VERMONT FLOOD HAZARD AREA STATUTES
– PROJECT SUMMARY –

DECEMBER 2011

A project of the

Vermont Planners Association

in association with the

Vermont Law School
Land Use Clinic

The Vermont Planners Association (VPA) is a statewide, nonprofit organization dedicated to advancing the art and science of planning in Vermont. Our membership, which includes professional and citizen planners and others from allied professions, is open to anyone who supports sound planning practices and principles. We promote strong local, regional and state planning programs through education, outreach and professional development. VPA maintains an open dialogue on contemporary issues facing our communities, and strives to represent the interests of the planning community before the Vermont Legislature and state agencies actively engaged in public planning and policy development.

VPA Contacts

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BACKGROUND

The Vermont Planners Association undertook this project over a year ago, at the request of its members, to clarify who has jurisdiction under Vermont statutes and the National Flood Insurance Program for regulating development within designated flood hazard areas. This request was precipitated by:

- Agricultural development in Burlington's Intervale, exempted by statute from municipal regulation, which threatened the city with suspension from the National Flood Insurance Program, and

- Difficulties presented in incorporating new VANR models for flood hazard area regulation – crafted to better reflect and comply with NFIP program requirements – under municipal bylaws governed by 24 V.S.A. Chapter 117, and particularly for development that statutes exempt from local regulation.

VPA contracted with the Vermont Law School's Land Use Clinic for technical and legal assistance on this project. VLS clinicians conducted background research, identified, contacted and met with affected state agency representatives, arranged for and staffed advisory committee meetings, and drafted project memos, summaries and proposed legislation. VPA's Technical Advisory Group reviewed and provided feedback on drafts prepared by VLS clinicians. An initial meeting of the Project Advisory Committee was held on December 10, 2010 to frame the scope of the project. A final meeting of the Project Advisory Committee was held at the State House on November 29, 2011 to present and discuss VLS's recommendations. VPA would like to thank everyone involved in this project – and especially our VLS clinicians – for their donations of time, expertise and resources.

ACKNOWLEDGEMENTS

VPA Project Coordinator: Sharon Murray, AICP VPA Legislative Liaison

VLS Land Use Clinic Project Coordinators: Peg Elmer, AICP Associate Director
Katherine Garvey, Assistant Professor, Attorney

VLS Clinicians: Ian Sinderhoff, Ryan Fitzgerald, Garrett Chrostek, Kyle Davis, Sandy Marks

VPA Technical Advisory Group:

Fred Dunnington	Middlebury	Michael Miller, AICP, CFM	Barre City
Jeff Guevin	VT Law School	Phil Dechert	Norwich
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Project Advisory Group/Contacts:

VANR/Flood Plain Management: Rob Evans, Ned Swanberg, Rebecca Pfeiffer, Kari Dolan
VAAFM: Diane Zamos, Jim Leland, Wendy Anderson
VACCD/DEHCD: Joss Besse, Faith Ingulsrud
VT DBISCHA: Kevin Gaffney
VT Emergency Management: Ray Doherty
VT League of Cities & Towns: Karen Horn, Milly Archer
VT Natural Resources Council: Kate McCarthy
VT Bankers Association: Chris D'Elia
VT Realtors Association: Chris MacDonald
Legislators: Sen. Virginia Lyons, Rep. David Deen, Rep. Sarah Buxton, Rep. Alison Clarkson
Legislative Counsel: Aaron Adler, Michael O'Grady, Tom King

QUESTION: Who, under Vermont law, has jurisdiction to regulate development within FEMA-designated flood hazard areas?

The key issue: to clarify in state statute who has responsibility for regulating development (as defined by FEMA) within designated flood hazards areas under the National Flood Insurance Program – especially for development that is exempt from municipal regulation under state law.

NFIP Eligibility Requirements

Under Section 1315 of the National Flood Insurance Act of 1968 as amended, communities that participate in the National Flood Insurance Program are required to have adopted adequate, legally enforceable "land use and control measures" that are consistent with federal program requirements (44 CFR, Parts 59 and 60) and state statutes.[1] The regulations must apply uniformly throughout the community to all privately and publicly owned land, and must take precedence over any less restrictive conflicting local laws, ordinances or codes. Actions by state or federal agencies that cannot be regulated by communities should be subject to state floodplain management regulations or executive orders:

> **If state law or regulation preempts a community from regulating certain types of activities or actions by state agencies, the NFIP policy has been that this is acceptable, provided that the state agency overseeing the activity applies floodplain requirements equivalent to NFIP minimum criteria. ... There should be no gaps in regulation.**
> *National Flood Insurance Program Community Enrollment and Eligibility Handbook*, FEMA 553 (January 2011)

The state is also considered a "community" under 44 CFR Part 60 – particularly for the regulation of state-owned properties and activities that are exempt from local review. The state has the option to comply with the floodplain management regulations of participating communities, or to establish and enforce state flood plain management regulations which, at minimum, satisfy NFIP program requirements.

