

Grand Forks, ND after levee break.

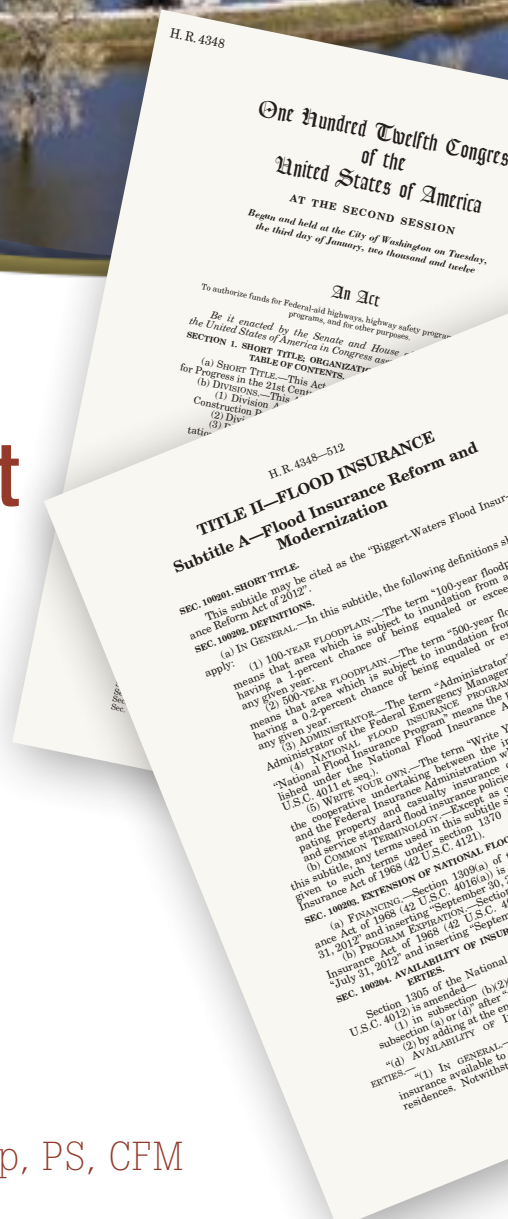
Photo by Michael Rieger/FEMA

The Biggert-Waters Flood Insurance Reform Act [and the Surveyor]

Formally known as *Title II* in the *Surface Transportation Bill (HR 4348)*, President Obama signed a reauthorization of the National Flood Insurance Program (NFIP) into law on July 6, 2012. Since 2008, our esteemed members of both houses of Congress, known for their laser-like levels of efficiency, managed to drag their feet enough to require passing 18 stop-gap extensions of the program. What the President signed assures the program exists until at least September 30, 2017.

The bulk of the 584-page bill has little to do directly with the land surveyor. But toward the end of *Title II - Flood Insurance* (starting on page 512 of the omnibus bill) are sections immediately relevant to surveyors as well as sections affecting bankers, realtors, insurance agents, developers and others involved with real property. Other sections addressed in this article enhance the surveyor's ability to consult with the public in a more informed way.

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First and foremost, reauthorization of the NFIP for five years means flood insurance policies can be written, claims can be paid, and Letters of Map Change (both Amendments and Revisions) can be issued... at least until 2017 (*Section 100203*).

Fiscal realities have required some strong changes in insurance rate structures, lender penalties and adjustments in deductibles. Until now, if your house was built before 1974 or before the area was identified as a 1%-chance annual floodplain on a flood map ("Pre-FIRM"), your premiums were not assessed actuarial rates, but instead (based on the presumption of innocent "good faith" construction ignorant of the flooding risk) were subsidized by the insurance provider (the federal government). Long recommended and finally enacted, *Section 100205* initiates a 5-year phasing out of pre-FIRM rates. This section excludes any structure that has "experienced or sustained substantial improvements exceeding 30% of the fair market value" from receiving subsidized insurance premium rates. Keep in mind that this language does not change the definition in 44 CFR 59.1 for "substantial improvement." Therefore, structures that are substantially improved at the current 50% level must be brought up to current code in their entirety, not just the improved portions. Nothing has changed. Local floodplain management ordinances can be and most likely will be revised to match the language of this new definition. The community would benefit in a revision through earning extra points under the Community Rating System (CRS).

