the requirement is removed.

In **Section 10.2.14**, can detached garages only be wet proofed (Miles City)? A detached garage for residential parking cannot be constructed in the Floodway, see prohibited structures in Section 6.1.1. A detached garage does not meet the requirements in Section 9.11 as an accessory structure in the floodway. Section 10 prescribes the building standards for non residential accessory structures in the floodplain outside of a floodway and the flood fringe where a floodway is designated and includes can wet proofing.

In **Section 10.2.14**, if a structure is wet proofed does it mean that the materials have to be made of flood resistant materials as well as having the proper venting (Miles City)? Yes, it does.

Does **Section 10.2.16**, Elevation of Lowest Floor, negate options for wet or dry flood proofing (Gallatin)? The requirement is modified by the requirements in Section 10.3 and 10.4 depending on the use.

Section 10.3.2 requires an attached garage floor to be two feet or more above the Base Flood Elevation, isn't the minimum requirement that the attached garage only needs to be wet proofed (Gallatin)? Yes, an attached garage used for parking, storage or access is treated as an enclosure for insurance purposes and must meet at least the wet proofing requirements so as to not affect the residential lowest floor rating for insurance purposes. However, most attached garages are converted to living spaces, so the minimum requirement is to have the attached garage floor two feet above the Base Flood Elevation.

In **Section 10.4.4.4**, what Sections are being referenced (Gallatin)? Reference to Sections 10.2.10, 10.2.11 and 10.2.12 has been added.

Comment for **Section 12.2.1 and 12.2.2**, it is not helpful to submit an application for flood plain permit concurrently with a variance application, prefer to use a flood plain permit application as a means to ensure the conditions of the variance have been met (Gallatin). The

requirements of a flood plain permit would have to be met, with the exception of specific building standard(s) that are instead allowed with a variance. The variance applies to a specific building standard only and not to any other process or procedure required to process and evaluates a floodplain permit application.

Section 12.4.1.9 appears to be a notice and not a criterion (Gallatin). The paragraph is reworded.

For **Section 12.4.2**, does the exception to the variance criteria apply to the floodway area (Miles City)? Clarification added to Section 12.4.1.3 and Section 12.4.2.1 that a variance cannot be granted for a new building in the floodway.

Minor word edits suggested for **Section 13.2, 13.3 and 13.4** (Gallatin). Suggested edits considered and some accepted.

Comment to **Section 14.2.3**, the possibility of getting a search warrant is slim to none (Gallatin). Probably is, but a search warrant that is refused can yet demonstrate a reasonable effort has been made by the responsible regulatory agency to adequately protect injury of other downstream.

In **Section 14.5**, why is the period of 10 days different than the 30 days in Section 13 (Gallatin)? In an enforcement situation, a speedy process to remedy a possible violation is important. A longer response may be allowed if necessary.