



# Successful NAI Negotiations

State of Montana  
2010 FLOODPLAIN RESOURCE SEMINAR  
*"FLOODPLAIN LEGAL WORKSHOP"*  
Edward A. Thomas, Esq.

# Today's Outline

- **Very Brief Recap of NAI**
- **Theory of Negotiations**
- **Publications, Web-Casts And Workshops**
- **A Real World Example**
- **Some Made Up , But Realistic Examples**
- **Your Examples!**
- **Questions and Answers**

# Land Use Regulations Are Local Within A State and Federal Context

**The Views Expressed Are Those of the Author and Do not Necessarily Reflect Approval Of Any Organization.**

- **This is Not Legal Advice – It is a Lecture on General Principles of Law, and Related Concepts. For Legal Advice see a Lawyer Licensed in Your Jurisdiction.**

# Does Nature Cause Disasters?

- **Some Folks Say: Global Warming Sea Level Rise- Causes Harm: Mother Nature is at Fault**
- **Are Natural Disasters “Natural”?**
- **Dr. Gilbert White Stated The Facts:**
  - **“Floods are Acts of Nature; But Flood Losses Are Largely Acts of Man”**
- **My Client Is Innocent!**

**Cause of Increased Flood Loss Is Changes in Density and Cost/Type of Buildings in Hazardous Areas**

# Please Understand

- **Even if we perfectly implement current standards, damages and flood heights will continue to increase.**

**Remember, we have done a number of positive things, both non-structural and structural, but...  
We'll discuss why that is...**

# Central Message

**Even If We Perfectly Implement  
Current Standards,  
Damages Will Increase.**

Remember, we have done a number of positive things,  
both non-structural and structural, but...  
We'll discuss why that is...

# With Full Build Out Flood Heights May Increase Dramatically

- **No Adverse Impact:**
  - **A New Direction in Floodplain Management Policy**
  - **Larry Larson PE, CFM and Doug Plasencia PE, CFM**
  - **Published in Natural Hazards Review Nov. 2001, IAAN 1527-6988**

# A Solution

- **Go Beyond NFIP Minimum Standards**
  - **No Adverse Impact-CRS Type:**
    - **Development Decision-making**
    - **Planning**
    - **Emergency Preparedness**

# No Adverse Impact Floodplain Regulation

- **Consistent with the Concept of Sustainable Development**
- **Provides a Pragmatic Standard for Regulation**
- **Complements Good Water Quality, Wetland and Stormwater Regulation**
- **Makes Sense on a Local and Regional Basis**
- **May be Rewarded by FEMA's Community Rating System, Especially Under the New CRS Manual**

# Governmental Rights and Duties to Manage Development

- **Does Government Have a Right to Regulate to Prevent Harm?**
  
- **Does Government Have an Affirmative Duty to Regulate to Prevent Harm?**



# Summary

- **No Adverse Impact Water Resources Management Is:**
  - A) Legal**
  - B) Equitable**
  - C) Practical**
  - D) Defensible in Court**

# Hazard Based Regulation And The Constitution

- Hazard Based Regulation Generally Sustained Against Constitutional Challenges
- Goal of Protecting the Public Accorded **ENORMOUS DEFERENCE** by the Courts



## Future Concept

**Activities that could adversely impact flood damage to another property or community will be allowed only to the extent that the impacts are mitigated or have been accounted for within an adopted community-based plan.**

# No Adverse Impact Roles

- **State, Regional & Local Government Working With the Private Sector Is the Key**
  - Develop and adopt NAI community-based plans
  - Adopt NAI strategies
  - Educate citizens on the “Good Neighbor Policy”



# What is the Result of Following the No Adverse Impact Principle?

- **With NAI, the Persons Who May be Victimized By Improper Development Are Made Aware and Can Have their Concerns Voiced to Community Officials.**
- **Really Turns the Usual Development Process Around!**

# How Can We Best Negotiate Our Way To Successful Floodplain Management ?

## Three Very Important Books:

- ***Getting to Yes*, Fisher and Ury+ Patton, Second Edition, Penguin Books 1991**
- ***The Power of A Positive No*, Ury, Bantam Books, 2007**
- ***Floodplain Management: A New Approach for a New Era*, Freitag et al., Island Press, 2009**

# *Getting to Yes* By Roger Fisher and William Ury

## Second Edition Has Additional Material by Bruce Patton

- **Great Book**
- **Focuses on “Getting to Yes” Through Principled Negotiations**
- **From Our Perspective We Want the Principle to be...**

# “Getting to Yes”= Getting to NAI

- **Do No Harm**
- **A/K/A No Adverse Impact**
- **Can We All Agree That This Development Must Be Done in Such a Manner as To:**
  - a) **Not Result in Lawsuits Against the Municipality and Local Officials?**
  - b) **Done In a Manner So It Will Not Harm Water Quality, Increase Velocities, Or Flood Others?**
  - c) **Consider Due Process and Equal Protection of All?**