Clients may be interested to know that flood insurance premiums can now be paid in installments (*100205(c)*), useful when they are in the midst of applying for Letters of Map Change

and don't want to pay more than minimally necessary. *Section 100239* allows qualifying private insurers to offer flood and multi-hazard policies outside of the federal insurance program (if companies are willing to take on such risky coverage) and therefore provides an opportunity for insurance purchasers to comparison-shop.

When a client calls and says, "They've changed the flood maps, put me in a flood zone, and now my bank is making me buy flood insurance", how do you respond? Your response, politely speaking, is probably something like, "Oh my. How can I help?" The true response should be that the property probably has always been in the flood zone and that the map was incorrect or incomplete (due to limited mapping resources), and also that it is the Federal government enforcing the mandatory flood insurance purchase through lenders. It is also possible that conditions have changed since publication of the prior flood map, such as increased impervious surface area due to development, failing stormwater management infrastructure, and aging dams and levees. As an aside, note that every lending institution has always had the prerogative to protect its interests by requiring flood insurance on structures serving as collateral on loans, whether or not the area is identified as being in the Special Flood Hazard Area (1%-annual chance floodplain). *Section 100207* provides for a five-year phase-in period for new premium rates that result from map changes.

Another change: Previously, upon issuance of new flood maps, insurance rates could sometimes be based on the information shown on the map at the time of the home's construction if "grandfathering" meeting certain

conditions resulted in a lower premium (affecting how we completed the Elevation Certificate). This option will also be phased out to eventually result in everyone paying full actuarially rated insurance premiums.

Section 100231 is entitled "Studies and Reports", and when fulfilled will provide a better understanding of the shortfalls of the current state of the National Flood Insurance Program. Studies mandated by *100231(a)* will quantify the number of residential and commercial policies and the effects of more or less coverage on the Program's viability. Studies under *100231(b)* will describe losses incurred by the NFIP due separately to hurricane- and non-hurricane related damages as part of efforts to estimate the maximum claim totals in the event of "a catastrophic year." Some of the language here appears to be in response to arguments about wind damage versus water damage resulting from hurricanes. *100231(c)* requires a GAO (Government Accounting Office) report on all pre-FIRM structures, nationwide. This amounts to an inventory that is basically a cost/benefit analysis of bringing structures up to current construction codes or buying out those properties, rather than continuing to pay for repeated disasters. *Section 100233* authorizes the GAO to study offering optional coverage through NFIP for costs incurred through additional living expenses and business interruption in the event of a flood event. Of interest to surveyors is *100231(d)*, requiring a GAO study of FEMA contractors, those folks we deal with every time we need to correct a flood map or ask for supporting documentation underlying currently effective maps.

Future mapping issues are hinted at by *100231(e)*, which provides for the



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National Academy of Sciences to study the graduated risk behind levees and “associated land development, insurance, and risk communication dimensions” in the “residual risk” areas not currently required to carry flood insurance. This political hot potato topic was the focus of a committee headed by Senator Mary Landrieu of Louisiana; constituents don’t want to pay higher (or any) premiums, but is it better to live in under or uninsured ignorance in the false sense of security provided by flood control structures?

Sound floodplain management includes more than merely the operation of land use and permitting processes regulated at the local level (*44 CFR 60.3*), and includes consistency in applying building codes related to siting, design, construction, and materials, *Section 100235* requires FEMA to study the effectiveness of incorporating such standards into the regulations in reducing flood-related damages. An important facet of this section is inclusion of studying the feasibility of incentives of lower insurance rates “for structures meeting whichever of such widely used and nationally recognized building codes or any applicable local building codes provides greater protection

from flood damage...” and comparing effects of building code requirements on rural and urban communities and Indian reservations. It seems that local conditions and local economics will be accounted for in the mandated study. Closely related are the next two sections of the Act, studying affordability and feasibility while raising awareness of flood hazards to encourage participation in the NFIP.

