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# Floodplain Management Today

## Violations and Enforcement Part III – “Big Stick Tools”

By Chuck Chase, CFM and LeRoy Sievers

In previous editions of *Floodplain Management Today*, we have written about violations and enforcement in articles titled “Ugly is not a Violation” and “Reaching for the ‘Big Stick.’” The articles discussed ways of gaining compliance through persuasion and gathering evidence. We referenced the saying, “walk softly but carry a big stick”. In this article, we want to discuss the various “big stick” enforcement options and how communities can utilize them.

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### Big Stick Tools for All Occasions

In Nebraska, your local floodplain ordinance, which is based on state model ordinances, should state: “Violation of the provisions of this ordinance or failure to comply with any of its requirements [...] shall constitute a misdemeanor.” In most cases, this is followed by a specific amount of the fine for violating the local floodplain regulations. The point is that you have the authority to seek fines. Yet, this is not automatic. As we will see with many of these tools, the property owner is entitled to due process.

Your ordinance probably goes on to say: “Any person who violates this ordinance ... shall *upon conviction* thereof be fined not more than...” Misdemeanor convictions are the result of a violation of criminal provisions. What this means to the local floodplain administrator is that a fine cannot simply be imposed on the property owner with a violation. Proof of a violation is required to be presented to a court of law. A violation will have to be established beyond a reasonable doubt. Consult with your community’s attorney now to determine what evidence will be required and how it is to be obtained and preserved. Consulting now with the attorney can avoid obstacles in the future.

Before you pursue a fine or any other enforcement action, you should send a minimum of two written notices by certified mail. The location and nature of the violation should be made clear in the letter. Reference should be made to the floodplain ordinance/resolution and what specific sections have been violated. The property owner with the violation should be informed of possible fines and other possible actions. The notice should outline remedial actions that, if taken, would bring the structure or development into compliance, and the notice should have a reasonable timeline provided to complete the work. Try to not make the letter too technical.

### **Issues Discovered During Development**

You may stumble across a building site that has no permit at all or you may discover that a permitted building is not being constructed as authorized. If the development is found to be out of compliance, a letter, as directed above, identifying the violation and potential enforcement actions should be sent or served to the owner and contractor requesting that all work stop. Without an authorizing ordinance, this letter is a *request* and merely points out the *possible* consequences if the work continues.

This letter can be considered a Stop Work Order (SWO) if it is authorized by your local ordinance. A SWO authorized by local ordinance, whether in the style of a letter or a fillable form, may be issued by a specified department within local government, preferably within the department the floodplain administrator works. The ordinance must specify consequences if the SWO is violated.

A Temporary Injunction, which is an order issued by a court of law, may be granted based upon evidence presented to a judge as a part of a formal court filed case. Evidence may be made by affidavit or live testimony along with exhibits. The Defendant is allowed to present evidence. The injunction lasts until it is lifted by a trial on the merits of the dispute. To stop work *prior to* a trial, a Temporary Restraining Order (TRO) may be obtained from a judge. The evidence must be compelling and submitted through affidavits. Typically, TROs are issued for a limited time until the hearing for the temporary injunction.

The Temporary Restraining Order and Temporary Injunction require the assistance of your community attorney, involve the court system, and can be very labor intensive and slow. Consequently, tools that are more efficient may involve the use of occupancy permits or certificates of completion. Thus, if the development is a residence or business and construction is complete, and if your community has an adopted building code and a building inspector, you may also withhold the occupancy permit or withhold the certification of compliance in order to deny final utility hookup. Again, these actions must be authorized by building codes, your ordinance, and/or other provisions adopted by your jurisdiction.

### **New and Completed Structures**

A mobile home is placed in the woods as a hunting cabin; a home is constructed in a county without zoning regulations; a Quonset is constructed on the back 40 down by the river- all in the floodplain and all without the knowledge of the floodplain administrator. It happens. It can even happen *with* the knowledge of the floodplain administrator in a community that, for one reason or another, is unable to halt the construction.

Bringing a structure into compliance after it is completed can be a difficult and costly venture for the property owner, but doing so is important to ensure the community maintains good standing with the NFIP. A noncompliant structure can be relocated or elevated. Non-residential structures can be dry floodproofed. Do all you can to work with the owner to find a way to bring the structure into compliance. Keep in mind that the ultimate goal is compliance not punishment.

If you have tried all the enforcement tools you have at your disposal and compliance is not achieved, there are two tools still available as a last resort.