# “Getting to Yes”

- **Separate People from the Problem**
- **Be Hard on the Problem Soft on the People**
- **Consider the Other Persons Perspective**
- **Look for Mutual Gain**
- **Insist on Objective, Harm Prevention, Criteria**
- **Consider What YOUR Best Alternative to a Negotiated Agreement (BATNA) Might Be**
- **Consider What Their Best Alternative to a Negotiated Agreement (BATNA) Might Be**
- **Read the Book!**

- ***Floodplain Management: A New Approach for a New Era*, Freitag et al., Island Press, 2009**
- **Wonderful, Real World Examples**
- **Filtered Through Six Questions**
- **I Recommend This Book in the Strongest Possible Terms!**
- **Please Read It!**

# The Six Questions in

## *Floodplain Management: A New Approach for a New Era*

- **1. What Values or Assets Do You Want to Protect or Enhance?**
- **2. What Are the Apparent Risks or Opportunities for Enhancement?**
- **3. What is the Range of Risk-Reduction or Opportunity-Enhancement Available**

# **The Six Questions in** *Floodplain Management: A New Approach for a New Era*

- **4. How Well Does Each Strategy Reduce or enhance the Resource?**
- **5. What Other Risks or Benefits Does Each Strategy Introduce?**
- **6. Are the Costs Imposed by Each Strategy too High?**

# **We Also Need To Consider Who Pays and Who Benefits**

- **A Huge Impediment To Proper Floodplain Management**
  
- **Externality**

# Who Pays For Disaster Assistance?

- **Costs of flooding are usually largely borne by:**
  - a) **The Federal and Sometimes the State Taxpayer Through IRS Casualty Losses, SBA Loans, Disaster CDBG Funds, and the Whole Panoply of Federal and Private Disaster Relief Described in the Ed Thomas and Sarah Bowen Publication "Patchwork Quilt (Located at:**  
[http://www.floods.org/PDF/Post\\_Disaster\\_Reconstruction\\_Patchwork\\_Quilt\\_ET.pdf](http://www.floods.org/PDF/Post_Disaster_Reconstruction_Patchwork_Quilt_ET.pdf) )
  - b) **By Disaster Victims Themselves**

# Cui Bono? (Who Benefits?)

- **At Least the Short Term Benefits of Unwise or Improper Floodplain Development Flow to:**
  - a) **Developers (profit on sale and occupancy)**
  - b) **Local Governments (Real Estate and Sales Taxes-Jobs etc.)**
  - c) **State Government (Some Sales Tax-Jobs etc.)**
  - d) **Mortgage Companies (Profits On Loans etc.)**
  - e) **The Occupants of Floodplains Who May Benefit From a Lovely Place To Stay For a While, Anyway**

# Why Should Government Do Something About This?

- **Fundamental Duty**
- **Protect The Present**
- **Preserve A Community's Future**

# Is There A Government Duty to Prevent Harm?

- **Does Government Have a “Duty to Prevent Injurious Consequences from Floods?”**

# Why Else Should Government Do Something About This?

- In a Word:

**Liability**

# How Can You Best Avoid These Friendly Lawyer Folks?



# ***The Power of A Positive No*, by William Ury, Bantam Books, 2007**

- OK.
- I know You Are All Busy People
- If You Will Only Read One of The Three Books I Am Recommending Please Read *The Power of A Positive No*
- ***It Fits NAI Negotiations To a T, in My Opinion***
- **The Bob Freitag *et al.* Book Is Also Incredibly Worthwhile**

# **Remember We Talked Earlier Today About How To Follow the No Adverse Impact Principle?**

- **Identify ALL the Impacts of a Proposed Development**
- **Determine ALL the Properties Which Will be Impacted**
- **Notify Potentially Affected Persons of the Impact of Any Proposed Development**

# How To Follow the No Adverse Impact Principle?

- **Design or Re-Design the Project to Avoid Adverse Impacts**
- **Require Appropriate Mitigation Measures Acceptable to the Community and the Affected Members of the Community**

# What is the Result of Following the No Adverse Impact Principle?

- **With NAI, the Persons Who May be Victimized By Improper Development Are Made Aware and Can Have their Concerns Voiced to Community Officials.**
- **Really Turns the Usual Development Process Around!**

