

State of Montana

Building Thriving Community Resilience and Sustainability: Floodplain Legal and Sustainable Development Workshop

*After Koontz v. St. Johns Water Management District:
Negotiating Safe Development*

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Natural Hazard Mitigation Association



Good Morning!

We appear today representing:

The Natural Hazard Mitigation Association

This is not and cannot be legal advice.

This is a statement of general principles of policy.

Land Use Regulations Are Local Within A State and Federal Context

The Views Expressed Are Those of the Authors 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.

Summary from Earlier Discussions

- Safe Development and Low Impact Development 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

Might All Montana Communities Wish To Consider Higher Standards?

Consider:

- A) Uncertainties in flood elevations-50% confidence
- B) Consequences if a factory, water treatment plant or other critical facility is flooded
- C) 50% chance that 1% flood will be exceeded within 70 years
- D) Changes in flood heights and velocities due to factors such as upstream wildfires and mud slides/mudflow
- E) Climate variability and climate change
- F) Effect of poor development practices on threatened and endangered species
- G) Being proper stewards of our land and resources so as to preserve and protect future generations inheritance

Other Contributing Factors:

- Think about the following scenarios-
 - Debris blockage (models assumes no blockage)
 - Wildfires (exacerbated flows from burned vegetation-hydrophobic soils etc.)
 - Technical assumptions and other uncertainties



Implementing Safe Development in the Real World

- Comprehensive watershed future conditions water resources mapping looking at water supply-water quality-stormwater management and flooding
- Interim Measure
 - Require a demonstration that **all** development does not change the hydrograph for the 1-10-50-100-500 year BOTH flood and storm
- How to do this:

Low Impact Development (LID)

These Ideas Are Very Much in Line with Suggestions from the USACE

- Policy Guidance Letter (PGL) No. 52, Flood Plain Management Plans
- “The four main strategies and their related tools which should be considered...are:

Modify human susceptibility to flood damage and disruption, with...:

- 1) land use regulations, such as a regulatory floodway designation which is more restrictive than NFIP regulatory floodway criteria of 1-foot rise in the 100-year flood elevation.

Policy Guidance Letter (PGL) No. 52, Flood Plain Management Plans (Continued)

- 2) public development & redevelopment policies, such as “no net increase in runoff” requirements for new development elevation requirements for new development within the post-project flood plain that exceed the NFIP requirements.
- 3) flood warning systems.
- 4) flood damage reduction measures such as floodproofing of structures

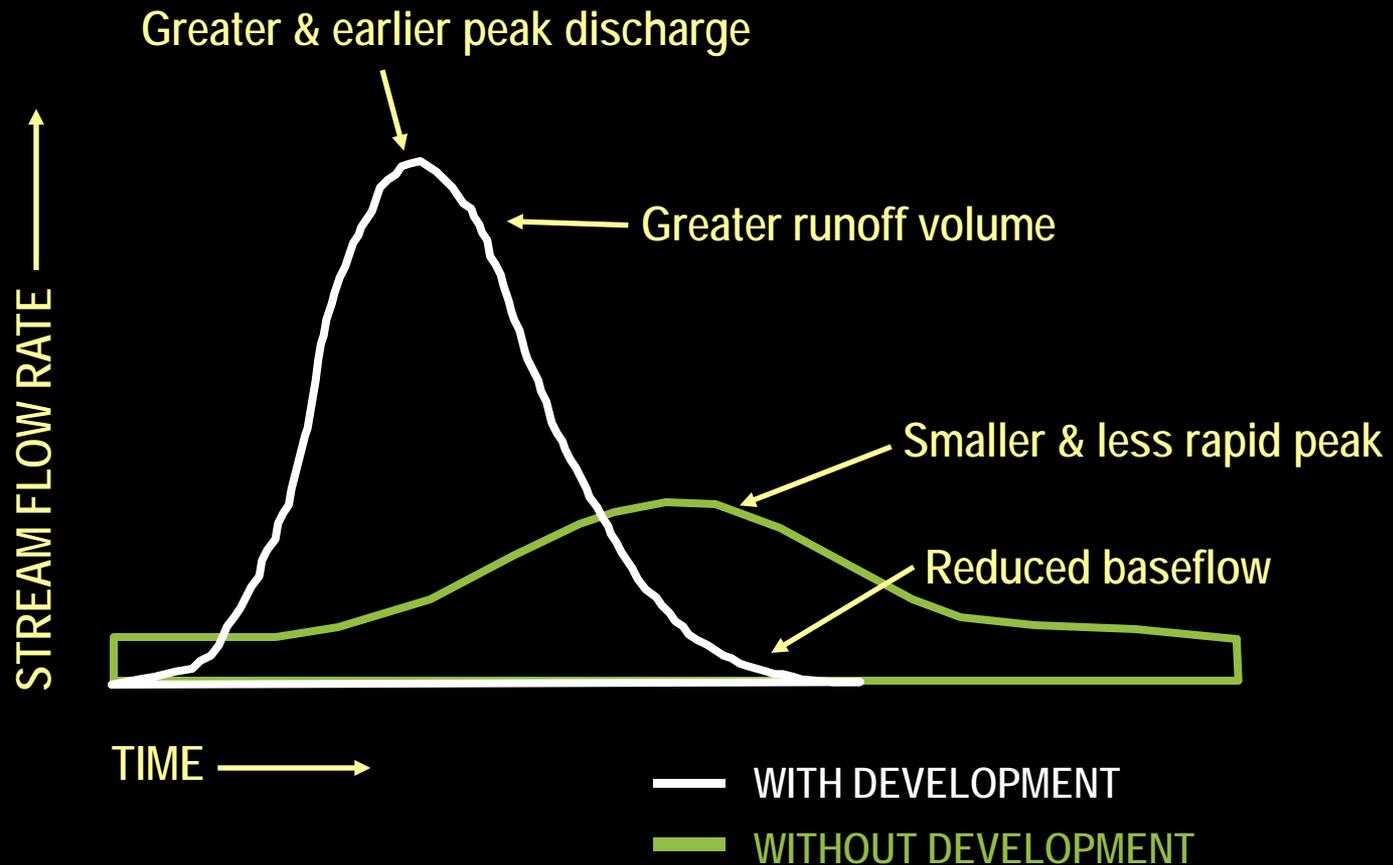
What Have We Been Doing?