Vermont Law (Vermont Statutes Annotated, Titles 10 and 24)

Vermont law specifically gives municipalities the authority to adopt flood hazard area regulations under the Vermont Planning and Development Act (24 V.S.A. Chapter 117) – under general enabling provisions for the adoption of land use (zoning and subdivision) bylaws, and as separately adopted "freestanding" bylaws under 24 V.S.A. §4424.[2] Recognizing that many municipalities lack the technical expertise needed to administer flood regulations, this statute also requires that all applications for development within flood hazard areas be referred to VANR Floodplain Management for review prior to the issuance of local permits or approvals.

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[1] "Communities" for this purpose include units of government who have the authority to adopt flood regulations (e.g., counties, municipalities) and the state.

[2] Municipalities are not required to adopt flood hazard area bylaws, nor to participate in the NFIP – most, but not all, are participating communities. Also, to enact or amend a flood hazard area bylaw, a municipality must have a duly adopted municipal plan in effect.

State staff must respond within 30 days, or a permit or approval may be issued without state review.

State law, however, under 24 V.S.A. §§ 4412, 4413 and other statutes and rules, also preempt or otherwise limit municipal regulation of certain activities that fall under the NFIP definition of "development."

Development **means any manmade change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials (CFR44 § 59.1).**

Statutory exemptions or limitations identified to date include, but may not be limited to the following:

- Farm structures and other farming activities (e.g., excavation, fill, composting, hay bale storage) covered under the state's Accepted Agricultural Practices (AAPs);
- Silvicultural activities (e.g., roads, log landings) under the state's Accepted Management Practices (AMPs);
- Public buildings and facilities, including state institutions and facilities, hospitals, community buildings, places of worship, schools, and certified solid and hazardous waste management facilities (under 24 VSA § 4413);[3]
- Telecommunications facilities regulated by the PSB (except as provided for under 2011 legislation);
- Electric transmission and generating facilities regulated by the Public Service Board (including smaller net-metered systems, and 5kV solar systems exempted from both state and local review under legislation adopted in 2011);
- Accessory dwellings that fall under the statutory category of permitted uses;
- Highway and bridge work (as called for under the state's model bylaws and under the NFIP definition of “development”);
- Water and wastewater systems regulated by the state (as required for regulation under the NFIP); and
- Flood control and streambank stabilization projects, as regulated by the state.

Some of these activities have been addressed indirectly, outside of municipal jurisdiction, through interagency memoranda of understanding and review, but state jurisdiction over pre-empted activities is not specified in state law (Title 10, Chapter 32) – or consistently applied to all pre-empted activities.

Title 10, Chapter 32 (Flood Hazard Areas) currently authorizes only state flood hazard area designation and mapping in support of municipal regulation under Title 24. It also requires that "All municipalities, regional planning commissions, and departments and agencies of state government shall mutually cooperate to these ends and to secure flood plain insurance for municipalities and the state of Vermont." It does not give state agencies the explicit authority to regulate development within these areas, including development that is otherwise exempted by statute from municipal review. As a result, statutory preemptions have resulted in jurisdictional gray areas that have become even more pronounced in the wake of Tropical Storm Irene – for example with regard to the regulation and rehabilitation of state buildings. Clarification is needed in state law, at minimum, with regard to exempt activities.

[3] Public facilities listed under § 4413 may be regulated only to the extent the regulation does not interfere with their intended functional use, and only with regard to location, size, height, bulk, yards, courts, setbacks, density, off-street parking, loading facilities, traffic, noise, lighting, landscaping and screening – which precludes the application of some NFIP-required standards (e.g., anchoring, elevation, or floodproofing).

OPTIONS:

Options identified for consideration by VLS clinicians, as reviewed by VPA's technical advisory group and our larger project advisory committee, are summarized as follows:

Jurisdiction	Action	Benefits	Drawbacks
I. Municipal Jurisdiction (Full)	Establish in statute (T.24, T.10) municipal jurisdiction over all development (as defined under the NFIP) in flood hazard areas, including development currently preempted by law from local review	▪ Eliminates gray areas in participating communities ▪ Maintains, enhances local jurisdiction ▪ Local government most accessible, best suited to regulate local development – allows for expedited review, permitting ▪ Regulations apply uniformly within a community, as required under the NFIP	▪ Lack of local expertise, resources – patchwork administration and enforcement; state technical review still necessary ▪ Applies only within participating communities – no statewide coverage ▪ State agencies may not support additional municipal oversight (e.g., VAAFM under the AAPs) ▪ Additional state assistance, guidance, and coordination needed Option ▪ RPCs hire a circuit rider (CFM or trained RPC staff) to assist local ZAs
II. State Agency Jurisdiction (Partial)	Establish in statute (T.24, T.10) state agency jurisdiction over all, or selected, statutory preemptions Option: Also establish state regulation for all development within nonparticipating municipalities (or municipalities that "opt out" of local flood hazard area regulation)	▪ Consistent with NFIP eligibility requirements ▪ Eliminates gray areas ▪ Could institute current system of state review under interagency MOUs and permitting processes Option: ▪ Could extend NFIP eligibility, flood insurance to nonparticipating communities	▪ Separate state/local jurisdiction, standards within a community. ▪ Requires rulemaking and the adoption of state rules that meet minimum NFIP requirements ▪ Local development difficult for state to regulate–especially minor development (e.g., interior renovations, decks, sheds) ▪ Additional staffing, resources may be needed to administer and enforce a state permit program Options: ▪ Cross-train district office staff ▪ Private certification, e.g., by Certified Floodplain Managers (CFMs) recognized by the state ▪ Cover state costs through permit fees
III. State Agency Jurisdiction (Full)	Establish in statute (T.10) state agency jurisdiction for all development within designated flood hazard areas ("New Jersey Model") Option: Delegate state oversight to "qualified" municipalities (similar to water/ wastewater system regulation)	▪ Consistent standards, review processes statewide ▪ Extends NFIP eligibility, and flood insurance to all municipalities	▪ Requires the adoption of state rules, regulations that meet minimum NFIP requirements ▪ Local development difficult for state to regulate – especially for minor development (e.g., interior renovations, decks, sheds) ▪ Additional staffing, resources needed to administer and enforce a state permit program Options: ▪ Cross-train district office staff ▪ Private certification, e.g., by Certified Floodplain Managers (CFMs) recognized by the state. ▪ Cover state costs through permit fees

RECOMMENDATIONS:

VPA views our role in undertaking this project as largely educational – to more clearly define the issues, research available options, and help inform the legislative process. That being said, each of the three options presented above has been reviewed by VPA's technical advisory group, by representatives from affected state agencies and organizations, and by our project advisory committee. Each has received mixed support, reflecting their respective benefits and drawbacks. ***Based on initial feedback, our VLS clinicians have recommended a version of the second option – partial state jurisdiction – for legislative consideration***, and have drafted proposed statutory amendments to that effect (attached):

> The proposed amendments ... clarify that any development exempted from municipal regulation is subject to state flood hazard area review and regulation. The proposed amendments charge the secretary of the Agency of Natural Resources with promulgating minimum regulations in order to bring the state into compliance with all NFIP requirements and to specifically regulate all development exempted under title 24. However, municipalities may promulgate bylaws that are stricter than the state minimum requirements for non-exempted development. This approach can be implemented without requiring widespread revision of titles 10 and 24. Moreover, this approach strikes a balance to avoid placing too much of an additional regulatory burden on either the municipalities or the state. The state, under 10 V.S.A. § 4424, is already charged with reviewing all permit applications for development within flood-prone or flood hazard areas. Requiring the state to develop a program and review permit applications for development within flood-prone or flood hazard areas may not require too much more in the way of additional resources, but Hurricane Irene has highlighted that there is insufficient staff in this area of the Agency of Natural Resources (ANR) (VLS Clinician Project Memo, 11/30/2011).

VLS clinicians also proposed updating Title 10 and Title 24 to incorporate federal program definitions (e.g., the NFIP definition of "development") for better conformance with NFIP requirements, and to eliminate or make optional the 30-day state agency referral requirement for state review of local applications, thereby freeing up state resources under a new state permitting program. This VLS proposal was presented to the larger project advisory committee at a meeting held at the State House on November 25, 2011. Highlights from this meeting:

- The need for legislative clarification to address jurisdictional gray areas was broadly acknowledged and supported, though legislative counsel questioned the perceived, versus actual, need for extensive statutory amendments. Counsel also recommended that applicable federal definitions more simply be incorporated by reference.
- VANR staff expressed real concern about the need for additional agency staffing and resources to administer a state permitting program. They have since also noted their concern about VANR assuming all state agency rulemaking and permitting authority, rather than having this shared between affected state agencies –e.g., under interagency MOUs and separate permitting processes. They support retaining the 30-day state agency review.
- The Agency of Agriculture, Food and Markets again noted their opposition to further municipal review of farm structures and activities covered under Accepted Agricultural Practices, and instead expressed support for a version that institutes the status quo under their MOU with VANR.

- In the wake of Tropical Storm Irene, legislators who participated in the project have indicated support for consistent, statewide regulation that would extend NFIP coverage to all Vermont communities.

- VPA and VLCT conceptually support state jurisdiction for statutorily preempted development, and for nonparticipating (or opt-out) communities, as long as municipalities retain the ability, as proposed, to adopt and enforce more stringent flood hazard area regulations that apply to all non-exempt development.

- A transitional period should be added to proposed legislation to give the state (VANR) time to develop a state permitting process, in consultation with municipalities, regional planning commissions and other affected state agencies, and to allow municipalities to update their bylaws accordingly.

- Though the 30-day state agency referral requirement for the technical review of applications sometimes delays the local permitting process, there was little support for its repeal, given that many local zoning administrators lack the needed expertise to administer and enforce flood hazard area regulations in full compliance with NFIP technical requirements. More, not less, state guidance and assistance is needed, regardless of the option selected.