A Notice, sometimes referred to as a "Notice on Deed" or "Notice on Title", can be used as an economic incentive. A Notice can be used for cases where the lowest floor of a structure is below the required elevation. The Notice is recorded in the Register of Deeds/County Clerk's office, identifying the building(s) and states that the structure is not compliant with the community's

ordinance. By stating the specifics of the violation, it informs any future owners of the non-compliant status of structure. The Notice specifies that property should be covered by flood insurance. The Notice could recommend that an insurance agent be consulted since the rates may be substantial. It does not prohibit sale of the property and it is not a lien. Yet, it makes property less attractive to prospective buyers. A Notice of this type must be authorized by provision of local jurisdiction ordinance.

If all other enforcement options have been exhausted, a measure of last resort is the Section 1316 procedure. Section 1316 refers to the section of 44 CFR Part 73 that authorizes the denial of flood insurance to specific properties where violations are not corrected. This process starts after a community has utilized all other enforcement mechanisms. A community would first work with NeDNR and FEMA Region VII and then submit a formal request with supporting documentation to be evaluated by FEMA. If approved, the particular property would be denied flood insurance and the community would remain in good standing with the NFIP for the uncorrected violation. That property would also be denied other federal assistance. Flood insurance availability could be restored if the violation is corrected and the community requests a rescission from FEMA.

### **Final Suggestions**

- Document all actions taken, and if you have not documented up to now, it is not too late to start.
- Do all you can to gain compliance using diplomacy/negotiation before you use these “Big Stick” enforcement tools.
- If your ordinance does not grant you the authority to use stop work orders, Notice on Title, or other enforcement tools, you should begin to discuss these tools with your community’s attorney and governing body to decide if they are appropriate for your community.
- Always work with your community’s attorney as you move toward any of these 'Big Stick' enforcement tools.
- Work with NeDNR and FEMA along the way. We can provide you technical assistance to ensure your ordinance is fully enforced.

The best position is to have prevented issues from making it this far. In most cases, this can be accomplished through a robust floodplain management program, clear communication about development requirements, and good diplomacy at the onset of the project. However, there is only so much you can do. Please reach out to Mitch Paine or Chuck Chase for any assistance on potential violations.

*LeRoy Sievers is the Legal Counsel for the Nebraska Department of Natural Resources.*

*Much research went into these articles and we would like to thank the following individuals for their contribution: Tom Huston, a land use attorney with Cline Williams Wright Johnson & Oldfather in Lincoln; Steve Samuelson, NFIP Specialist with the Kansas Department of Agriculture; and Shandi Teltschik, the FEMA Region VII NFIP Liaison to Nebraska.*

## The Risk MAP Process: Discovery

By Jared Ashton, PE, CFM

Over the next decade, NeDNR and FEMA are making a concentrated effort to revise flood maps across Nebraska using up-to-date engineering methods and new data. NeDNR has proposed to initiate floodplain mapping projects in 32 watersheds, covering 42,400 square miles, or about 55% of Nebraska. The funding for these projects is being provided through the FEMA Risk Mapping, Assessment and Planning program, also known as Risk MAP. The goal of Risk MAP is to identify the flood risk present in communities, communicate that risk to the people impacted, and then provide planning and outreach to the communities to help them reduce or mitigate flood risk.