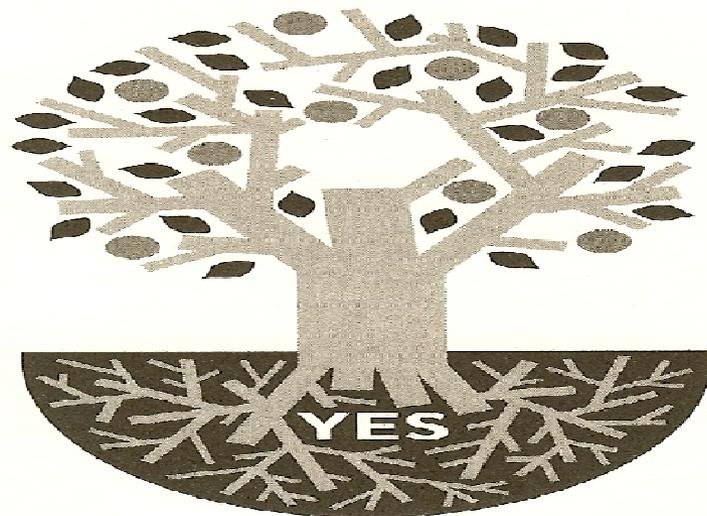
# No Adverse Impact Hazard Regulation Is A Winning Concept

- **So How Do We Proceed?**
- **Planning**
- **Partnerships**
- **Negotiations**
- **Multi-Use Mapping and Engineering**
- **Negotiations**
- **Fair Regulation to Prevent Harm**

# Identify ALL the Impacts of a Proposed Development

*Chapter One*

UNCOVER YOUR YES



# Design or Re-Design the Project to Avoid Adverse Impacts

## Require Appropriate Mitigation Measures

*Chapter Two*

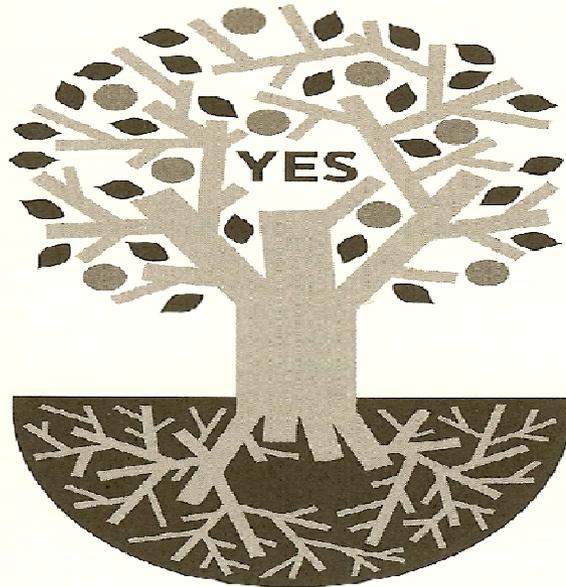
EMPOWER YOUR NO



# Turn the Usual Development Process Around!

*Chapter Three*

RESPECT YOUR WAY TO YES



*Empower  
Private Sector  
To Do What It  
Does Best!*

*Solve Problems!*

***The Power of A Positive No*, by William Ury,  
Bantam Books, 2007**

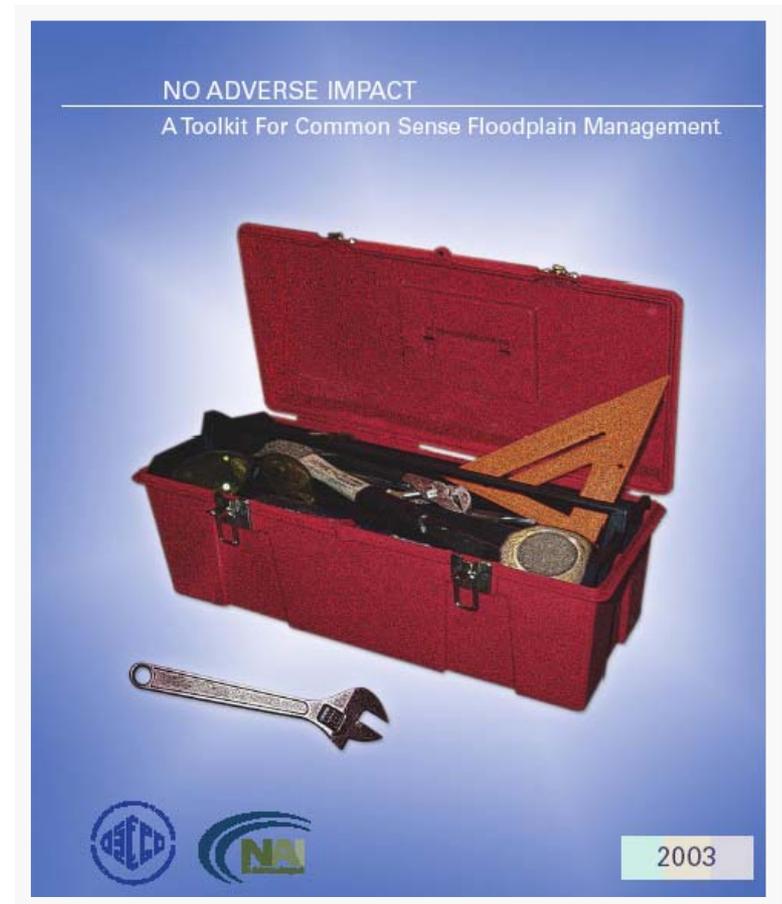
- **Please Read It!**

- **NAI Toolkit**
- **Best Single Publication on Floodplain Management and No Adverse Impact**
- **Discusses CRS Credits For Good Behavior in Some Detail**



