No. 08-1318

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COLUMBIA VENTURE, LLC,
Plaintiff-Appellant,

v.

DEWBERRY & DAVIS, LLC,
Defendant-Appellee

and

UNITED STATES OF AMERICA
Party-in-Interest

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

# *AMICUS CURIAE* BRIEF OF THE ASSOCIATION OF STATE FLOODPLAIN MANAGERS IN SUPPORT OF AFFIRMANCE

David K. Mears
Environmental and Natural
Resources Law Clinic
Vermont Law School
164 Chelsea Street, PO Box 96
South Royalton, VT 05068
(802) 831-1627
*Attorneys for Amicus Curiae*
*Association of State Floodplain Managers*

Jon Kusler
Associate Director
Association of State Wetland Managers
1434 Helderberg Trail
Berne, NY 12023
(518) 872-1804
*Of Counsel*

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/s/ David K. Mears 12/03/08
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## STATEMENT OF THE IDENTITY OF THE *AMICUS CURIAE*, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE:

Amicus Association of State Floodplain Managers ("ASFPM" or "Association") is a 503(c)(3) not for profit corporation dedicated to reducing flood losses. The mission of the Association is to mitigate flood losses, reduce costs and human suffering caused by flooding, and to promote the wise use of the natural and beneficial functions of floodplains. ASFPM has over 10,000 members and chapters in twenty-seven states, including 210 members in South Carolina. All officers of the corporation must be current State Employees. Amicus ASFPM is an organization of state, tribal, local, federal, and private professionals involved in floodplain management, flood hazard mitigation, flood preparedness, and flood warning and recovery. The ASFPM rarely files an amicus brief, and has done so in this case only after careful consideration and a unanimous vote of the board of directors.

ASFPM and its members will be adversely affected if Columbia Venture, LLC ("Columbia Venture") is permitted by the court to go forward with this suit. All fifty states and 19,700 local governments participate in the National Flood Insurance Program ("NFIP"). Almost all depend upon Federal Emergency Management Agency ("FEMA") floodplain maps. The NFIP has mapped floodplains primarily with the assistance of private and

government map contractors such as Defendant-Appellee Dewberry & Davis, LLC ("Dewberry"). These maps are used by the states and local governments for regulating floodplains and floodways and for other flood loss reduction purposes. These maps are also used by FEMA as part of its implementation of the flood insurance program. Some of these states, such as Wisconsin and North Carolina, map floodplains directly with financial support from, and in close cooperation with, FEMA.

Allowing landowners with lands mapped by FEMA and its contractors to sue FEMA contractors based upon state tort theories could result in suits directly against the states or local governments when, as frequently occurs, states or local governments serve as map contractors. Allowing such suits would also more broadly discourage private map contractors from undertaking flood insurance studies for FEMA and would raise costs. More generally, state tort claims such as those brought by Columbia-Venture would, if allowed to proceed, discourage accomplishment of the goals of the NFIP, including reducing the loss of life from flooding, reducing flood disaster relief, and reducing escalating flood losses. Inevitably, these suits would have a chilling effect on state and local regulatory and flood loss reduction programs.

The decision of the district court below properly applies the doctrine of preemption and protects the floodplain mapping program used by FEMA, other federal agencies, states, tribes, and local governments, as well as by the private sector. This result is consistent with ASFPM's mission to mitigate flood losses. For this reason, ASFPM and its members have a strong interest in affirming the decision of the district court.

This *amicus curiae* brief is filed pursuant to Rule 29 of the Federal Rules of Appellate Procedure. Amicus ASFPM has the consent of Defendant-Appellees but Plaintiff-Appellants Columbia Venture, LLC declined to consent. For this reason, ASFPM has filed a concurrent motion for leave of Court to file this brief.

## SUMMARY OF THE ARGUMENT:

Columbia Venture's state tort claims against Dewberry are preempted based on conflict preemption. The claims are preempted because allowing state tort liability creates an obstacle to the implementation of the NFIP. More specifically, allowing landowners to challenge flood calculations through state tort claims would interfere with FEMA's ability to develop and adopt technically and scientifically sound flood maps. Authorizing the imposition of tort liability would discourage collaboration on these complex maps and would therefore increase the cost and decrease the efficiency of the map development process so integral to implementation of the NFIP. In addition, allowing state tort claims would also undermine the carefully crafted procedure for appeal that Congress included in the National Flood Insurance Act ("NFIA"). Having a separate option to challenge flood maps in the form of state tort claims would eliminate uniformity in applying the NFIA appeal procedures and interfere with FEMA's ability to retain expert consultants. For these reasons, this Court should affirm the finding of the district court and hold that Columbia Venture's claims should be dismissed.

