

# Floodplain and Shoreland Management

# Notes

## Non-Flood Damage and the 50% Rule

The job of a local zoning official is never easy, but dealing with nonconforming structures may be the one issue that drives many ZA's into less demanding work, such as air traffic controller.

Takings, protection of private property rights, diminished property values, unreasonable and arbitrary regulations... these are some of the common complaints that are heard and local officials in many cases have little flexibility to resolve these problems due to the underlying purposes of nonconforming policies.

Adding fuel to the fire are the additional restrictions imposed by floodplain, shoreland and wetland zoning programs which must be administered in dangerous or sensitive natural resource areas.

While we can't wave a magic wand and make all of these problems disappear, several recent changes in statutes and administrative codes provide more options for property owners faced with making hard choices about damaged or at-risk nonconforming floodplain structures.

In 1997, Wisconsin Act 455 was signed into law. This legislation permits non-flood damaged structures to be repaired, reconstructed or improved in order to restore the structure to its pre-disaster condition without limits based on the extent of damage or regulatory constraints of local or state minimum floodplain management standards. Such natural occurrences as fire, wind storm, snow storm, ice storm or other similar events would qualify for this exemption.

In order to take advantage of this

exemption, the structure must be restored to the size, use and location that it had immediately before the disaster occurred. In addition, while local and state regulations are waived, the structure must still comply with minimum FEMA standards:

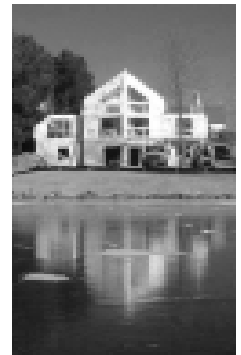
- lowest floor of the structure must be at or above the Regional Flood Elevation (RFE);
- structure must comply with minimum FEMA floodproofing standards, which require that the structure be built with flood-resistant materials, be properly anchored, have all utilities and mechanical equipment at or above the RFE, and be constructed by methods and practices that minimize flood damages;
- structure cannot cause any additional increase in the RFE;
- water supply and on-site waste treatment systems must be floodproofed; and
- flood-carrying capacity of any affected watercourse must be maintained.

In 2004, Chapter NR 116 was modified to offer more opportunities for non-conforming property owners to properly floodproof their structures. In the past, any cost associated with a structural modification, including elevation, counted against the 50 percent cumulative lifetime cap on that structure. The cap is based on the structure's current equalized assessed value.

State code now excludes from that cap the costs associated with elevating a legal nonconforming structure if that structure is elevated to or above the Flood



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Winter 2006

# HAZARD MITIGATION PLANNING

The State of Wisconsin Hazard Mitigation Plan has been approved by the Federal Emergency Management Agency (FEMA), and meets the planning criteria for a "standard" and "enhanced" plan per 44 CFR Section 106. Approval of the plan ensures that Wisconsin will retain its eligibility for disaster assistance programs through the Stafford Act. By having an plan that meets the "enhanced" planning criteria, the state will be eligible to receive up to 20% (instead of 7.5%) of the estimated federal assistance in the next federal disaster declaration for the Hazard Mitigation Grant Program to implement mitigation projects identified in the State and local all hazard mitigation plans. The plan is available on the Division's website at <http://emergencymanagement.wi.gov>.

Under the federal guidelines, local governments and tribal organizations are also required to have an all hazard mitigation plan that has been approved by the Federal Emergency Management Agency in order to be eligible for mitigation funding. Over the past four years, more than \$2.5

million has been provided through the Pre-Disaster Mitigation (PDM) Program to assist local governments and tribal organizations in development of the mitigation plans. Along with the PDM funds another \$592,973 in Hazard Mitigation Grant Program (HMGP) funds was provided.

Wisconsin currently has 27 all hazard mitigation plans approved by FEMA (19 countywide plans, 7 single jurisdictions, and one 1 tribal organization.) Another 41 plans are under development. This includes 32 countywide plans, 4 single jurisdictional plans, and 5 tribal plans.

Funds to support mitigation planning will continue to be made available. It is the State's expectation that eventually all communities in Wisconsin will have a State and FEMA approved all hazard mitigation plan in place.