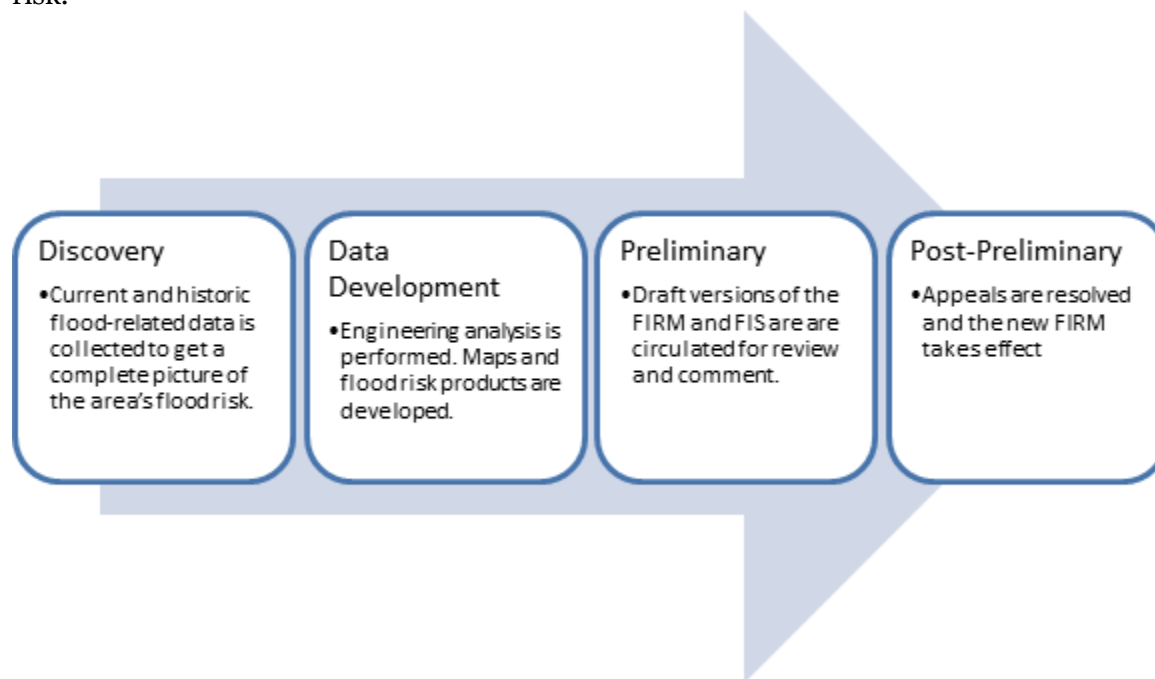


Figure 1. The 4 phases of Risk MAP

To help community officials better understand Risk MAP and their role in the process, NeDNR will be publishing a series of newsletter articles to explain each phase of the Risk MAP program, starting with the Discovery Phase.

### Phase I: Discovery

The objective of Discovery is collect flood risk and mitigation data and other community information through community stakeholder outreach and engagement. NeDNR begins Discovery by sending out a Watershed Stakeholder Participation Survey to stakeholders in every community in the watershed. The purpose of the survey is to help refine the project scope, plan outreach, and begin to assemble the engineering and GIS data that each community possesses into a format that can be used later in the project.

#### *Refine Project Scope*

This is the first opportunity for the communities to designate areas they are concerned with or would like additional information about, such as locations that are historically flood prone or where new development is anticipated. NeDNR can then work with community officials to determine the best way to study these areas and how to provide information to local stakeholders

so that development in these areas can occur, without placing additional people and property at risk of flooding.

*Plan Outreach*

The Watershed Stakeholder Participation Survey asks if the community currently participates in the National Flood Insurance Program (NFIP), has a hazard mitigation plan or comprehensive plan, enforces building codes, or has implemented flood risk mitigation activities. Using this information, NeDNR can tailor its outreach to the specific needs of a community.

*Assemble Data*

A significant amount of data goes into a floodplain mapping project. In order to develop useful and accurate maps, NeDNR needs data that shows political boundaries, roads, bridges, culverts, and various other features. Often times, communities already have much of this data in varying formats. The Watershed Stakeholder Participation Survey helps NeDNR determine which communities have information to share and where there may be additional data needs. Additionally, the survey asks if there are engineering studies that have been performed within the watershed. These studies could be useful for calibrating models or, if they meet certain requirements, could potentially be incorporated into the project.

After the Watershed Stakeholder Participation Surveys are returned, NeDNR compiles the responses into a Discovery Report and Discovery Map. The Discovery Report includes findings of the Discovery process, identified mapping needs, and areas of desired mitigation technical assistance or future mitigation projects. The Discovery Report is intended to help FEMA and the communities involved determine whether to continue with the Risk MAP project. In addition, the information within the Discovery Report can and should be used by communities to help further discussions of mitigation action. The Discovery Map is a visual summary of the Discovery Report, as shown in the figure. The map includes political boundaries, roads, and rivers as well as highlighting areas of flood risk and areas of mitigation interest.