**ARGUMENT:**

The District Court correctly held that Columbia Venture's state law claims against Dewberry are preempted. The outcome in this case is directed by the Supremacy Clause of the United States Constitution, which states that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, § 2. The type of preemption found by the district court, conflict preemption, exists when there would be a conflict in applying both the state and federal regulations. *College Loan Corp. v. SLM Corp*., 396 F.3d 588, 596 (4th Cir. 2005). Moving one level deeper, the form of conflict preemption found by the district court, "obstacle conflict," exists when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. at 595–96 (internal citations omitted).

In this case, Columbia Venture's state law claims clearly stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. While, as a general matter, there is a presumption against federal preemption of state laws, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005),[1] particularly where the injured party does not have a remedy under federal law, *Abbot by Abbot v. American Cyanamid*

[1] *See also* Reid v. People of State of Colorado, 187 U.S. 137, 148 (1902); Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 611 (1926); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

*Co.*, 844 F.2d 1108, 1112 (4th Cir. 1988), the facts of this case are sufficient to overcome that presumption. In fact, the present case illustrates exactly the circumstance in which the presumption against preemption is overcome. Not only is there a federal remedy in the form of the NFIA appeal process, but Columbia Venture's claims, if allowed to proceed, would clearly stand as an obstacle to the implementation of the NFIP, as discussed below.

## I. Allowing State Tort Liability Creates an Obstacle to the Implementation of the National Flood Insurance Act

Congress adopted the National Flood Insurance Act in 1968 as a comprehensive federal, state, and local flood loss reduction scheme. National Flood Insurance Act, 42 U.S.C. §§ 4001–4129 (2000). The Act has been in force for forty years and has been amended multiple times to provide specific roles for state, local, and federal governments as well as for the private sector in flood loss reduction.

Congress enacted NFIA after determining that floods and their devastating effects were taking an unacceptable financial toll on the nation. *Id.* § 4001. Unlike previous flood relief programs, Congress used the NFIA to address the underlying source of flood loss: increased development in flood-prone areas. *Id.* As the Seventh Circuit stated: "the primary purpose behind the Flood Program was to diminish, by implementation of sound land use practices and flood insurance, the massive burden on the federal

treasury of escalating federal flood disaster assistance." *Mid-American Nat. Bank v. First Sav. & Loan Ass'n*, 737 F.2d 638, 642 (7th Cir. 1984). One component of this scheme is to identify flood-prone communities and flood-prone areas. A second is to encourage states and communities to adopt floodplain regulations meeting minimum FEMA standards. A third is to provide flood insurance to landowners. 42 U.S.C. § 4002(b) (2000). To do this, Congress has authorized FEMA to map areas of risk and to make national flood insurance available for such areas at a rate proportional to flood risk. *Id.* §§ 4013–15. Floodplain mapping is integral to the insurance process, *Id.* §§ 4101–07, and to the regulatory scheme.

Over the years, the Act has become increasingly comprehensive. The Act was amended in 1969 to authorize the "Emergency" Flood Insurance Program which allowed for the creation of Flood Hazard Boundary Maps ("FHBM"). *Id.* § 4056.[2] The Flood Disaster Protection Act of 1973 initiated a more extensive use of Flood Insurance Studies and analyses to develop base flood elevations and designate floodways and risk zones for most NFIP communities using detailed hydraulic and hydrologic analyses.[3] Studies are developed by private and public map contractors like Dewberry.

[2] Emergency Flood Insurance Program, Pub.L. 91-152, § 408, 82 Stat. 582 (1969).
[3] Flood Disaster Protection Act of 1973, Pub.L. 93-234, 87 Stat 975 (1973).