*For more information regarding the State's hazard mitigation program, contact Roxanne Gray, State Hazard Mitigation Officer, at 608-242-3211 or e-mail Roxanne.gray@dma.state.wi.us.*

## ***Floodplain and Shoreland Management Notes***

"Floodplain and Shoreland Management Notes" is published by the WDNR, Bureau of Watershed Management. Its purpose is to inform local zoning officials and others concerned about state and federal floodplain management, flood insurance, shoreland and wetland management, and dam safety issues. Comments or contributions are welcome.

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Photographs in this issue were provided by DNR file photos and FEMA.

Protection Elevation (FPE). For property owners in dangerous floodway areas, this provides more incentive for elevating a structure, since they will still have the full 50 percent allowance to be used for other structural repairs, modifications or additions. Another incentive is that structures destroyed or damaged beyond 50 percent of value by a flood disaster are not covered by this exemption and would have to meet all local and state standards in order to be rebuilt. For structures in the floodway, that would mean relocating the structure to an area outside the floodway.

Unlike the statutory change for non-flood damaged structures, the administrative code change for exemption of elevation costs is a minimum standard and can be modified by local communities to provide increased protection for property owners and to reduce the community's liability for permitted development in the floodplain. Some additional measures that should be considered include:

- Require that all elevation projects be designed by a registered engineer or architect to ensure that the structure will withstand the flood pressures, depths, velocities, uplift and impact forces at the site.
- Ensure that the structure is properly anchored to resist flotation and lateral movement.
- Only allow elevation on piers or pilings to minimize obstructions to flood flows, prevent build-up of debris, reduce the risk of structural failure due to collapsed load-bearing walls, and ensure that areas below the FPE remain unenclosed and non-habitable.
- Require all utilities, mechanical equipment, accessory structures, storage tanks, wells and septic systems be properly floodproofed or relocated to minimize flood damages and pollution.
- Develop an adequate emergency action plan to provide rescue and relief services to residents of elevated structures.

Please remember that the statutory change does not apply to routine structural repairs, modifications or additions. For these activities, nonconforming property owners are still limited to the 50 percent cap, which is cumulative over the life of the structure. It is the community's responsibility to monitor and track these structural improvements. The only activities which are exempted from these requirements are those which can be classified as "ordinary maintenance and repairs."

This would include such activities as reshingling a roof, residing a wall, replacing damaged or worn windows or doors, painting, new floor coverings, new cabinets, etc. While local zoning officials have discretion on interpreting the rules, any activity which involves a structural modification or repair to a structure does not qualify as ordinary maintenance or repair and all reasonable labor and material costs associated with that project must be counted. For additions, all costs apply; there can be no ordinary maintenance and repair exclusions.

If you have questions about this guidance, please contact Gary Heinrichs, DNR Madison office. [Gary.Heinrichs@dnr.state.wi.us](mailto:Gary.Heinrichs@dnr.state.wi.us), 608-266-3093.



-Tornado damage in SFHA

## Q/A on Flood Zone Determinations

Local officials are frequently called when property owners are told their property is located within a flood zone. The questions asked range from "what is a flood zone" to "how do I get my structure removed?" Local officials are not required to provide flood zone determinations, but they are required to provide assistance to property owners.

**Question:** What is a "flood zone determination" as it relates to a mortgage?

**Answer:** It is a process used by lending institutions to meet their federal banking regulation requirements to make an evaluation of whether or not the structure that they are processing a loan for is in the 1 percent chance flood hazard area. Lenders can do this evaluation themselves or, as most elect to do, hire such service provided by firms that make flood zone determinations their sole business.

**Question:** How do lenders find flood zone determination companies?

**Answer:** The Federal Emergency Management's (FEMA) website <http://www.fema.gov/nfip/fzone1.shtm> provides a list of companies that are in the business of providing flood determination services. FEMA makes the following note regarding the list: "FEMA does not attest to the quality of accuracy of the services offered. That must be determined by potential users of those services. FEMA does not approve, endorse, regulate, or otherwise sanction any company on this list."

**Question:** If a property owner disagrees with the lender's determination that the property is in a floodplain, what can be done?

**Answer:** In some cases, a lender determines that a property is in the Special Flood Hazard Area (SFHA),

but the property owner disagrees. The SFHA is also known as the 100-year floodplain. It is more precisely defined as the floodplain associated with a flood that has a 1 percent annual chance of being equaled or exceeded in any given year. Therefore, the SFHA is not a flood event that happens once in a hundred years; rather, a flood event that has a 1 percent chance of occurring every year. Property owners in this situation have a couple of options. They may apply for a Letter of Map Amendment (LOMA), or a Letter of Map Revision - based on Fill (LOMR-F) (if fill placement is the basis of the request). In addition, property owners may apply for a Letter of Determination Review (LODR).