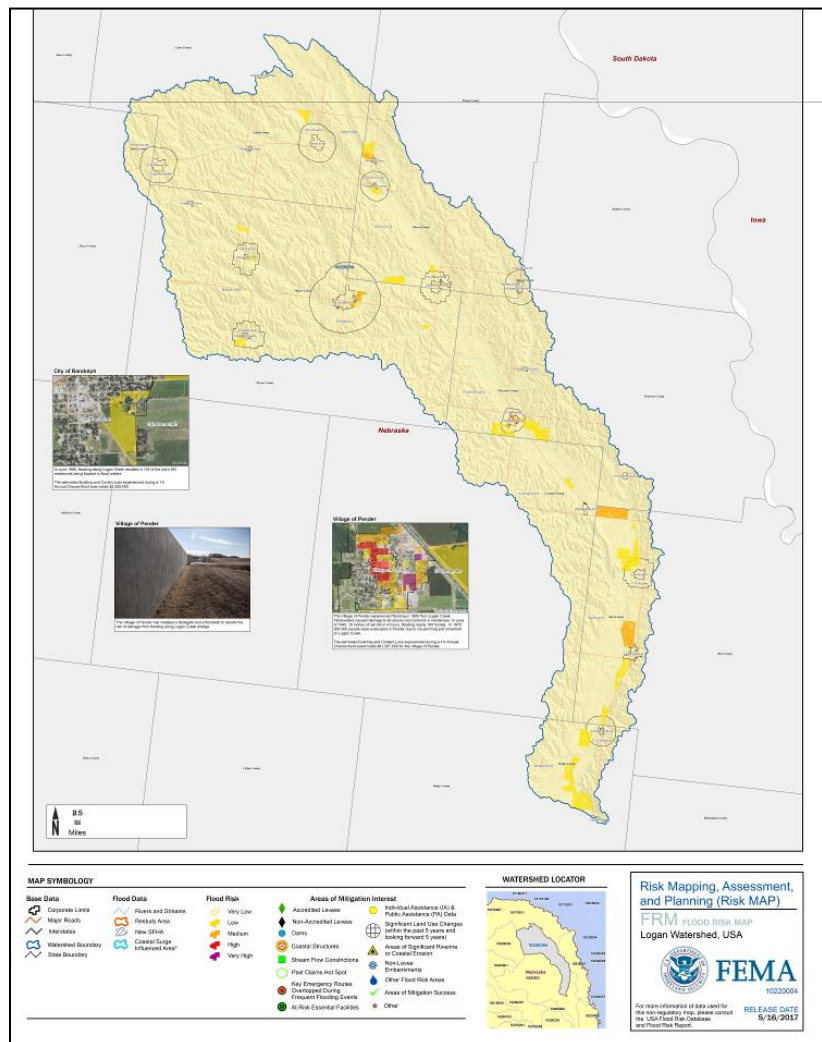


Figure 2. An example flood risk map for Logan Creek Watershed

At the end of Discovery, NeDNR hosts Discovery Meeting(s) in the watershed. At these meetings, the Discovery Map and Report are used to and provide meeting attendees an overview of flood risk in the watershed. Community stakeholders should use these meetings to review the Discovery documents, ask questions about the process, and continue to share relevant information about their community.

Discussions and information shared in Discovery meetings are incorporated into the Discovery Report and Map, which are then resubmitted to the community stakeholders.

Discovery is a very important phase in a Risk MAP project. It marks the beginning of the collaborative effort between the communities in a watershed, NeDNR, and FEMA that are essential to successfully completing all phases of the project and ensuring that the effective FIRMs at the end of the project are accurate and useful to the communities.

Currently, the Logan Creek Watershed in northeast Nebraska is undergoing the Discovery process. Throughout the next five years, many more watersheds will be engaged. NeDNR will update the stakeholders in each watershed when the Discovery Process will start.

## **FEMA Seeks Comments on Low-Impact Development Guidance**

FEMA Headquarters is looking to clarify an area of uncertainty in local floodplain management programs. Many communities and states have brought to the attention of FEMA staff that floodplain development permits are not well suited to dealing with low to no impact development such as mailboxes on posts, lightpoles, or maintenance work to buildings in the floodplain. While the 44 CFR Part 60.3 stipulates that *any* development must obtain a permit, it does not make any distinction for mailboxes compared to apartment complexes.

A new guidance document has been put out for public comment that would require communities to develop a “review, assess, and document” process to ensure that each low to no impact development is at least evaluated as to whether or not it should have a full floodplain development permit. The draft guidance also would require communities to make permanent record of all of the decisions made about these low to no impact developments.

Community officials and the public are encouraged to comment on the draft guidance. The guidance and comment instructions can be found here: <https://www.fema.gov/draft-guidance-participating-communities-satisfying-nfip-floodplain-development-permit-requirements>

## FEMA Awards 2 Flood Mitigation Assistance Grants

In early 2017, FEMA Region VII approved two grants to local communities to undertake mitigation projects and plans. The Flood Mitigation Assistance program granted nearly \$150,000 to the City of Deshler and the Papio-Missouri River NRD. These are the first FMA grants that the state has received in nearly 7 years.