Allowing state tort suits against FEMA map contractors based upon the inadequacy of the mapping would undermine implementation of this comprehensive scheme. State court litigation would reduce the confidence of states, local governments, landowners and others in maps and discourage their use in planning, regulation, and other floodplain management. This would significantly thwart the intent and the ability of the NFIA to reduce flood losses.

### A. Allowing Landowners to Challenge Flood Calculations Through State Tort Liability Would Be an Obstacle to FEMA's Ability to Create Technically and Scientifically-Based Flood Maps

#### 1. Technically- and Scientifically-Based Flood Maps are Essential to Implementation of the NFIP

The flood risk information presented on the FEMA flood maps and reports "forms the technical basis for the administration of the NFIP."[4] Mapping has been a critical component of the National Flood Insurance Program since its inception in 1968. FEMA has relied upon public and

[4] FEDERAL EMERGENCY MANAGEMENT AGENCY, NATIONAL FLOOD INSURANCE PROGRAM, PROGRAM DESCRIPTION 9 (August 1, 2002), http://www.fema.gov/doc/library/nfipdescrip.doc [hereinafter PROGRAM DESCRIPTION]. This document, and several others cited in this brief, are not included in the record, but are cited to provide background and clarity on the scientific and technical complexities of the NFIA. Courts have held that it is within their discretion to consider extra-record materials presented in amicus curiae briefs when they contain specialized information that may aid decision-making, such as when it is "necessary to explain technical or complex subject matter." National Wildlife Federation v. National Marine Fisheries Service, Slip Copy, Nos. CV 01-640RE & CV 05-23-RE, 2005 WL 878602, at *4 (D.Or. 2005). Furthermore, as Dewberry notes in their brief, these documents are a part of the public record and this Court may therefore take judicial notice of them. Fed. R. Evid. 201. *E.g.*, Lovelace v. Software Spectrum, Inc., 78 F.3d 1015, 1018 n.1 (5th Cir. 1996).

private map contractors like Dewberry to develop maps for flood-prone areas during this period and continues to do so.

To make flood insurance available to a local government, ordinarily FEMA must first map and identify flood-prone areas through the performance of a flood insurance study ("FIS"). 42 U.S.C.§§ 4101, 4104. The results of the study are then translated into a flood insurance rate map ("FIRM"). Following adoption of a final FIRM, a community wishing to participate in the National Flood Insurance Program must enact a "flood plain management" ordinance to regulate the development of new or improved structures in risk areas. *Id.* §§ 4012 (c), 4022, 4102. A community failing to adopt and enforce local ordinances consistent with minimum FEMA standards loses the benefit of federal flood insurance. Landowners in communities qualifying for the NFIP receive flood insurance at government subsidized rates.

This program has yielded substantial benefits by reducing flood losses. Over the last forty years, the National Flood Insurance Program has saved an estimated one billion dollars each year in reduced flood losses.[5] This is due in no small part to mapping. FEMA has developed individual

[5] RAWLE O. KING, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, THE FLOOD INSURANCE AND MODERNIZATION ACT OF 2007: A SUMMARY OF KEY PROVISIONS 3 (June 25, 2007), http://assets.opencrs.com/rpts/RL34052_20070625.pdf.

maps for more than 19,700 communities.[6] According to FEMA, as of 2002, "approximately 100,000 flood map panels have been produced depicting approximately 150,000 square miles of floodplain areas."[7] By the end of 2007, there were 5,653,949 flood insurance policies in effect based upon this mapping.[8]

These maps are widely used. In 2002, FEMA concluded that

> FEMA flood hazard maps are used an estimated 15 million times annually for State and community floodplain management regulations, for calculating flood insurance premiums, and for determining whether property owners are required by law to obtain flood insurance as a condition of obtaining mortgage loans or other Federal or federally related financial assistance."[9]

Flood hazard maps are used by FEMA to determine which communities must adopt regulations to qualify for National Flood Insurance and to determine the flood insurance premiums which landowners must pay. These flood hazard maps are also used by States and communities for emergency management.[10] Private users of FEMA flood hazard maps include engineers, surveyors, architects, floodplain managers, homeowners,