Treating Water As Garbage

- Yesterday we mentioned an excellent Law Review Article which makes the point that "Diffused surface water should be treated as a necessary asset to replenish groundwater aquifers used for drinking water, and not as waste to be disposed of by landowners."
- See, Darin L. Whitmer, COMMON ENEMY OR UNILATERAL THREAT: WHY JURISDICTIONS NEED TO BECOME REASONABLE IN REGARDS TO DIFFUSE SURFACE WATERS 41 Creighton L. Rev. 423, April, 2008.

Stormwater

Impacts of Development on Streams



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 Safe Development

Also called: No Adverse Impact

- A/K/A Do No Harm
 - A/K/A *“Sic utere tuo ut alienum non laedas”*
 - [Use your property so you do not harm others]
- 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!

Book Published in 2009

- *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
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?

***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 Our Needs to a T, in My Opinion*
- *The Bob Freitag et al. Book Is Also Incredibly Worthwhile*

How To Follow the Safe Development Impact Principles:

- 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

Remember the Result of Following the Safe Development Principles

- Using these Principles 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!

Safe Design & Fair 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



Steps to Uncover the “Yes”

- Never Start With “NO!”
- We Are Against NO
- Start With What We Are For
- We Want Your Development!
- We Need The Tax Revenue

Go From Reactive To Proactive

- The Biggest Obstacle to Successful Negotiations Is
- Us
- Be Ready To Take A Time-Out
- Ury Calls This Idea “Going to the Balcony”
- Listen to Your Emotions
- Control Them
- Keep Asking “Why?”
- Figure Out YOUR Interests
- Figure Out YOUR Values
- Safety? Sustainability? Protect the Rights of All?

Find A “Yes”

- Maybe We Are For Development
- We Are For Safe Place For Our Citizens To Live
- We Must Consider Others When We Develop
- Channel Any Emotion Into Action

Your Yes

- Bases Discussion on Something Positive
- Provides All Parties A Sense Of Direction
- Gives Everyone Some Positive Energy

Design or Re-Design the Project to Avoid Adverse Impacts

Chapter Two

EMPOWER YOUR NO



“To Be Prepared Is Half The Victory”
Miguel de Cervantes

- How Are You in Montana Becoming Prepared?

If Needed, Develop A Well Thought Out, Clear, “NO!”