Forms for these purposes can be found on the FEMA website [http://www.fema.gov/fhm/frm\\_main.shtm](http://www.fema.gov/fhm/frm_main.shtm). The following paragraphs describe first the LOMA or LOMR-F process, followed by the LODR process.

Upon receiving a completed MT-EZ (for LOMAs) or MT-1 (for LOMR-Fs) application, FEMA reviews property-specific information (including surveyed elevation data; typically the elevation of the lowest adjacent grade of the structure in question, provided by a licensed land surveyor. Note: The homeowner may be required to hire a licensed engineer or surveyor to perform this elevation survey, if this data is not readily available), and makes a final flood zone determination for the property. Once an application and all necessary data are received, the determination is normally issued within 30 to 60 days. If the LOMA or LOMR-F removes the SFHA designation from the property, it can then be presented to the lender as proof that there is no federal flood insurance requirement for the property. However, even though a LOMA or LOMR-F may waive the federal requirement for flood insurance, a lender retains the prerogative to require flood insurance. No fee is charged for the

review of a LOMA; however, there is a \$425 review fee for a LOMR-F. A listing of all fees associated with flood map reviews can be found at [http://www.fema.gov/fhm/frm\\_fees.shtm](http://www.fema.gov/fhm/frm_fees.shtm).

In addition, property owners may apply for a Letter of Determination Review (LODR). A LODR is a review of the lender's determination. In other words, the LODR is a process where FEMA reviews the same information the lender used to determine that the structure was located in a SFHA. It is important to note that the LODR process does not consider the elevation of the structure or property above the flood level; rather, it considers only the location of the structure relative to the special flood hazard area boundary shown on the FIRM. Thus, property owners should be aware that the lender does not consider the elevation of the property or structure when determining if the property or structure is in or out of the SFHA. FEMA reviews this information and issues its finding of whether the structure is located in the SFHA according to the current NFIP map. The request for such a letter must be jointly requested by the property owner and the lender no later than 45 days following the date the lender notified the borrower that the property is in a special flood hazard area. While this determination cannot consider the elevation of the structure or property, it can be useful if property owner feels the lender's interpretation of the map is incorrect.

To summarize, then, there are obviously some important distinctions between the two processes (LODR versus LOMA/LOMR-F).

1. The determinations are based on different data. The LODR process does not consider the (vertical) elevation of the structure or property above the flood level; rather, it considers only the horizontal location of the structure relative to the special flood hazard area bound-

ary shown on the Flood Insurance Rate Map. The LOMA/LOMR-F process uses actual survey elevation data to determine if the property or structure is at or above the elevation of the SFHA.

2. There are different fees involved.

LOMA	No fee
LODR	\$80
LOMR-F	\$425

3. The determinations result in different actions. A LODR does not result in an amendment or revision to the National Flood Insurance Program map. It is only FEMA's finding regarding the structure's location with respect to a delineated special flood hazard area. A LOMA or LOMR-F actually removes the SFHA designation from the property by letter.

**Question:** Are local officials liable for making flood zone determinations?

**Answer:** The new Fannie Mae/Freddie Mac flood insurance guidelines require lenders to determine whether a structure is in a Special Flood Hazard Area (SFHA). The key distinction for government officials is between providing information and making a determination that a property is in or out of a SFHA. If a local official makes a determination and fills out the Standard Flood Hazard Determination Form (SFHDF), he/she could be liable for inaccuracies or misrepresentations. Local officials' only obligation is to have the information available and accessible to the public, including the determination companies.

In Wisconsin, it is recommended that local officials require the property owner to provide a site plan showing the location of the proposed project in relation to the SFHA. The site plan should be done by a licensed engineer or surveyor.

Local officials should be extremely

*Continued from Page 5 . . .*

cautious about making flood zone determinations. The flood zone determination companies are being paid to use their expertise to make this determination and to guarantee that it is accurate. These companies cannot expect local officials to make the determination. This is not the local officials' responsibility; it is the lender's, under federal law.