[6] PROGRAM DESCRIPTION, *supra* note 4, at 12.
[7] *Id.* at 4.
[8] Federal Emergency Management Agency, Total Policies in Force by Calendar Year, http://www.fema.gov/business/nfip/statistics/cy2007pif.shtm (last visited Dec. 1, 2008).
[9] PROGRAM DESCRIPTION, *supra* note 4, at 8.
[10] *Id.*

insurance professionals, and lenders.[11] Maps are used for floodplain management; flood insurance rating; flood hazard prediction; engineering of flood mitigation projects, bridges, and roads; and other purposes.[12]

As in the present case, maps become outdated over time and need to be revised to reflect new scientific and engineering knowledge; new information concerning flood elevations; watershed development and the resulting increased runoff; more detailed topographic information; the construction of bridges, roads, and other structures which change flood levels; and the construction and operation of flood control structures. Revisions are also needed to reflect improvements in floodplain and floodway delineation procedures including the use of geoinformation systems; the development and improvement of flood models and multi-regression analysis equations; and better understanding of the residual risks of flood control structures such as levees. In 2003 Congress authorized a five year program (the "Map Modernization Program") to modernize and improve floodplain maps. This update will cover about sixty-five percent of the nation's floodplains.[13] The Map Modernization Program is a 1.2 billion

[11] UNITED STATES GENERAL ACCOUNTING OFFICE, FLOOD MAP MODERNIZATION: PROGRAM STRATEGY SHOWS PROMISE, BUT CHALLENGES REMAIN (GAO-04-417) 47–48 (March 2004), http://www.gao.gov/new.items/d04417.pdf.
[12] *Id*.
[13] COMMITTEE ON FLOODPLAIN MAPPING TECHNOLOGIES, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, ELEVATION DATA FOR FLOODPLAIN MAPPING 56 (2007). [hereinafter FLOODPLAIN MAPPING] *available at* http://books.nap.edu/openbook.php?isbn=0309104092.

dollar program[14] and will rely to a considerable extent upon private map partners and contractors such as Dewberry to carry out hydrologic and hydraulic analyses.

The states and local governments are important partners in these efforts under the National Flood Insurance Program. Most states provide technical assistance to communities using FEMA funding under the Community Assistance Program (CAP), their own funding, or a combination of the two. CAP was developed in recognition that there were not sufficient FEMA staff resources to provide technical assistance to, or monitor compliance with, the nearly twenty thousand participating NFIP communities and that other resources would have to be used.[15]

Due to the shortage of federal staff, preparation of flood maps is a collaborative process between FEMA and public or private map contractors. FEMA establishes guidelines for mapping, provides funding, and supervises mapping. Map or technical assistance contractors are also involved in addressing specific issues or problems. FEMA publishes the maps in hard copy and makes many available online. While FEMA relies heavily on

[14] *Id.* at 10.

[15] Federal Emergency Management Agency, Community Assistance Program - State Support Services Element, http://www.fema.gov/plan/prevent/floodplain/fema_cap-ssse.shtm (last visited Dec. 1, 2008). *See also* FEDERAL EMERGENCY MANAGEMENT AGENCY, FEMA'S FLOOD MAP MODERNIZATION—PREPARING FOR FY09 AND BEYOND: INTEGRATED FLOOD DATA UPDATE, RISK ASSESSMENT, AND MITIGATION PLANNING (draft, June 1, 2008), http://www.fema.gov/pdf/plan/mapmod_phaseii_concept_paper_june_1_release.pdf (describing the roles of mapping partners under the Cooperating Technical Partners (CTP) Program).

private contractors, FEMA is ultimately in control of the technical mapping process.

In the present case, for example, FEMA contracted with Dewberry to provide engineering services to FEMA to help determine floodway boundaries. The ultimate decision on floodway boundaries was, however, made jointly between FEMA and local officials with engineering parameters established by FEMA. Dewberry was not in control of the decision. In this case, Richland County then used FEMA's floodway maps to adopt and enforce local zoning ordinances. This kind of collaborative effort by FEMA, local authorities, and non-governmental contractors provides the best approach for producing the most accurate floodplain maps and utilizing these maps efficiently.