# NAI Toolkit

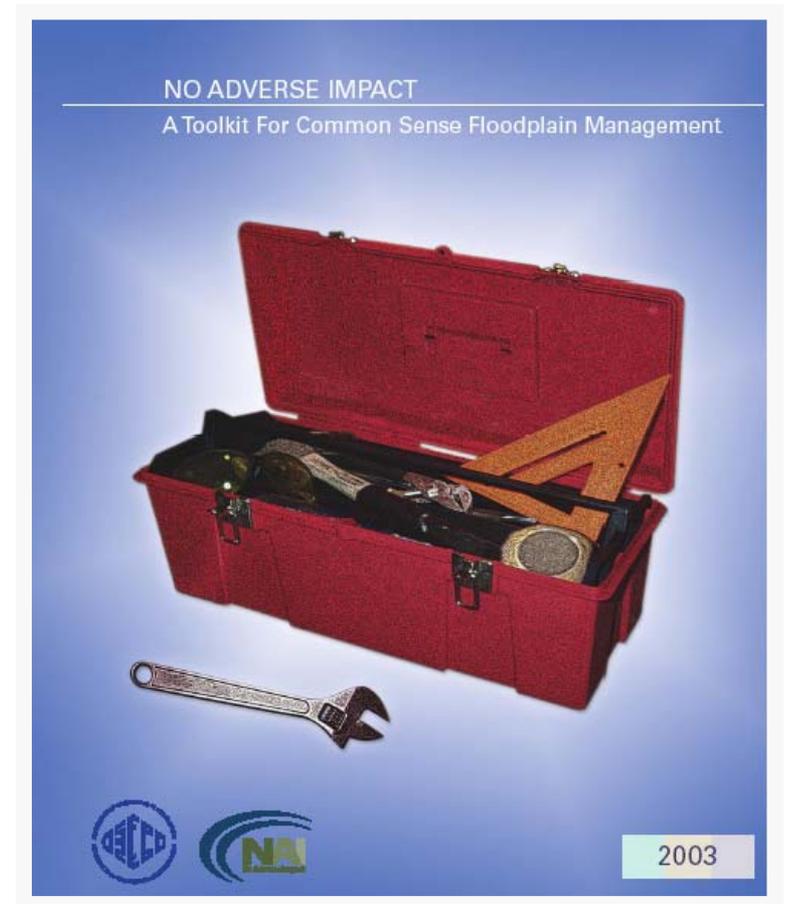
- ***No Adverse Impact:  
A Toolkit for Common  
Sense Floodplain  
Management (2003)***





# NAI Strategies

- **Strategies grouped according to:**
  - Basic - NFIP
  - Better
  - NAI



- **1. Total Water Resources**

# NAI Next Steps

- **Develop a Comprehensive Watershed Wide Future Conditions Water Resources Plan Addressing Water Supply+ Water Quality+ Stormwater Management + Floodplain Management**
- **A Worthwhile Goal**
  - **Require that All Development Does Not Adversely Change The Hydrograph For The 1-, 10-, 50-, 100-, 500-Year**
  - **BOTH Flood and Stormwater**

**To Achieve This Goal We Will Need:**

**Demonstration Projects+ Incentives**

**A Entirely New Way of Considering Water as A Precious Resource**

**Alternative to achieving this Goal Is Increased Flood Heights in Watersheds; Misery; Quite Probably Litigation Too**



# NAI Total Water Resources Management

ASFPM 2009 Annual Conference

Fernando Pasquel, PE; Turgay Dabek, PE; Ed Thomas, Esq. Baker  
Panel Discussion: Bill DeGroot, PE, Denver UDFCD;  
Lisa Hair, EPA;  
Jon Kusler PhD, Esq., ASWM

June 8, 2009

**Baker**

45



# Using Smart Growth to Reduce Flood Hazards and Restore Natural Lands

On Behalf Of:

**The Association of State Floodplain Managers  
Annual Conference 2009  
Orlando , Florida**

Edward A. Thomas, Esq.