- Know Your Stuff
- Develop a Plan B
- Build a Coalition-Partnerships
- Who Shares Your Interests?
- Take Away Their Ability To Launch A Surprise Attack
- Consider The Worst Case
- Consider The Worst Case If You Have To Live With A Yes, When You Should Have Said No
- The Mirror Test

Three Questions When Considering “No”

1. Do I Have An Interest In Saying No?
2. Do I Have The Power
3. Do I Have The Right

Then Ask The Same Questions About Saying “Yes”

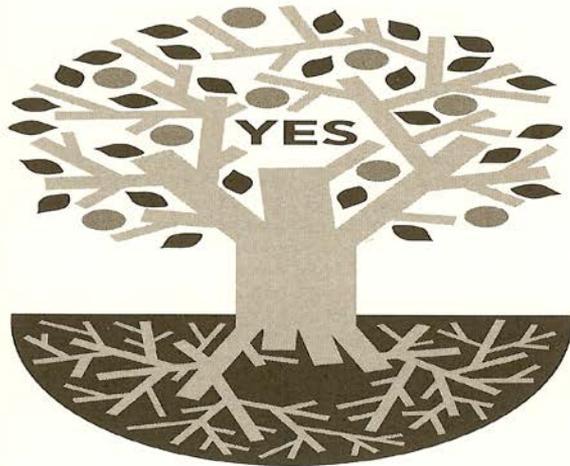
1. Interest
2. Power
3. Right

Turn the Usual Development Process Around!

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

Chapter Three

RESPECT YOUR WAY TO YES



*Solve
Problems!*

Make Sure That Your “No” does Not Burn Bridges

- Be Respectful
- Working in Private Industry Is Tough
- Adopt A Positive Attitude Of Respect
- Pay Attention To Your Emotions, Needs, and Interests
- Then Do The Same For The Other Guy
- Respect Them For Your Best Interests!
- Listen-Listen
- Listen More To Understand-To Find A “Yes” In There Somewhere

Work On Finding A “Yes!”

- Ask Clarifying Questions
- Can You Please Help Me Understand Why You Need This?
- Acknowledge The Other Party – Does Not Mean Agreeing, Just Understanding