### 2. Flood Plain Mapping is a Complex Technical and Scientific Process Best Achieved Through Collaboration

Preparation of FEMA flood maps typically involves three technical steps carried out by one or more contractors like Dewberry, consistent with FEMA's detailed specifications and guidance. First, stream flow associated with a 100-year flood is estimated. Next, the flood elevation profile (elevation of the flood along the length of stream) for the 100-year flood and a floodway are determined. Finally, the inundation areas associated with that profile and the floodway are mapped. Performing these three steps

requires expert analysis of peak flow stream gauging data, rainfall records or estimates, and computerized flood models. Further interactive guidance by FEMA is required because map contractors may chose from a number of different models, depending upon the factual situation and desired factors.

Mapping requires simultaneous consideration of a broad range of factors such as topography, land use, stream gauge records, the effects of flood control measures, the impact of bridges and culverts, and other factors.[16] Because conditions vary, and different models produce somewhat different results, disparities arise in the results of flood mapping, including predicted flood elevations. See, for example, *Normandy Pointe Associates v. Federal Emergency Mgt. Agcy.*, in which five flood maps with different elevations for the 100 year floodplain had been produced for a specific area. *Normandy Pointe Associates v. Federal Emergency Mgt. Agcy.*, 105 F. Supp.2d 822 (S.D. Ohio 2000). Even with expertise and the best available modeling, there can be inaccuracies and varying results. There is no such thing as a "perfect" floodplain or floodway map. The differences in flood elevation and mapping results have been recognized in studies by the

[16] *See* Federal Emergency Management Agency, Guidelines and Specifications for Flood Hazard Mapping Partners, Vol. 1: Flood Studies and Mapping, §§ 1.1.3, 1.2.3.1 (April 2003), http://www.fema.gov/library/viewRecord.do?id=2206.

National Research Council.[17] Flood mapping is, in some instances, more akin to weather prediction than conventional engineering analysis, particularly where there are only short term stream gauging records or no records at all for a river or stream. With this in mind, it is relevant to the present case to note that, because of the uncertainties inherent in weather prediction and the need for agency discretion, courts have often refused to hold forecasters liable for inaccurate forecasts.[18]

To increase accuracy, flood maps are best developed through a collaborative process like the process used by FEMA and its contractors. Such an interactive process reduces error and helps ensure use of the most appropriate hydrologic models.

Congressional intent supports such technical collaboration. Congress stated that one of the purposes of the Act was to "provide for the expeditious identification of, and the dissemination of information concerning, flood-prone areas." 42 U.S.C. § 4002 (b)(2) (2000). Congress directed the heads of federal agencies to "give the highest practicable priority in the allocation of available manpower and other available resources to the identification and

[17] *See* FLOODPLAIN MAPPING, *supra* note 13, at 5–7 (discussing different mapping techniques and their varying accuracy); National Research Council, Committee on Risk-Based Analysis for Flood Damage Reduction, Water Science and Technology Board, Risk Analysis and Uncertainty in Flood Damage Reduction Studies 6 (2000) ("The Corps's experiences in applying alternative methods to estimate flood stage indicate that there can be substantial differences in the results.") *available at* http://www.nap.edu/catalog.php?record_id=9971#toc.

[18] *E.g.* National Manufacturing Co. v. United States, 210 F.2d 263 (8th Cir. 1954); Brown v. United States, 790 F.2d 199 (1st Cir., 1986); Chanon v. United States, 350 F. Supp. 1039, 1041 (S.D. Tex. 1972).

mapping of flood hazard areas and flood-risk zones." 42 U.S.C. §4101(c) (2000). Congress recognized that FEMA also needs the help of private contractors. Congress specifically stated in the NFIA that "[t]he Director [of FEMA] is authorized to … enter into contracts with any persons or private firms, in order that he may-- (1) identify and publish information with respect to all flood plain areas … and (2) establish or update flood-risk zone data…." *Id.* § 4101 (a) (1)&(2). This recognition by Congress, along with the tangible benefits that have been realized through collaboration between FEMA and contractors like Dewberry, illustrates that such collaboration is integral to adequate floodplain mapping.

### 3. Allowing State Court Tort Liability Challenges to Flood Maps Would Create a Significant Obstacle to Collaboration and Adequate Mapping.