If a local official chooses to assist property owners in determining their flood zone status, it should be made clear that the determination is for informational purposes only. The property owner's lender must still have an official determination done on an approved form, with the preparer's name, address, and telephone number listed. The preparer is the individual or company that made the determination, not the government agency or official that provided information. Local planning and zoning officials' names should not appear in this space. Local officials should make sure the lenders in their area understand this.

The making of flood zone determinations is a growing business, and competition is keen. There are over 100 companies providing the service. To cut costs, some companies simply call local officials and ask them to interpret a flood map over the phone. It's best to not provide the interpretation. The local official has no way of knowing if the property information they are given is accurate. It is the determination company's responsibility to visually interpret the correct map in making a determination. Any reputable company will have all the current maps for any area in which they do business. Local governments simply need to make the flood maps available for public review. Communities currently participating in the Community Rating System (CRS) program may wish to take note of the requirements of Activity 320 – Map Information. This CRS activity is designed to reward communities for informing a requester of a property's flood

zone status, not determine whether flood insurance is required. This activity does not create any liability for government officials. Local officials should make it clear to all requesters that the lender (or a third party hired by the lender) is still required to do an accurate determination and fill out the determination form.

**Question:** Joe and Mary are buying a new home. As the closing approaches, they are contacted by the mortgage company and told that they need flood insurance. They notify their agent, Helen Realtor, who calls the mortgage company and informs the lender that the survey shows the house is **not** in a flood zone. The mortgage company requests that a certification be obtained from a second flood certification company. This is done, and the report verifies Helen's claim that the property is outside the flood zone. The lender agrees that flood insurance is not required. How do flood certification companies determine if property lies within a flood zone?

**Answer:** Flood certification companies utilize federal and county flood zone maps to determine whether or not property lies within a flood zone. Once the determination is made from a federal map that a property appears to be located within a flood zone, these results are compared with the county maps. If access to the survey of the property is available, this is used as an additional tool in the decision-making process. Finally, visual inspection of the property helps in determining if the developer has modified the topography of the land to raise the lot and/or home above the flood zone.

Flood zone lines can appear to come close to a house, and it is difficult to determine the exact location of a flood line merely from a map. For many new subdivisions, roads and streets have not yet been drawn on the maps, and the location of the lot can be difficult to discern. Once a flood certification company finds a lot to be located in a

flood zone, the survey should be checked to confirm the findings. If the survey shows that the house lies outside the flood zone, the lender should be asked for a re-evaluation by the same or a different company. This may result in saving a client money and peace of mind.

*This article was originally appeared in **Flood News for Michigan Floodplain Managers**, Summer/Fall 2005 and was reprinted with permission.*

## Septic Systems - What to Do After the Flood

The Environmental Protection Agency (EPA) has developed a brief two page brochure on what to do when a septic system is affected by flooding. The brochure can be downloaded from the EPA website [www.epa.gov/ogwdw000/faq/emerg\\_septic.html](http://www.epa.gov/ogwdw000/faq/emerg_septic.html).

The brochure focuses on the water quality issues related to flooded septic systems. For floodplain managers in Wisconsin, other factors must be taken into consideration when responding to questions regarding flooded septic systems.

Consideration must be given to the kind of septic system being applied for and where the proposed system is to be located. Also, a floodplain development permit is required if any soil is disturbed.

- **Floodways.** New septic systems or additions to existing septic systems are prohibited in floodways under Section NR 116.12(1)(e) and Sec. NR 116.15(2)(b), Wisconsin Administrative Code. Any permit requests for new or additions to existing systems in

the floodway must be denied. Replacement or repair of failing septic systems are allowed if it has been required by a government agency to correct a public health hazard and must meet the requirements of COMM 83, Wis. Admin. Code.

- **Floodfringe.** New, addition to and replacement of septic systems are permitted in the floodfringe. Such systems must be floodproofed to the flood protection elevation and meet the requirements of any local ordinance as well as the requirements found in Chapter Commerce 83, Wis. Admin. Code.
- **General Floodplain.** A determination of the appropriate flood zone must be conducted in order to ensure the appropriate regulations are applied.

If questions arise during the permitting process, contact should be made with the DNR Regional staff person.



*-Flooded residential septic system*

# Water Dependent Structures

After witnessing the storm-related devastation along the Gulf Coast last summer, many people would question why anyone would build in a mapped floodplain or even an unmapped area that is at risk of flooding.