Though this project predates 2011 flood events, project findings reflect feedback we've since received from our members, VLCT and the Zoning Administrator's listserv – that, in the wake of spring floods and Tropical Storm Irene, many zoning administrators have been overwhelmed by their duties and responsibilities for flood hazard area management, including technical permitting and enforcement requirements under the NFIP. As noted above, more state guidance and technical assistance is needed. We've also heard from affected legislators that consistent, statewide flood regulations may be needed, to ensure that all communities and property owners are eligible to participate in the National Flood Insurance Program and have access to flood insurance.

The attached draft legislation prepared by VLS clinicians as part of this project has been forwarded to participating legislative counsel in response to their drafting deadlines – with the understanding that any resulting legislation will likely differ markedly in both form and content. This is presented only as a suggested starting point for legislative discussion. VPA is most concerned that the jurisdictional gray areas presented by statutory exemptions be clarified in statute, in conformance with state and local NFIP eligibility requirements. How this can best be accomplished will be determined – with more public and state agency input – through the legislative process.

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ATTACHMENTS: VLS CLINICIAN DOCUMENTS

Summary of Proposed Changes to Title 24-Chapter 117 and Title 10-Chapter 32 for Flood Hazard Area Statutes

To: Sharon Murray, Aaron Adler, and Michael O'Grady
From: Kyle Davis, Sandy Marks and Peg Elmer, VLS Land Use Clinic
Date: November 30, 2011

Purpose of Proposed Amendments to Chapter 117 – Title 24 and Chapter 32 - Title 10:

Currently, the Vermont statutory provisions dealing with flood hazard regulation (e.g., title 10 and title 24) do not meet the minimum review requirements under NFIP. Specifically, the exemptions found under title 24 conflict with the NFIP requirement that all development within flood hazard areas be reviewed. In addition, many of the definitions under title 10 and title 24 do not meet the minimum requirements under NFIP. For example, the NFIP definition of "development" arguably, and per FEMA's interpretation, is broader than the V.S.A. definition. The proposed amendments focus on clarifying, in statute, the authority that has the responsibility for regulating development (under the broader NFIP definition) in designated flood hazard areas. Moreover, the amendments are intended to require the review of any future exemptions that may be codified in statute.

The proposed amendments adopt an approach clarifying that any development exempted from municipal regulation is subject to state flood hazard area review and regulation. As an initial matter, this approach is relatively simplistic in that it addresses the necessary issues without requiring wide-spread revision of the existing statute. This approach is equally favorable because it does not place too great an additional burden on either the state or the municipalities since ANR already reviews all flood hazard area permits pursuant to 24 V.S.A. § 4424 and the municipalities can continue regulating non-exempted development. In addition, by eliminating the 30-day-review requirement under 24 V.S.A. § 4424(2)(D)(i)–(ii) these resources might be freed to shift to state review of exempted development. Municipalities can still ask for technical assistance from the secretary under the proposed amendments. Additional appropriation may be necessary to implement the changes under the proposed amendments. However, it could also be possible to cross train and use certified floodplain managers in order to ease the burden. The state could also consider charging a permitting fee to help offset some of the additional cost.

A stakeholder's meeting on 29 November 2011 brought up issues that are not directly addressed in these proposed amendments that should be considered:

(1) There was support for adoption of the "New Jersey Model" in Vermont, which would require the state to assume the primary regulatory responsibility for NFIP. This approach is similar to the regulatory approach adopted by the state for water and waste water systems. Under this approach, the state could delegate responsibility to qualifying municipalities. This approach would bring uniformity across the state since the state would be charged with promulgating state-wide minimum NFIP requirements. However, such an approach would place a great burden on the state, require additional resources, and require complete revision of titles 10 and 24.

(2) A modified approach to our proposal was discussed that would allow municipalities to opt-in and request the state to assume the regulatory responsibility. Again, this would require additional resources and place an additional burden on the state, with an added drawback of not knowing how many municipalities might want to request that the state take over the program.

(3) Definitional amendments under title 24 could mean that local bylaws are no longer in compliance with state requirements, which brings up a transitional issue. The question as to when the new definitions will apply still needs to be clarified. This should be addressed in the final draft of the proposed legislation.

Summary of Proposed Changes to Title 24-Chapter 117 and Title 10-Chapter 32 for Flood Hazard Area Statutes

To: Sharon Murray, Vermont Planner's Association
From: Kyle Davis, Sandy Marks and Peg Elmer, VLS Land Use Clinic
Date: November 22, 2011

Purpose of Proposed Amendments to Chapter 117 – Title 24 and Chapter 32 - Title 10:

The National Flood Insurance Program (NFIP) and the implementing regulations set forth requirements that must be met for municipalities to be eligible for insurance under the program. NFIP is a voluntary program under which eligible communities and their citizens can obtain flood insurance. Generally, for NFIP eligibility, the state or municipalities must provide review of *all* "development" located within "flood-prone" or "designated flood hazard areas." *See* 42 U.S.C.A. §§ 4001–4129; 44 C.F.R. §§ 59–79.