**Baker**

46

# LID Balances Development and Watershed Protection

- **What is LID?**
  - An approach to site or subdivision design that mitigates the impacts of development on stormwater flows and water quality (specific design storm)



Traditional Streetscape



LID streetscape

# Total Water Resources Management-Linkages

- **Land Use-Water Quality-Stormwater-Floodplain Management**
- **Transportation**
- **Municipal Liability**
- **Protection of Groundwater**
- **Savings on Road Salt**

# Recent Publications on Comprehensive Water Resources Management

- ***A Perfect Storm of Opportunities to Establish and Fund a Program to Reduce Misery and Protect Water Resources; April 2008.***
- **Article for the Louisiana Sea Grant Law and Policy Program. This article encourages a comprehensive view of water as a resource.**
- **[http://www.lsu.edu/sglegal/pdfs/lcl\\_89.pdf](http://www.lsu.edu/sglegal/pdfs/lcl_89.pdf)**

# Publications Web-Casts and Workshops

- **2. Failed Dams and Levees**



# Levee Liability Update

## 2008 Annual Conference of the National Association of Floodplain and Stormwater Managers

Napa, California

Edward A. Thomas Esq.

**Baker**



# Legal Problems When Levees Do not Protect: A Challenge To The Engineering Profession

On Behalf Of:

**The Society of American Military Engineers**

**Rock Island Post**

**Quad City Botanical Center**

**December 18, 2008**

Edward A. Thomas, Esq.

# Paper On This Topic From ASFPM

## LIABILITY FOR WATER CONTROL STRUCTURE FAILURE DUE TO FLOODING



**Special Edition for the Floodplain Managers Annual Meeting  
September 7, 2006**

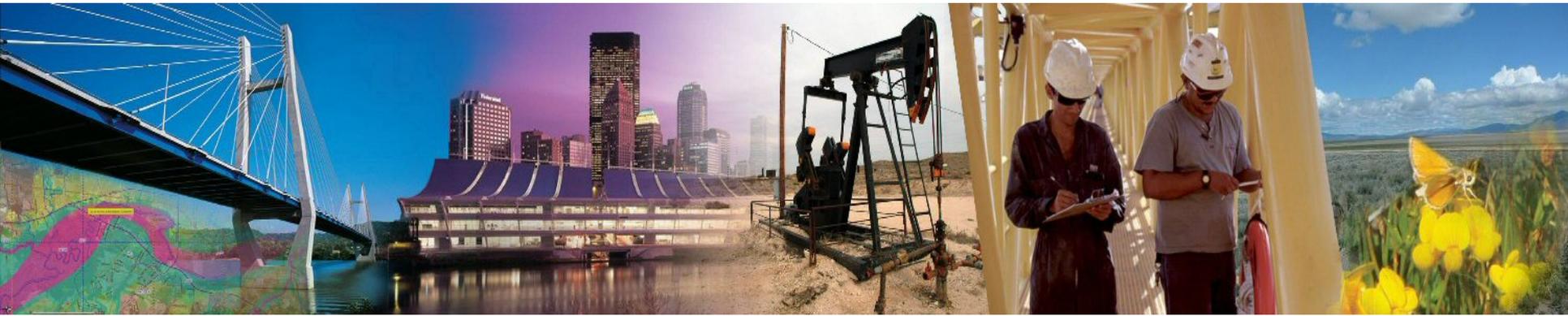
**Edward A. Thomas, Esq.**

**Michael Baker, Inc.**

**[www.floods.org](http://www.floods.org)**



# MICHAEL BAKER CORPORATION



**On Behalf Of:**

**The American Council of Engineering Companies**

**Web-Cast**

# Failed Dams and Levees: Examining Engineering Liability

Edward A. Thomas Esq.

# Liability For Failed Dams and Levees-Linkages

- **State and Municipal Liability**
- **Professional Liability**
- **FEMA Efforts**
- **USACE Efforts**
- **SAME Interest**
- **ASCE Interest**
- **ACEC Interest**
- **Emergency Planning and Preparedness**
- **Evacuation Planning**
- **COOP and COG**
- **Continuity of Business Operations**

# Publications and Workshops

- **3. Legal Aspects of Floodplain and Stormwater Management**



# Protecting the Property Rights of All: The Technical, Legal and Practical Implementation of Watershed Based Floodplain Management

On Behalf Of:

**The Association of State Floodplain Managers**  
**2009 Annual Conference**  
**Orlando, Florida**

Jennifer Marcy, CFM- PBS&J

David Mallory, PE- UDFCD

Edward A. Thomas, Esq.-Michael Baker

**Baker**

57



# Protecting the Property Rights of All

State of Montana  
2010 FLOODPLAIN RESOURCE SEMINAR  
*“FLOODPLAIN LEGAL WORKSHOP”*

*Edward A. Thomas Esq.*

**Baker**

- **NO ADVERSE IMPACT AND THE COURTS: PROTECTING THE PROPERTY RIGHTS OF ALL**
- **Prepared for the Association of State Floodplain Managers**
- **By: Jon A. Kusler, Esq. and Edward A. Thomas, Esq.**
- **Special Edition Minnesota Association of Flood Plain Managers, November 2007**



# Recent Publications on Floodplain Management

- 1.) Law Review Article for the Vermont Journal of Environmental Law, on property rights and floodplain management:

*Mitigating Misery: Land Use and the Protection of Property Rights Before the Next Big Flood. Winter 2007-2008*

<http://sba.vermontlaw.edu/ccfg/files/VJEL/Thomas&Medlock.pdf>

- 2.) Monograph for the Denver University School of Law, Rocky Mountain Land Use Institute, on legal aspects of floodplain & stormwater management as they relate to sustainability:  
*Protecting the Property Rights of All: No Adverse Impact Floodplain and Stormwater Management 2008*

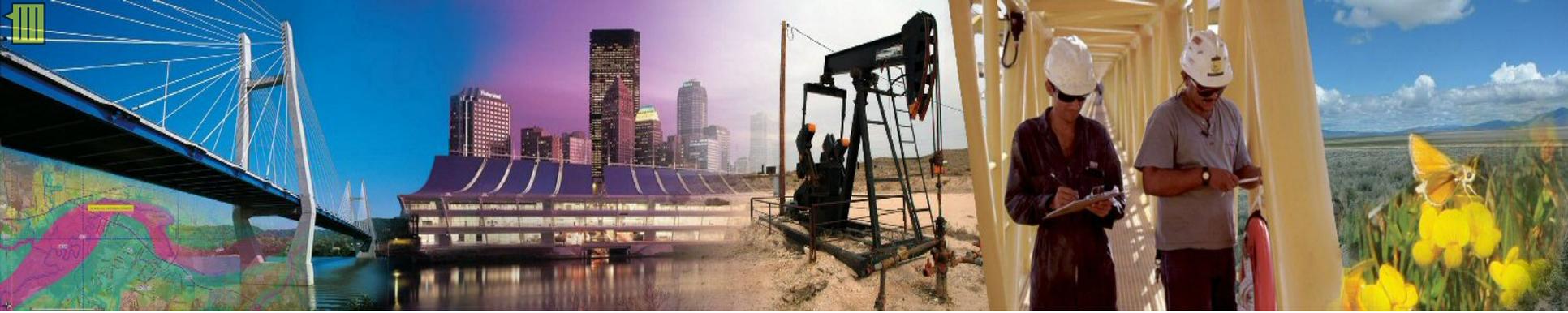
<http://law.du.edu/images/uploads/rmlui/rmlui-sustainable-floodplainMgmt.pdf>

# **Legal Aspects of Floodplain and Stormwater Management-Linkages**

- **State and Municipal Liability**
- **APA**
- **Land Use Planning**
- **Professional Liability**
- **Emergency Planning and Preparedness**
- **Evacuation Planning**

# Publications, Web-Casts and Workshops

- **4. Outreach and Risk Communication**



## **ACEC Web-Cast**

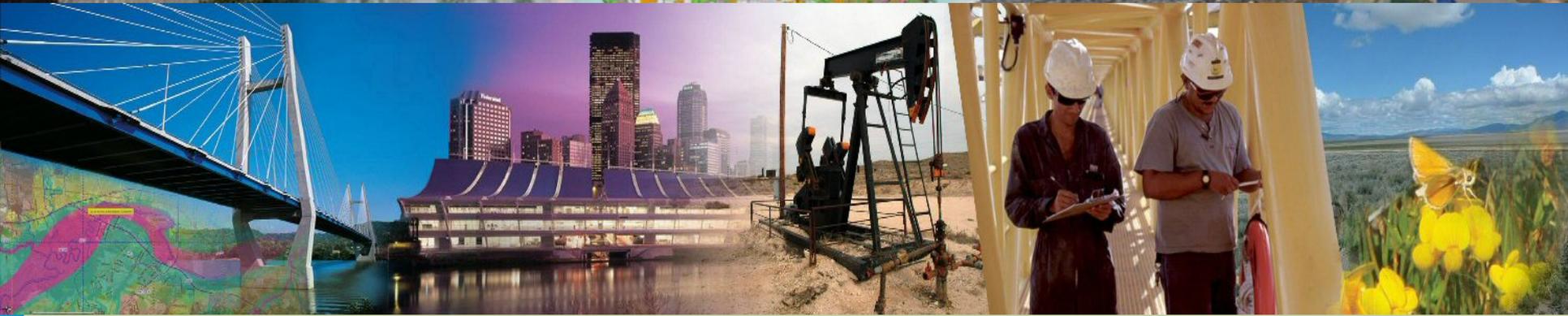
# *Liability of Communities and States for Regulating Construction in Flood Hazard Areas*

**March 4, 2008**

**Dr. Jon Kusler Esq.  
Edward A. Thomas Esq.**



MICHAEL BAKER CORPORATION



# Special FEMA Region 9 Sponsored Outreach Meetings January 2008

## Liability For Failed Levees

Edward A. Thomas Esq.