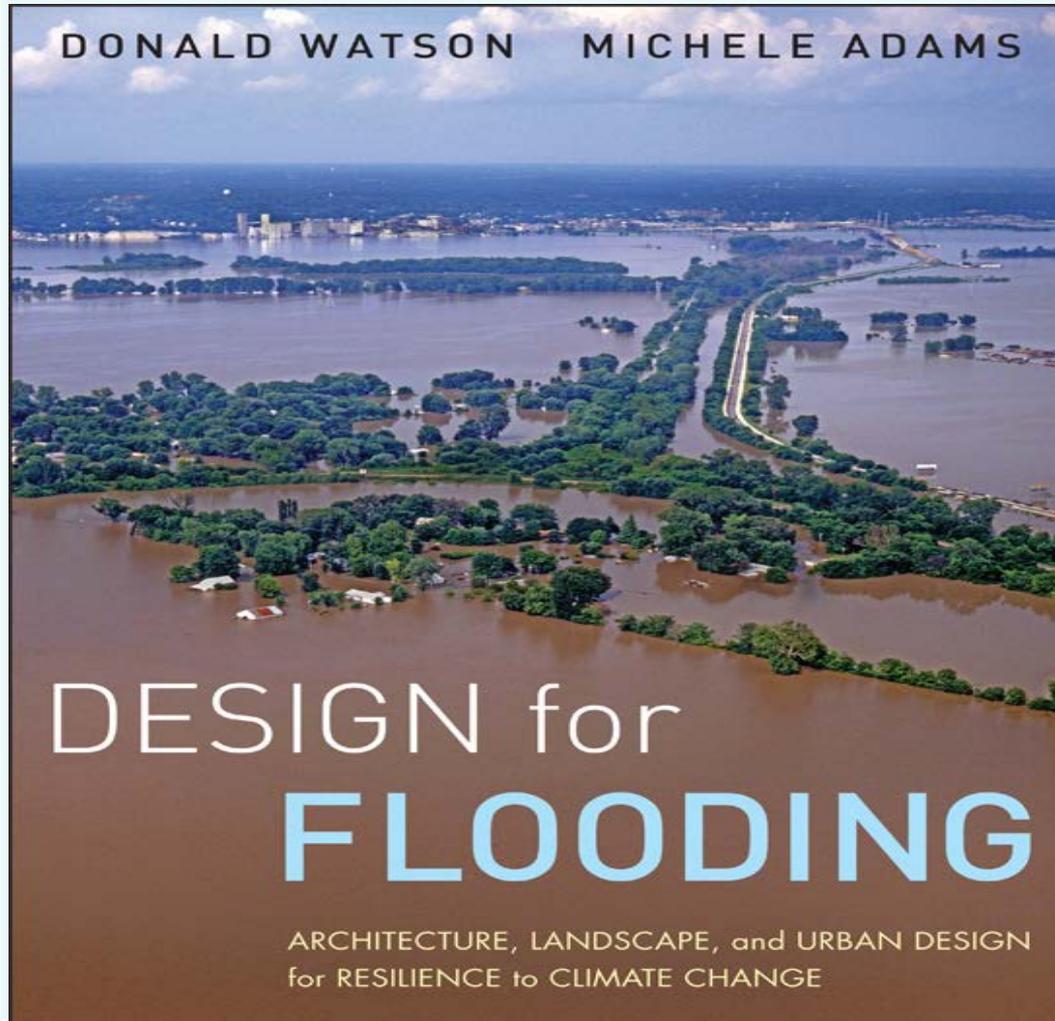
Be Nice

- The Awesome Power Of “I Am Sorry....
- That We Cannot Do what You Want Exactly As You Want It....”
- I Feel Your Pain
- Try To Find Some Positive Statements You Can Say First
- This Is A Lovely Proposal...However....

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

- **Please Read It!**

Don Watson and Michele Adams Book



*Extremely
important book*

Other Tools

NAI Toolkit

- Best Single Publication on Floodplain Management and No Adverse Impact
- Discusses FEMA Community Rating System (CRS) Credits For Good Behavior in Some Detail

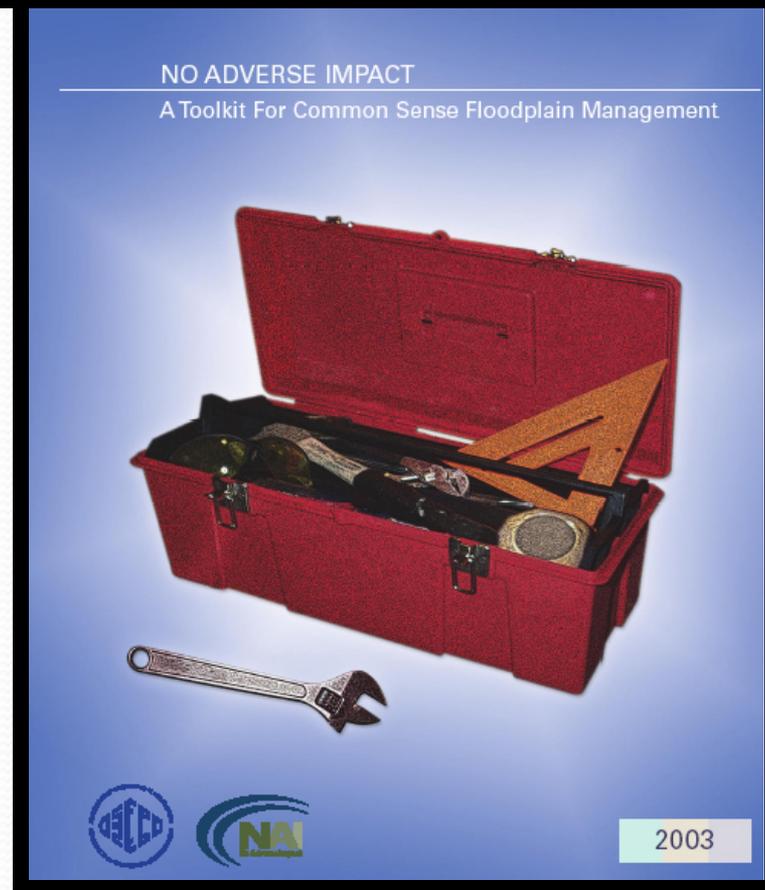
Webcasts such as:

- Climate Change and Emergency Management by NHMA available at:

<http://nhma.info/uploads/resources/Climate%20Change%20and%20Emergency%20Management%20Adaptation%20Recording-20120808.arf>