Currently, the Vermont statutory provisions dealing with flood hazard regulation (e.g., title 10 and title 24) do not meet the minimum review requirements under NFIP. Reasons titles 10 and 24 do not comply with NFIP include: (1) definitions under title 10 and title 24 do not comply with the federal definitions; (2) there are forms of "development" as defined under federal law that are exempt from regulation and review under Vermont law; (3) in order to comply with NFIP, neither title 10 nor title 24 provide clear regulatory authority for either the state or municipalities to regulate "development" that is exempt from municipal review. For example, title 10 of chapter 32 is especially weak in assigning specific statutory authority and responsibility for flood hazard area regulation to the State.

The proposed amendments focus on clarifying, in statute, the authority that has the responsibility for regulating development (under the broader NFIP definition) within flood-prone and designated flood hazards areas – especially for development that has been exempted in statute (title 24) from municipal zoning review. Moreover, the amendments are intended to require the review of any future exemptions that may be codified in statute. It is particularly important to legislatively address the statutory issues with Vermont's flood hazard areas in the wake of spring floods and Irene.

Vermont's Statutory Exemptions from Flood Hazard Area Review

Numerous exemptions from flood hazard review have been added under title 24, some just in the last few years. In addition, the NFIP definition of "development" is broader than the definition of "development" under titles 10 and 24 and includes additional "activities" not typically regulated under chapter 117 zoning or subdivision regulations. The exemptions identified to date include:

- farm structures (now subject to AAFM, VANR and local review under an interagency MOU)
- other farming activities (e.g., composting, hay bale storage) not covered under the MOU
- logging activities under accepted management practices for silviculture (e.g., logging roads, landings, storage areas)
- public facilities – including state and other community buildings and facilities, places of worship, schools, solid waste management facilities, etc.

- telecommunications facilities regulated by the PSB (as specifically addressed in 2011 legislation, through 2014),
- electric transmission and generating facilities regulated by the PSB – including but not limited to 5kV systems exempted by the legislature in 2011 from both state and local review
- accessory dwellings that fall under the statutory category of permitted uses (subject only to administrative review),
- road and bridge work, under the NFIP definition of development,
- stream bank and stream channel work, as otherwise regulated by the state,
- water and wastewater systems, as regulated by the state.

There is also an open-ended question regarding the review of interior repairs and improvements that are typically regulated instead under local building codes, but which have not been widely adopted in Vermont. Implicitly, requiring strict adherence to the provisions in and requirements under NFIP "substantial improvements" should receive review. However, if such review is problematic in practice, ANR could address the issue through rule making.

Identification of Regulatory Approaches to bring Title 10 and Title 24 into NFIP Compliance

In formulating these statutory amendments, the following five regulatory approaches for addressing the exemptions were identified:

1. Executive Orders (EO) (e.g., as NH has done for state buildings, which are required to go through local review);
2. Interagency Memorandums of Understanding (MOU) (e.g., as Vermont has done for agricultural structures);
3. Statutory amendments clarifying that otherwise exempted uses and activities remain subject to local flood hazard regulation (e.g., Iowa farm structure exemption language);
4. Statutory amendments clarifying that any development exempted from municipal regulation is subject to state flood hazard area review and regulation; and
5. Statutory amendments that give primary responsibility for regulating all development within flood hazard areas to the state, with the ability to delegate this authority to "qualified" municipalities that adopt more restrictive regulations (e.g., the New Jersey model, and as Vermont has done for water and wastewater systems).

Discussion of Identified and Adopted Regulatory Approaches

As an initial matter, the proposed amendments adopt a variation of Approach number 4 above– statutory amendments clarifying that any development exempted from municipal regulation is subject to state flood hazard area review and regulation. The proposed amendments charge the secretary of the Agency of Natural Resources with promulgating minimum regulations in order to bring the state into compliance with all NFIP requirements and to specifically regulate all development exempted under title 24. However, municipalities may promulgate by-laws that are stricter than the state minimum requirements for non-exempted development. This approach can be implemented without requiring widespread revision of titles 10 and 24. Moreover, this approach strikes a balance to avoid placing too much of an additional regulatory burden on either the municipalities or the state. The state, under 10 V.S.A. § 4424, is already charged with reviewing all permit applications for development within flood-prone or flood hazard areas. Requiring the state to develop a program and review permit applications for development within

flood-prone or flood hazard areas may not require too much in additional resources, but Hurricane Irene has highlighted that there is insufficient staff in this area of the Agency of Natural Resources (ANR). Further proposed repeal of 10 V.S.A. § 4424(2)(D)(i)–(ii) would result in the possibility for re-allocation of additional resources. If the 30-day-review provision is repealed and the resources shifted to handle the additional requirements imposed under title 10, excessive additional resources may not be necessary. However, some additional appropriations are likely necessary in order to implement the proposed amendments.