**Bake**Baker

# Harm Prevention And The Law

- **Is NAI a Silver Bullet?**
- **Use of NAI Will Significantly Reduce the Probability of a Loss in Court!**
- **Even Better Odds if there is A Good, Fair Variance Procedure + Flexibility in the Regulation + Community Applies the Principle to their Own Activities.**

## Prevention

- **We Throw Money At Problems After They Occur**
- **You Can Pay A Little Now Or Lots Later**
- **The Legal System Is Ready To Help You Pay Later**

# Take Away Message

- **Responsible For Community Development?**
  - **Many Areas Can Flood**
  - **Uninsured Victims Will Likely Sue-If They Can Find Someone to Blame**
  - **Fair Harm Prevention Regulation Helps Everyone**

# Message For All Involved In Community Development

- **The Fundamental Rules of Development Articulated, By Federal Law, Envision Housing and Development Which Is:**
  - **Decent**
  - **Safe**
  - **Sanitary**
  - **Affordable**

# Flooded Development Fails That Vision!

- **Housing And Development Which Flood Are:**
  - **Indecent**
  - **Unsafe**
  - **Unsanitary**
  - **Unaffordable- by the Flood Victims, By Their Community, By The State, and By Our Nation!**

- **State and Municipal Liability**
- **Emergency Planning**
- **Evacuation Planning**
- **Professional Liability**
- **APA**
- **ASCE**
- **ACEC**
- **FEMA**
- **USACE**

- **5. Creating and Funding a Hazard Mitigation Program**



Post Disaster Reconstruction:  
*The Patchwork Quilt— A Creative Strategy for  
Safe Post-Disaster Rebuilding*

Association of State Floodplain Managers  
Orlando Florida  
June 10, 2009

**Deborah Mills, CFM; Edward A. Thomas Esq.; Sarah Bowen, CFM;  
Jennifer K. Dunn CFM; MSc; Ross Richardson; Jane Sibley Franz, CFM, AICP;  
Heidi Recksiek**

**Baker**

**This Publication and PowerPoint Is On The  
Association of State Floodplain Managers Web  
Site**

**POST-DISASTER RECONSTRUCTION**

**THE PATCHWORK QUILT:**

***A CREATIVE STRATEGY FOR SAFE &***

***LONG TERM POST-DISASTER REBUILDING***

**Edward A. Thomas Esq. and**

**Sarah K. Bowen CFM**

**Special Edition of November 20, 2008 for the National  
Floodproofing Conference IV**

**New Orleans, Louisiana**

# Creating and Funding a Hazard Mitigation Program-Linkages

- **Emergency Planning**
- **APA**
- **FEMA**
- **USACE**
- **Evacuation Planning**
- **Hazard Mitigation**

**To Better Serve Our Nation, Baker Has Developed A Vast Body of:**

**A.) Publications**

**B.) Workshops**

**C.) Web-Casts**

**Most Are Available In pdf Format On Various Web-Sites**

**We Have Distributed a List of Major Legally Related Publications For Your Information and Use**

**How Can We ALL Work Together To Make Best Use Of Them?**

# How Can We Succeed?

- **Learning At Conferences Such As The Excellent Montana Floodplain College 2010**
- **Learning By Reading-See Handouts**
- **Negotiating on Behalf of Present and Future Generations**
- **Let's Work Together To Reduce, and Even Eliminate Needless Damages Caused By Unwise and Improper Construction!!!!**

# **Baker** One Example of Yes! No! Yes!

- **Oklahoma Handout**

# Additional Examples

## 1.) How About Dealing With An Unhappy Developer Whose Land is Floodway

How To Proceed?

Two Situations:

- A) Land Has Been Identified Floodway For Years;**
- B) Land Was Just Purchased For \$ 1,000,000 -Zoned  
Industrial-New Map Indicates Floodway**

Different Negotiations?

Lets Discuss

# Additional Examples

**You Are:**

- a AMFM Member
- A CFM
- A Local Floodplain Administrator

**You Want the Community to Adopt Higher Standards**

**How To Proceed?**

**Let's Discuss**

# Your Turn!

- **Let's Do Some Additional Examples**
  
- **OK?**

# Remember!

- **Principled and Calm**
- **Knowledgeable**
- **Yes!**
- **NO!**
- **YES!!!!**

# Or If It Is A Good Project...

- **Yes.**

- **Yes.**

- **Yes!**

# Portion of The Playbook From The Earlier Lecture

- **How Efforts To Regulate Are Attacked**
- **The Playbook**

# The Playbook – How Can Government Efforts to Regulate Be Attacked? I

- **Bluster and Threats; and**

# How Does Our Negotiations Module Help?

- **Turns a Potential Confrontation Into a Problem Solving Session**

# How Can Government Efforts To Regulate Be Attacked? II

- Allegation that the Regulator has Deprived a Developer of a Constitutional Right “Under the Color of Law”. (*42 USC Section 1983/1988*);
- **This is Not Theory-Very Real In Oklahoma (Canadian County) and States Like Montana**