Enough of that. For the surveyor:

Section 100215 re-establishes a Technical Mapping Advisory Council, similar to the 1994 National Flood Insurance Reform Act’s composition but expanded in size and scope. Of the 20 members, one is to be “a member of a recognized professional surveying association or organization”. There are stated qualifications for members, and each identified group provides its own nominee to

FEMA using its best judgment to select a qualified professional as its representative. All nominees are subjected to various governmental checks to assure no conflict of interest prior to appointment, and new Council members will most likely have to go through the same training in ethics as their predecessors. The Council is tasked with making annual reports to FEMA’s Administrator recommending ways to improve technical, functional, and financial aspects of the NFIP. Specific charges include: more cost effective mapping methods; improved mapping standards and guidelines; upkeep and maintenance of FIRMs and risk identification; sharing mapping duties with local partners; and gathering and coordinating the many agencies and organizations currently collecting and reporting flood data to produce a good product in a cost savvy and technically sound way. The charges in this section directly relate to recommendations of the first Technical Mapping Council and the 2009 National Research Council’s “Mapping the Zone: Improving Flood Map Accuracy”

The next section (*100216*) gets down to the nuts and bolts of improving flood maps and mapping. The Advisory Council is charged with formulating a program to review, update, and maintain FIRMs. The focus is clearly on those areas either currently developed or under future developmental pressure, similar

Flooding in Nashville, TN

Photo by David Fine/FEMA



to *Procedural Memorandum 38* regarding Floodplain Boundary Standards. This section requires that the mapping elements of every FIRM updated under this section will be assessed for accuracy of elevation data and that flood data will be developed on a watershed basis – a big step away from the artificial boundaries of governmental jurisdictional boundaries. Surveyors: be on the watch for new standards. Of significant economic interest to surveyors, *100216 (f)* authorizes appropriations in the amount of “\$400,000,000 for each of the fiscal years 2013 through 2017”—a lot of cash for reviewing, updating, and maintaining maps.

A key sentence in the original Act of 1968, related to local review of new mapping presented by FEMA for community adoption, has been amended by *Section 100217*, also setting the stage for some serious surveying. *42 USC 4104, Flood Elevation Determinations*, addressing proposed BFE for land use purposes, has been amended to read:

“The sole grounds for appeal shall be the possession of knowledge and information indicating that 1) the elevations being proposed by the Administrator with respect to an identified area having Special Flood Hazards (SFHA) are scientifically or technically incorrect or 2) the designation of an identified SFHA is scientifically or technically incorrect.”

Section 100246 may possibly affect the surveyor more than any portion of the Act. For those offering Letters of Map Change as part of their regular practice, please read the following carefully:

“SEC. 100246. REIMBURSEMENT OF CERTAIN EXPENSES.

Section 1363 of the National Flood Insurance Act of 1968 (42 U.S.C. 4104) is amended by striking subsection (f) and inserting the following: (f) REIMBURSEMENTS OF CERTAIN EXPENSES. When, incident to any appeal under subsection (b) or (c) of this section, the owner or lessee of real property or the community, as the case may be, incurs expense in connection with the services of surveyors, engineers, or similar

services, but not including legal services, in the effecting of an appeal based on a scientific or technical error on the part of the Federal Emergency Management Agency, which is successful in whole or in part, the Administrator shall reimburse such individual or community to an extent measured by the ratio of the successful portion of the appeal as compared to the entire appeal and applying such ratio to the reasonable value of all such services, but no reimbursement shall be made by the Administrator in respect to any fee or expense payment, the payment of which was agreed to be contingent upon the result of the appeal. The amounts available for implementing this subsection shall not exceed \$250,000. The Administrator shall promulgate regulations to carry out this subsection.”

Great news! Your client may be able not only to get the currently required refund on premiums, but quite possibly a partial refund on your, the surveyor’s, fee for professional services for delivering that LOMA or LOMR-F. We are awaiting word from the Administrator for details on these new regulations. The funds available for reimbursements under this provision are highly limited, and may be expended quickly. Do note that contingency fees are specifically rejected, an ethical warning reminiscent of RESPA. Make no promises or guarantees that applications for map

changes will succeed, and don’t base your fees on map change approvals.

There are many other important changes and improvements in this new legislation, including new modeling of coastal hazards (replacing methodology as old as the NFIP itself). The full package is available through the Library of Congress website (<http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.4348>). To streamline your search to the relevant 60-odd pages, visit Cadastral Consulting (<http://www.cadcon.com/floods.html>).

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Photo by Marvin Nauman/FEMA photo