Executive Orders and MOUs: A major issue with both EOs and MOUs is that neither approach is expressly authorized by statute. This means that there may not be sufficient legal authority for EOs or MOUs to satisfy the requirements under 42 U.S.C.A. §§ 4001–4129 and 44 C.F.R. §§ 59–79. In addition, municipal officials do not practice searching for EOs or MOUs that might cover exemptions, such that explicitly exempting certain forms of development from local review under title 24 leads to a local misunderstanding that such activities are exempt from all review and misinformation is provided to project developers and landowners. While using EOs or MOUS as the sole means of regulating the exemptions is discouraged, the expressed use of MOUs under titles 10 and 24 is encouraged. Under the adopted approach, ANR is charged with reviewing “development” within flood-prone or flood hazard areas exempt under title 24. ANR is encouraged to develop MOUs with other implicated agencies for the development and implementation of the requirements found under title 10.

Statutory amendments clarifying that otherwise exempted uses and activities remain subject to local flood hazard regulation: In the wake of Irene, many interested parties expressed concern over the ability of some municipalities to handle this additional regulatory burden. However, by completely extinguishing the exemptions and allowing municipalities to regulate under flood hazard by-laws, formally exempted forms of development is likely not politically feasible. Therefore, these amendments adopted a middle ground. The municipalities are allowed to promulgate by-laws that are stricter than the state minimums for non-exempted forms of development, and the secretary is charged with directly regulating any present and future development exempted under title 24. Currently under title 24, ANR is charged with reviewing any permit for development within flood-prone or flood hazard areas prior to issuance by a municipality. Since ANR is already tasked with this review, it made sense to place them in charge of reviewing the statutory exemptions under title 24.

Statutory amendments that give primary responsibility for regulating all development within flood hazard areas to the state, with the ability to delegate this authority to "qualified" municipalities that adopt more restrictive regulations: This Approach would require wide-spread amendment to titles 10 and 24 to effectuate. Although such a scheme could be effective in bringing the state into compliance with NFIP, many municipalities dislike the idea of their regulatory authority being taken away and subject to delegation from the state. Moreover, this approach would significantly increase the burden on the state and require extensive additional resources in order to implement.

Discussion of the proposed statutory amendments

Amendments under title 10:

Section 751

The purpose section has been amended in order to reflect the requirement that all "development" within flood-prone and flood hazard areas must comply with the requirements set forth under NFIP and requires ANR to regulate all "development" that is exempt from local review under title 24.

Section 752

The definitions found under this section have been amended to parallel the definitions under the NFIP found at 44 C.F.R. § 59.1.

Section 754 (*New Addition*)

This new section is added in order to require that ANR promulgate minimum requirements necessary to implement the requirements of NFIP for all "development" within flood-prone or flood hazard areas that is exempt from local review under title 24. This section also enables municipalities to pass by-laws that are stricter than those minimum requirements imposed by ANR for non-empted development. Only one permit, issued by the municipality, is required for such development.

Amendments under title 24:

Section 4403

The definitions applicable to the Flood Hazard under Section 4424, are amended to parallel the definitions found in the NFIP at 44 C.F.R. § 59.1.

Section 4412

A "catchall" provision was added at the end of this section that requires all "development," as defined under Section 4403, shall comply with NFIP and title 10.

Section 4413

A "catchall" provision was added at the end of this Subsection that requires all "development," as defined under Section 4403, shall comply with NFIP and title 10.

Section 4424

Two amendments are particularly pertinent here: (1) A "catchall" provision was added at the end of this section that requires all "development," as defined under Section 4403, shall comply with NFIP and title 10; and (2) the 30-day review requirement under subsection 10 is repealed and a new subsection is added. This new subsection is to require a filing system as well as requiring state technical assistance.

Proposed statutory amendments for Titles 10 and 24:

Chapter 32: FLOOD HAZARD AREAS

SECTION [herein addressed]

751 Purpose
752 Definitions
754 Duties and obligations

§ 751. Purpose

~~The purpose of this chapter is to minimize and prevent the loss of life and property, the disruption of commerce, the impairment of the tax base, and the extraordinary public expenditures and demands on public service that result from flooding; to ensure that the development of the flood hazard areas of this state is accomplished in a manner consistent with the health, safety and welfare of the public; to provide state assistance to local government units in management of flood hazard areas; to coordinate federal, state, and local management activities for flood hazard areas; to encourage local government units to manage flood-prone lands; to maintain the wise agricultural use of flood-prone lands; to carry out a comprehensive statewide flood hazard area management program for the state in order to make the state and units of local government eligible for flood insurance under the requirements of the federal department of housing and urban development in administering Title XIII of the Housing and Urban Development Act of 1968.~~

The purpose of this chapter is to:

(1) minimize and prevent the loss of life and property, the disruption of commerce, the impairment of the tax base, and the extraordinary public expenditures and demands on public service that result from flooding;
(2) to ensure that any development within any designated flood hazard areas of this state is accomplished in a manner that minimizes or eliminates the potential risk to life and damage to public and private property, including public facilities and infrastructure;
(3) to authorize and require the development, adoption, and enforcement of minimum state floodplain management regulations and for the state regulation of any development within any designated flood hazard areas that is exempt from municipal review by chapter 117 of title 24;
(4) to encourage municipalities to manage flood-prone lands;
(5) to provide state assistance to municipalities in the management and regulation of designated flood hazard areas;
(6) to coordinate federal, state, and local management activities for designated flood hazard areas;
(7) to maintain the agricultural use of designated flood hazard areas if such use complies with the requirements laid forth in this chapter and the National Flood Insurance Program;
(8) to carry out a comprehensive statewide flood hazard area management program for the state in order to make the state and the municipalities eligible for flood insurance under the requirements promulgated by the Federal Emergency Management Agency in administering the National Flood Insurance Act of 1968 as amended by the Flood Disaster Protection Act of 1973, 42 U.S.C.§§ 4001 *et. seq*.