# How Does Our Negotiations Module Help?

- **Turns a Potential Confrontation Into a Problem Solving Session**

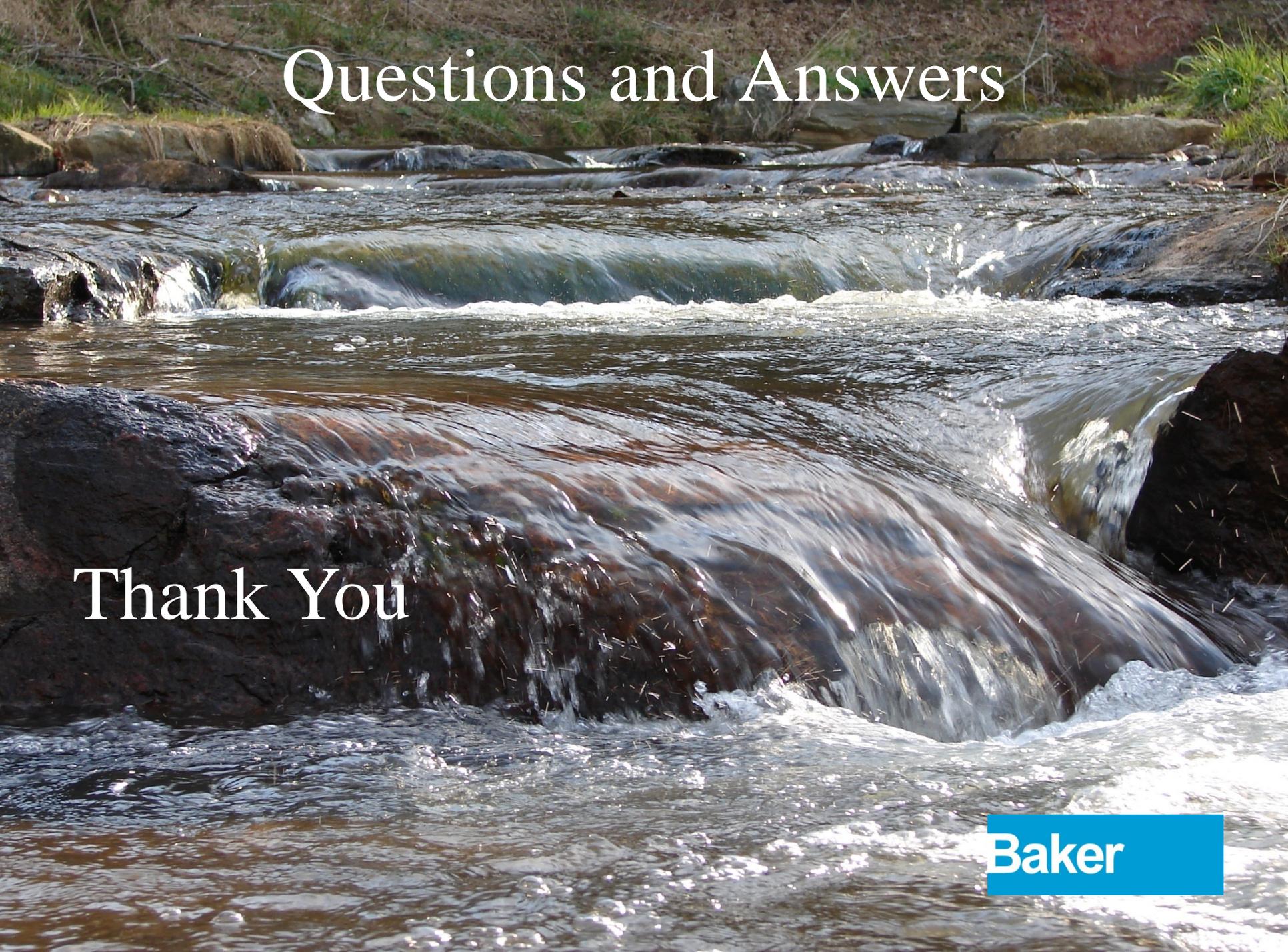
# How Can Government Efforts To Regulate Be Attacked? III

- **“Class of One” Allegations of Discriminatory Treatment Based on Personal Animus, or Other Inappropriate Factors; and**

# How Does Our Negotiations Module Help?

- **Takes Emotions Out of the Equation**
- **Turns a Potential Confrontation Into a Problem Solving Session**

# Questions and Answers



Thank You

**Baker**



# Successful NAI Negotiations

State of Montana  
2010 FLOODPLAIN RESOURCE SEMINAR  
*"FLOODPLAIN LEGAL WORKSHOP"*

Edward A. Thomas, Esq.  
617-515-3849 (Office)  
[ethomas@mbakercorp.com](mailto:ethomas@mbakercorp.com)