The City of Deshler applied for a grant to update their hazard mitigation plan to include a deeper analysis of the community's flood risk and search for additional mitigation solutions. The desire for updated flood risk information comes after two back-to-back years of major flooding. In both 2015 and 2016, flooding along both Spring Creek and Snake Creek through town. In each flooding event, a number of community facilities encountered problems including the city park facilities, the county fairgrounds, and the city nursing home buildings. In both years, nearly 80 residents were evacuated because of the flooding. Many residents and business owners with properties near the creeks sandbagged and in some cases saw water throughout the buildings.

In 2016, Mayor Naomi Grupe organized a meeting with various agencies to discuss solutions. Representatives from NeDNR, NEMA, the Little Blue NRD, and the community met to discuss the flooding, mitigation strategies, and available resources. The biggest concern was the nursing home and finding a way to reduce flood risk at those buildings. When looking at the Flood Insurance Rate Map, the group noticed that the nursing home facilities are not in the floodplain, so clearly there are areas of Deshler that face flood risk but might not know it. The group concluded that studying the area outside of the mapped floodplain, as an expanded hazard mitigation plan would yield ideas for community-wide flood mitigation. The City successfully submitted an application to the FMA grant program, and over the course of the next two years, an expanded mitigation plan will be completed.



Figure 3. Snake Creek overflows into the city park on April 26, 2016. Photo courtesy of Bill McPherson, Thayer County EM.

The Papio-Missouri River NRD works with communities in its jurisdiction on flood mitigation and floodplain management. Arlington, located east of Fremont in Washington County, lies between the Elkhorn River and Bell Creek. In the northeast corner of the community, most of the floodplain from Bell Creek is ballfields and parking lots. Just to the south of the ballfields are a handful of homes that lie within the floodway or floodplain. The NRD and the Village wanted to focus on repetitive loss properties. One in particular had suffered repeated flooding in recent years and the homeowners were desperate to find a solution. In the end, the NRD applied for FMA funds to purchase one severe repetitive loss property (a property that has suffered two or more claims that have exceeded the market value) and one repetitive loss property (a property that has suffered two claims exceeding 25% of market value). Purchasing these properties will help Arlington become more resilient in the face of future flooding.

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# Forms Used in Floodplain Management

By Mitch Paine, CFM

Administering a local floodplain management program involves a variety of forms and documents that must be kept in perpetuity for all development in floodplains. This article will focus on some of the most common and important forms that floodplain administrators need to understand.

## Floodplain Development Permit

First, the [floodplain development permit](#) is the most important form for any local program. *Any* development in the floodplain including grading, excavation, or structures must have a floodplain development permit before work starts. That permit helps a community track changes in the floodplain to better understand how various developments may affect other properties in the community during a flood.

The permit can be filled out by the property owner or the contractor, but it should be signed by both parties before being submitted to the floodplain administrator. The floodplain administrator should fill out the information about base flood elevation and any required compliance items. The permit also is a key way to track the value of building improvements to ensure that any substantially improved structures are built in compliance.

That permit also allows floodplain administrators to check for compliance with other sections of the floodplain management ordinance or other applicable local regulations. For any development, the first check to ensure compliance is the floodplain development permit. A sample floodplain development permit is available on the NeDNR website and can be used with a community's letterhead or made into a longer form.

## Elevation Certificate

The second most important form used most often is the [elevation certificate](#). Elevation certificates are used to determine if a constructed or improved building is built in compliance with local floodplain management regulations. This document provides the most complete picture of flood risk at an individual structure. It is most often filled out by a licensed surveyor or professional engineer. Some of the key items that floodplain administrators should watch out for are sections A7, B1, B8, B9, B10, and C1. The compliance requirements of buildings is covered in other [Floodplain Management Today](#) articles, but any elevation certificate should be reviewed in particular for these sections.

A7 indicates the building diagram number based on the diagrams on pages 13-15. This building diagram number establishes the compliance requirements based on the type of building. Floodplain administrators should make sure this is correct for the proposed building.

B1 is important so that the building is correctly identified in your jurisdiction. Many elevation certificate preparers miss items B8 – B10, so it's important to ensure these are accurate. B8 should identify the correct flood zone in which the property is located.

B10 is often incorrect. The source of the base flood elevation should be the FIS for Zones AE and AH always. A base flood elevation in an AE zone should never be taken from the FIRM. A FIRM only shows base flood elevations for Zone AO. For any building in Zone A, the "Other/Source:" should be checked and if the base flood elevation is obtained from NeDNR, it should read "NeDNR BFE Determination for Section XX-XX-XX."