While most structures should be sited well outside harms way, some development activity must occur along the shores of rivers, lakes and ocean ports. These water-dependent structures are needed for commerce, recreation, safety and public utility purposes. It is the local zoning official's job to determine what structures are truly water dependent and what standards they must be built to. In most cases, these structures will be in the floodway zone and must meet the requirements of NR 116.12 and local zoning ordinances.

In Wisconsin, what types of structures might be commonly found along lake and river shorelines and would qualify as legitimate water-dependent structures?

Examples for commercial purposes would include: unloading facilities (wharves, piers and platforms); fueling apparatus; cranes and hoists; and ramps or paved surfaces. For recreational areas, it may

be necessary to place dry boathouses, lifeguard towers, boat ramps, marina facilities and bath houses in the near-shore area. Communities might permit navigational aids, roads, signage, structures accessory to historical uses and other "public good" structures.

Regardless of the purpose of the structure or the entity placing it, there are certain criteria applicable to all such development:

- Any artificial change to improved or unimproved real estate is considered development and must be properly permitted;
- Any manmade object with form, shape or utility is considered a structure;
- Any new structure in the floodway cannot cause any increase in flood elevations; must be built of flood-resistant materials and have a low flood damage potential; must be properly anchored to prevent flotation, collapse or lateral movement; and all mechanical equipment and utilities must be floodproofed;



- Example of residential water dependent use: dry boathouse



- No habitable structures are allowed in the floodway;
- No structure or portion of a structure can be placed below the ordinary high water mark (OHWM) on a navigable body of water unless specifically authorized by the DNR under the Chapter 30 criteria, except for exempted minor structures such as small piers, boat hoists, etc.; and
- If development is proposed below the OHWM, amendments may be required to the adopted floodway lines, water surface profiles, base flood elevations and other engineering data. If flood elevations increase or the floodway area is changed, FEMA review and approval will be needed.

When a proposal for a water-dependent structure is submitted, communities should ask the following questions:

1. Is this structure absolutely necessary in this location (practicable alternatives)?
2. What are the environmental impacts of permitting it at this location?
3. What are the short-term and long-term impacts of not permitting it?
4. What are the minimum design, construction and operational standards which must be implemented to minimize adverse impacts?
5. How does this structure/use fit in with the community's strategic plan or vision?
6. What else can we do to make this a better project?

Beyond the minimum standards which must be followed, communities should consider other potential adverse impacts of near-shore development. These include natural scenic beauty, disruption of fish or wildlife habitat, impacts on wetlands or endangered resources, degradation of water quality, cumulative impacts and practicable alternatives.

Many communities are exploiting a waterfront location to stimulate economic growth and bolster the quality of life for its residents. Properly done, these projects can make a real difference. When planning for this type of development, please remember that the purposes of floodplain management are designed to help communities move toward a sustainable future and a positive economic outlook.



- Example of commercial water dependent use: wharf

# Chapter NR 115 Update

Last summer, more than 1,200 citizens sacrificed a summer evening to attend one of 11 public hearings held around the state regarding the proposed revisions to Wisconsin's Shoreland Management Program, NR 115. The process of updating the state's 35-year-old rules to preserve clean water, great fishing, and natural scenic beauty along Wisconsin's lakes and rivers has been challenging, controversial—and absolutely essential.

DNR shoreland protection staff launched the revision process in 2002 by convening a citizens' advisory committee to look at the current rules, which set statewide minimum standards (in largely unincorporated areas) for lot sizes, building setbacks and limits on removing shoreland vegetation. The proposed changes debated at public hearings reflect nearly three years of advisory committee meetings and hundreds of phone calls, e-mails and comments by the public. The changes sought to strike the proper balance between providing property owners more flexibility in what they could do on their land in exchange

for measures to offset the resulting impacts on lakes and rivers.

Over 12,000 comments have been received on the proposed revision to NR 115. After reviewing and compiling the comments, the Department will make changes to the rule proposal based on the comments heard during the comment period and public hearings. The final draft of the rule will then be taken to the Natural Resources Board for final consideration.

Due to the high volume of comments, it is unclear when the rule will be brought to the Board for approval and the specific changes that will be made to the proposal.