§ 752. Definitions

For purposes of this chapter, all terms herein used shall have the same meaning as defined under the National Flood Insurance Program found at 42 U.S.C. § 4121 and 44 C.F.R. § 59.1 as amended, except as otherwise provided below:

(1) "Agency" means the agency of natural resources.

~~(2) "Flood hazard area" means an area which would be inundated in a flood of such severity that the flood would be statistically likely to occur once in every hundred years. In appropriate circumstances this might be the 1927 or the 1973 flood. In delineating any flood hazard area for the one hundred year flood based upon prior floods, flood control devices such as, but not limited to dams, canals, and channel work should be considered in the delineation.~~

~~(3) "Floodway" means the channel of a watercourse and adjacent land areas which are required to carry and discharge the one hundred year flood within a regulated flood hazard area without substantially increasing the flood heights.~~

~~(4) "Flood proofing" means any combination of structural and nonstructural additions, changes, or adjustments to properties and structures, primarily for the reduction or elimination of flood damage to lands, water and sanitary facilities, structures and contents of buildings.~~

~~(5)~~(2) "Legislative body" means the board of selectmen, trustees, mayor and board of aldermen of a municipality.

~~(6)~~(3) "Municipality" means any town, city or incorporated village.

~~(7) "Obstruction" means any natural or artificial condition including but not limited to, real estate which may impede, retard, or change the direction of the flow of water, either in itself or by catching or collecting debris carried by the water, or so situated that the flow of the water might carry it downstream to the damage of life or property.~~

~~(8)~~(4) "Regional planning commission" means the regional planning commission of which a municipality is a member or would be a member based upon its location.

~~(9)~~(5) "Secretary" means the secretary of the agency of natural resources or the secretary's duly authorized representative.

§ 753. Flood hazard areas

(a) To meet the objective of this chapter and the requirements of 24 V.S.A. § 4412, the designation and management of flood hazard areas shall adhere to the following procedure and schedule. All municipalities, regional planning commissions, and departments and agencies of state government shall mutually cooperate to these ends and to secure flood plain insurance for municipalities and the state of Vermont. All correspondence sent to a municipality pursuant to this chapter shall be sent to the municipal clerk, the legislative body, and planning commission.

Copies of this correspondence shall be sent to the regional planning commission, the agency of commerce and community development, and the state planning office.

(b) The secretary shall, as the information becomes available, provide each municipality with a designation of flood hazard areas. The designation shall include a map or maps.

§ 754 Duties and Obligations

The secretary shall ensure through the promulgation of regulations that all development within flood hazard areas complies with the minimum requirements necessary for the state and municipalities to meet community eligibility requirements for participation in the National Flood Insurance Program found at 42 U.S.C. §§ 4001–4129 and 44 C.F.R. §§ 59–79 and shall:

(1) Cooperate with other state agencies regional planning commissions and the municipalities in effectuating the purpose of this title.

(2) Provide education and assistance to municipalities regarding obligations under title 24 necessary to comply with the National Flood Insurance Program.

(3) Have supervision over and act as the state's agency in all matters regarding development within flood hazard areas that is exempt from municipal regulation under chapter 117 of title 24. To discharge this responsibility, the secretary shall:

(A) Adopt regulations , in accordance with the procedures in the Administrative Procedure Act, setting forth the requirements necessary under the National Flood Insurance Program to ensure that all development within flood hazard areas that is exempted from municipal review under chapter 117 of title 24 is regulated by the state, in order to comply with the regulatory obligations set forth under the National Flood Insurance Program found at 42 U.S.C.A. §§ 4001–4129 and 44 C.F.R. §§ 59–79, particularly 40 C.F.R. §§ 59.22 and 60.3.

(B) Review all permit applications for development within flood hazard areas that is exempted from municipal review under chapter 117 of title 24:

i. The secretary shall establish, by rule, agency requirements for the issuance and enforcement of permits for development within flood hazard areas that is exempt from municipal review under chapter 117 of title 24.

(C) Notify and solicit comments from the municipality and citizens where the development will occur;

(D) Consult with affected agencies including, but not limited to the Agency of Agriculture, the Agency of Transportation, the Department of Buildings and General Services, the Department of Public Service, and any other agency or department of state government with a significant interest in the development at issue when carrying out the duties under this chapter, and

(E) Provide notice of applications received and permits issued to the municipality in which the development will occur.