NAI Toolkit

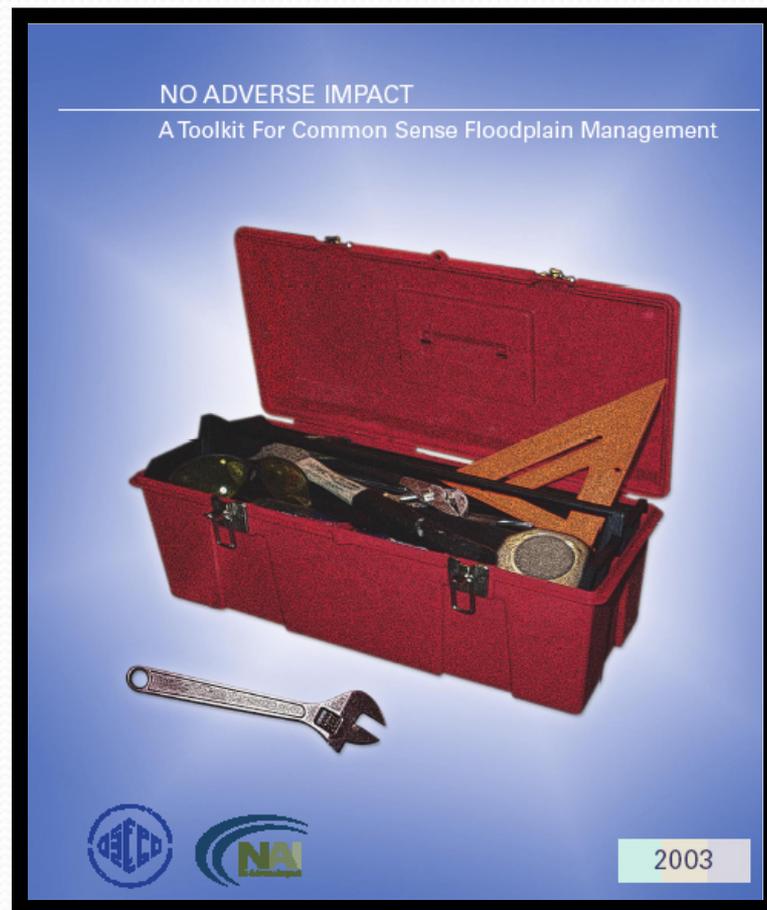
- *No Adverse Impact:
A Toolkit for Common
Sense Floodplain
Management (2003)*



www.floods.org/NoAdverseImpact/NAI_Toolkit_2003.pdf

NAI Strategies

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



Summary

To Better Serve Our Nation, There Are 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?

The Playbook Extract From The Legal Lectures

- How Efforts To Regulate Are Attacked
- The Playbook

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

- Bluster and Threats;

How Does Our Training Help?

How Can Government Efforts To Regulate Be Attacked? Part 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 Training Today & Yesterday Help?

How Can Government Efforts To Regulate Be Attacked? Part III

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

How Does Our Training Yesterday & Today Help?

How Can We Succeed?

- Learning At Conferences Such As This Really Excellent Conference & Those Put on By the State Floodplain Managers
- 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!!!!

One Example of Yes! No! Yes!

Miami, Oklahoma Story

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 \$ One Million-Zoned Industrial-New Map Indicates Floodway

Different Negotiations?

Lets Discuss

Please Supply Additional Examples from Your Experiences

A Possibility as an Example-You Are:

- A Local Stormwater manager

You Want the Community to Adopt Higher Standards

How To Proceed?

Let's Discuss

Your Turn!

- **Let's Do Some Additional Examples**
- **OK?**
- **How to Promote Low Impact Development?**
- **Green Infrastructure?**
- **Who is your audience?**

Remember!

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

Fundamental Message to Floodplain & Emergency Managers From This Training

- Stormwater, Floodplain & Emergency Managers have to stop being the “Abominable No People”!!

If It Is A Good Project...

- Yes.

- Yes.

- Yes!

Take Away Message

- Community Leaders Have Responsibility for Public Safety and Need To Be Aware:
 - Many Areas Can Flood
 - Uninsured Victims Will Likely Sue- and will try to find someone to blame
 - Fair Harm Prevention Regulations Help Everyone

Message For All Involved In Community Development

- The Fundamental Rules of Development Articulated, By 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.

Summary

- Fundamentally Our Society Must Choose Either: Better Standards to Protect Resources and People or Standards Which Inevitably Will Result in Destruction and Litigation

The people in this room will play a key role in helping create a safe and sustainable future or in failing to prevent actions which will make worse the incredible disaster response and recovery challenges we already face.

You are making tremendous progress!

Please keep going!

In Closing, A Thought from the American Society of Civil Engineers (ASCE)

- The first Fundamental Canon of the American Society of Civil Engineer's (ASCE) Code of Ethics states that:

“Engineers shall hold paramount the safety, health, and welfare of the public....”