Then, B9 is crucial to be accurate and floodplain administrators should be checking this. For Zone AE, the base flood elevation should always be estimated to the tenth of a foot, such as “1151.3,” never to the whole number. For Zone A, the base flood elevation should always be a whole number, such as “1151.”

Lastly, C1 is another important piece of the elevation certificate to ensure correctness. While having elevation certificates before and during construction can be helpful in ensuring the building get built compliantly, only the “Finished Construction” certificate shows final compliance with floodplain management regulations.

In addition, on every elevation certificate, there is a section G that can be used by community officials to track developments. Section G is optional, but floodplain administrators may find it useful to ensure that floodplain development permits, elevation certificates, and any other community permits are connected and tracked.

### **Floodproofing Certificate**

The [floodproofing certificate](#) is provided when a nonresidential structure is proposed to be dry floodproofed to meet the elevation requirements. Any nonresidential building must first have a floodplain development permit and must be accompanied by an elevation certificate and floodproofing certificate. This certificate can be filled out by a professional engineer or architect, but not by a surveyor. Floodplain administrators should check to make sure that elevation data match the elevation certificate. On page 4 of the floodproofing certificate, it requires that any floodproofed building have photographs, certification of being watertight, and a comprehensive maintenance plan. Having a checklist for any floodproofed nonresidential building can be helpful in ensuring all of the requirements are submitted to the floodplain administrator.

Understanding the floodplain development permit, elevation certificate, and floodproofing certificate are fundamental pieces for every local floodplain management program. These documents ensure compliance with local floodplain management regulations and any property that does not obtain all required forms is considered a violation. For any questions on these forms, please contact Chuck Chase or Mitch Paine at NeDNR for assistance.

## **Mark Your Calendar**

If you have questions about any of these opportunities, please contact Chuck Chase or Mitch Paine.

### **Basic Floodplain Management Workshop – Alliance; Thursday, July 27th**

The Nebraska Department of Natural Resources will be holding the Basic Floodplain Management Course from 8:30-noon. It will be held at the Knight Museum Theatre located at 908 Yellowstone Ave. This basic course will cover the permit process, map reading, and elevation certificates. This is a great opportunity for new floodplain administrators to learn the basics of floodplain management. It is also a great refresher for floodplain administrators who desire a basic refresher.

### **Advanced Topics in Floodplain Management Workshop – Alliance; Thursday, July 27th**

The Nebraska Department of Natural Resources will be holding their Advanced Topics in Floodplain Management Course from 1:00-4:30pm on July 27th. It will be held at the Knight Museum Theatre located at 908 Yellowstone Ave. This advanced course will provide in-depth discussion of pertinent technical bulletins, substantial improvements, and substantial damage. It will also have a forum of special topics. This course is a good opportunity to go beyond the basics in your understanding of the NFIP.

To register for the Basic and/or Advanced course send your name, organization, phone, and e-mail address to Brent Kusek at [BKusek@cityofalliance.net](mailto:BKusek@cityofalliance.net) or (308) 762-5400

### **CFM Exam and Study Session**

The Iowa Department of Natural Resources will be holding a CFM exam and study session on Friday, September 29<sup>th</sup>, 2017 in Des Moines, IA. If any Nebraska floodplain administrators or other professionals would like to take the exam on this day, please contact Bill Cappuccio, the Iowa State NFIP Coordinator, at [bill.cappuccio@dnr.iowa.gov](mailto:bill.cappuccio@dnr.iowa.gov) or at (515) 725-8342.

The study session will be held from 8:30am – 2:00pm and the exam will be held from 2:00 – 5:00pm in the 4<sup>th</sup> Floor Conference Room in the Wallace State Office Building at 502 East 9<sup>th</sup> Street in Des Moines, IA.

### **National Flood Insurance Program Training Videos**

NFIP Training courses for insurance agents, claims adjusters, surveyors and community officials are being offered through the FEMA Emergency Management Institute (EMI) Independent Study (IS) Program. IS courses are open and free to anyone. Floodplain administrators may find these videos helpful.

The Independent Study catalog is available at <http://training.fema.gov/is/crslist.aspx> . Course exams require a FEMA Student Identification (SID) Number, which can be obtained at <https://cdp.dhs.gov/femasid> .

## **WANT MORE INFORMATION?**



Visit NeDNR's Floodplain Website at  
<http://dnr.nebraska.gov/fpm>



### **Or Contact**

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