(4) Nothing in this subchapter shall prevent municipalities from adopting flood hazard area bylaws under title 24 that are stricter than the minimum requirements set forth by the secretary, to apply to all development within flood hazard areas that is not exempted from municipal regulation. In this case, the regulated entity must only obtain one permit under the stricter municipal by-law.

(5) The secretary shall require, by regulation, that all applications, supporting documentation, and permits and decisions issued under this chapter be separately filed and maintained in the permit records of the municipality unless the secretary is the permitting authority and that a copy be sent to the secretary.

Chapter 117: MUNICIPAL AND REGIONAL PLANNING AND DEVELOPMENT

SECTION [herein addressed]
- 4303 Definitions.
- 4412 Required provisions and prohibited effects.
- 4413 Limitations on municipal bylaws.
- 4424 Shorelands; flood or hazard area; special or freestanding bylaws.

§ 4303. Definitions

~~(8) "Flood hazard area" for purposes of section 4424 of this title means the land subject to flooding from the base flood. "Base flood" means the flood having a one percent chance of being equaled or exceeded in any given year. Further, with respect to flood and other hazard area regulation pursuant to this chapter, the following terms shall have the following meanings:~~

~~(A) "Floodproofing" means any combination of structural and nonstructural additions, changes, or adjustments to properties and structures that substantially reduce or eliminate flood damage to any combination of real estate, improved real property, water or sanitary facilities, structures, and the contents of structures.~~

~~(B) "Floodway" means the channel of a river or other watercourse and the adjacent land area that must be reserved in order to discharge the base flood without accumulatively increasing the water surface elevation more than one foot.~~

~~(C) "Hazard area" means land subject to landslides, soil erosion, earthquakes, water supply contamination, or other natural or human-made hazards as identified within a "local mitigation plan" in conformance with and approved pursuant to the provisions of 44 C.F.R. section 201.6.~~

~~(D) "New construction" means construction of structures or filling commenced on or after the effective date of the adoption of a community's flood hazard bylaws.~~

~~(E) "Substantial improvement" means any repair, reconstruction, or improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure either before the improvement or repair is started or, if the structure has been damaged and is being restored, before the damage occurred. However, the term does not include either of the following:~~

~~(i) Any project or improvement of a structure to comply with existing state or local health, sanitary, or safety code specifications that are solely necessary to assure safe living conditions.~~

~~(ii) Any alteration of a structure listed on the National Register of Historic Places or a state inventory of historic places.~~

(8) Specifically for municipal flood hazard area bylaws adopted under this chapter, pursuant to chapter 32 of title 10, and federal requirements for community participation in the National Flood Insurance Program, federal program definitions under 42 U.S.C. § 4121 and 44 C.F.R § 59.1 as amended shall apply.

§ 4412. Required provisions and prohibited effects.

(10) *(NEW)* Flood hazard areas. Any development within a flood hazard area that is exempt from municipal review under this chapter or other state statutes and rules shall comply with the requirements found under chapter 32 of title 10, the National Flood Insurance Program found at 42 U.S.C. §§ 4001–4129 and 44 C.F.R. §§ 59–79, and any regulation promulgated by the Secretary of the Agency of Natural Resources pursuant to the authority found in chapter 32 of title 10.

§ 4413. Limitations on municipal bylaws

(i) (*NEW*) Flood hazard areas. Any development within a flood hazard area that is exempt from municipal review under this chapter shall comply with the requirements found under chapter 32 of title 10, the National Flood Insurance Program found at 42 U.S.C. §§ 4001–4129 and 44 C.F.R. §§ 59–79, and any regulation promulgated by the Secretary of the Agency of Natural Resources pursuant to the authority found in chapter 32 of title 10.

§ 4424. Shorelands; flood or hazard area; special or freestanding bylaws

(D) Mandatory provisions. Municipal flood and other hazard area bylaws shall require that all applications, supporting documentation, and municipal permits and decisions issued under the bylaws shall be separately filed and maintained in the permit records of the municipality and mailed to the secretary. ~~All flood and other hazard area bylaws shall provide that no permit for new construction or substantial improvement shall be granted for a flood or other hazard area until after both the following:~~

~~(i) A copy of the application is mailed or delivered by the administrative officer or by the appropriate municipal panel to the agency of natural resources.~~

~~(ii) Either 30 days have elapsed following the mailing or the agency delivers comments on the application.~~

(i) The secretary may review municipal implementation of this section on a random basis, or in response to a complaint, or on his or her own motion.

(ii) Municipalities may request technical assistance from the secretary for permitting decisions made under this subchapter.

(a) The secretary shall provide assistance within 30 days of receiving such a request.

(NEW) Any development within a flood hazard area that is exempt from regulation under municipal bylaws is subject to the requirements found under chapter 32 of title 10, the National Flood Insurance Program found at 42 U.S.C. §§ 4001–4129 and 44 C.F.R. §§ 59–79, and any regulation promulgated by the Secretary of the Agency of Natural Resources pursuant to the authority found in chapter 32 of title 10.