However, a proposed timeline for the NR 115 review process has been developed and is outlined below. Any questions regarding the NR 115 review process should be directed to Toni Herkert at [toni.herkert@dnr.state.wi.us](mailto:toni.herkert@dnr.state.wi.us).

## Proposed NR 115 Timeline

1. Database of NR 115 public hearing comments completed – Spring 2006
2. Response Summary completed – Spring 2006
3. NR 115 Advisory Committee meeting – Spring/Summer 2006
4. Focus Group development including AC members – Summer 2006
  - a. Impervious Surfaces
  - b. Mitigation
  - c. Implementation/enforcement – started after draft rule review
5. NR 115 Advisory Committee meeting – Fall 2006 (if needed)
6. Draft Rule – Fall/Winter 2006
  - a. based on public hearing comments; and
  - b. focus group discussions
7. Implementation/Enforcement focus group (use draft rule) – Fall/Winter 2006
8. NR 115 Final Advisory Committee meeting – Winter/Spring, 2007 (if needed)
9. Natural Resources Board, request approval round 2 public hearings – Spring, 2007
10. Public Hearing round 2 – Summer 2007
11. Winter NRB final approval – Fall/Winter 2007 (5 years since beginning process with AC)
12. Legislative review

# DNR Staff Changes

## **Linda Hyatt–Watershed Management**

Linda has been recently appointed the Upper Green Bay Basin Leader. As the former West Upper Fox Basin Team Leader located in Wautoma, she provided dam, floodplain and water regulatory engineering reviews and approvals for several counties in the Northeast Region among her many other duties. In her new position, she will continue to provide some engineering assistance to the NE Region on a limited basis until a new engineer is hired. Contact Information: Wisconsin Dept. of Natural Resources, 427 E Tower Drive, Suite 100 Wautoma, WI 54982-6927 (920) 787-4686.

## **Sue Josheff–Watershed Management**

Sue has been recently appointed the Lower Rock River Basin Leader. As the former Rock River Basin Engineer located in Fitchburg, she provided dam safety and floodplain management assistance for the water regulation program in the Rock River Basin (Dodge, Jefferson and portions of Columbia, Dane and Rock Counties). In her new position, she will continue to provide some engineering assistance on a limited basis until a new engineer is hired. Contact Information: Wisconsin Dept. of Natural Resources,

3911 Fish Hatchery Road, Fitchburg, WI 53711 (608) 275-3305.

## **Dean Stitgen–Watershed Management**

Until recently, Dean Stitgen was the Water Management Engineer for the Northeast Region where he reviewed proposed projects for engineering adequacy, completed H & H analysis required by DNR and answered questions from the public. He is now a Water Management Engineer with statewide responsibilities. He will take the lead on maintaining various programmatic databases and providing technical engineering assistance to field staff. He will continue to provide some engineering assistance to the NE Region on a limited basis until a new engineer is hired. Contact Information: Wisconsin Dept. of Natural Resources, P. O. Box 7921, 101 South Webster Street, Madison, WI 53707 (608) 266-1925.

## **Linda Meyer – Legal Services**

In 2005, Linda Meyer retired from the DNR. She was the “go to person” for shoreland zoning issues. She has been replaced by Marcia Penner and Edwina Kavanaugh. Contact Information: Wisconsin Dept. of Natural Resources, P. O. Box 7921, 101 South Webster Street, Madison, WI 53707 (608) 266-0848.

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## Upcoming Events

### **Construction Erosion Control Workshops**

Go to link below for brochure

[http://dnr.wi.gov/org/water/wm/nps/pdf/constr\\_workshop.pdf](http://dnr.wi.gov/org/water/wm/nps/pdf/constr_workshop.pdf)

March - April 2006

### **Stormwater Twilight Workshop**

Sponsored by WAFSCM

Contact Gary Heinrichs for information

[gary.heinrichs@dnr.state.wi.us](mailto:gary.heinrichs@dnr.state.wi.us)

April 18, 2006

Country Springs Inn

Pewaukee

### **Coastal Hazards Twilight Workshop**

Sponsored by WAFSCM

Contact Roxanne Gray for information

[roxanne.gray@dma.state.wi.us](mailto:roxanne.gray@dma.state.wi.us)

July 20, 2006

Northern Great Lakes Visitor Center

Ashland

### **ASFPM Annual Conference**

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

June 11-16, 2006

Albuquerque, NM

# Floodplain and Shoreland Management Notes

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