“This canon must be the guiding principle for rebuilding the hurricane protection system in New Orleans.

And it must be applied with equal rigor to every aspect of an engineer’s work – in New Orleans, in America, and throughout the world.”

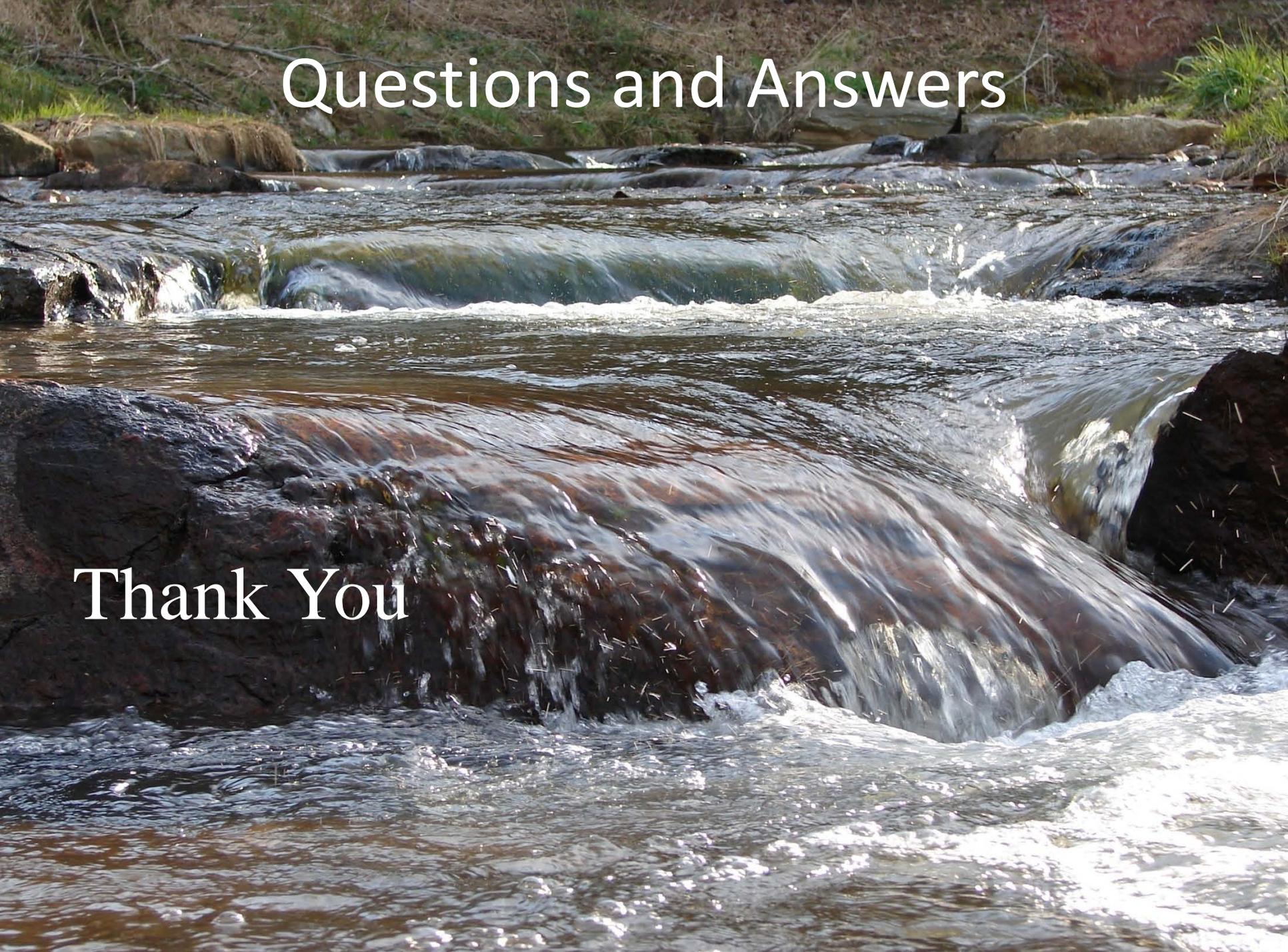
Next Steps

- When is the Right Time to Do the Right Thing?

NHMA Membership Includes

- People wanting to make a difference and work towards reducing losses from disasters
- Engineers, planners, floodplain managers, government officials, community activists, academics, practitioners, students, etc.
- People involved in building resilient organizations and communities
- Thanks for giving us this opportunity to meet you!

Questions and Answers



Thank You

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