If state tort claims were allowed, it would deter map contractors from cooperating with FEMA. This would eliminate the benefits of collaboration and increase the burden on FEMA. The District Court appropriately concluded in this case that "[t]he prospect of potential liability from state law actions would likely deter some private companies from entering into contracts or from continuing to contract with FEMA. ... With fewer resources, FEMA's ability to carry out the Congressional objectives set forth

in §§ 4001(e)(5) and 4002(b)(2) would be significantly diminished." Joint Appendix at 371.

Allowing state tort liability challenges to flood maps would also raise the cost of mapping. The District Court was also correct when it stated that

> It is not unforeseeable that allowing tort claims against independent contractors, such as Dewberry, would result in the transfer of the costs of potential liability to FEMA through contract fees. It follows that this would result in increased expenditures by the federal government to implement the flood insurance program. This in turn would destroy the balance sought by Congress in promulgating the NFIA.

Joint Appendix at 370.

There can be no question that state court litigation would add to the cost of the NFIP flood mapping program, which is already a costly and time-intensive process. In terms of the current costs of the program, FEMA in 2001 reported that "[f]lood hazard maps have been issued for over 19,200 communities at a cost of over $1.5 billion (actual dollars) [$2.8 billion in 2001 dollars]."[19] Additionally, the forthcoming Map Modernization Program is anticipated to cost more than one billion dollars over a five year period.[20]

Litigation will add to this cost directly. In this case, for example, Columbia Venture is requesting more than one hundred million dollars in

[19] PROGRAM DESCRIPTION, *supra* note 4, at 4.
[20] FLOODPLAIN MAPPING, *supra* note 13, at 10.

damages. Joint Appendix at 206. The total cost to Dewberry, even if not found liable, will be much greater when attorney's fees, expert witnesses, and court costs are considered. Contractors will inevitably pass on the costs associated with state tort litigation to FEMA.

Litigation on state tort claims will also increase costs indirectly. Such litigation will likely discourage FEMA's state and local mapping partners in the Map Modernization Program from entering into cooperative mapping agreements, increasing the costs of flood mapping. The fear of litigation will thus decrease the supply of private contractors. Fewer mapping partners will increase demand on the remaining available contractors, thereby increasing the cost of their services. Also, the impacts of allowing Columbia Venture's claims to stand could subject state and local partners undertaking mapping in cooperation with FEMA to state tort litigation brought by affected landowners.

State tort liability would also decrease efficiency in mapping. As the district court noted, "allowing aggrieved landowners to bring state tort claims against contractors ... impedes the process of identifying and disseminating information about flood-prone areas." Joint Appendix at 373. The present litigation has already taken two years and may take many more. As this case demonstrates, litigation against FEMA's flood mapping

contractors could tie up completion of flood maps for years, frustrating the attempt of the federal government to reduce flood losses through local land use regulation. If every aggrieved landowner was allowed to pursue state tort claims, and thousands of multi-year claims were allowed, progress on floodplain mapping could slow to a snail's pace. This creates the possibility of not only reduced efficiency in the mapping process, but the chance that it might become impossible for FEMA to produce adequate floodplains maps all together. This result would not only be an obstacle to NFIA, but would frustrate the goals intended by Congress when enacting the Act.

### B. Allowing State Tort Liability Would Be an Obstacle to, and Contrary to, Congress's Intent to Create a Uniform Appeal Process for FEMA's Flood Maps

#### 1. Congress Carefully Crafted a Comprehensive Appeal Process as a Part of the NFIA

As the Fifth Circuit noted in *West v. Harris*, "Congress has undertaken to establish a comprehensive flood insurance program under the control of [FEMA] to achieve policies national in scope." *West v. Harris*, 573 F.2d 873, 881–82 (5th Cir.1978). When it composed the NFIA, Congress provided landowners with an explicit and carefully crafted procedure to challenge floodplain evaluations.[21] Courts have noted the care

[21] *See, e.g.* S. Rep. No. 93-583, *as reprinted in* 1973 U.S.C.C.A.N. 3217, 3230–31 (noting that the appeals provision was finalized after much debate and discussion in Congress).

with which Congress drafted this appeal process. *Reardon v. Krimm*, 541 F. Supp. 187, 189 (D. Kan. 1982).[22] Under Section 4104(b) of the NFIA, landowners may appeal FEMA's proposed flood delineations administratively and then to a federal district court if they believe that the delineations are "scientifically or technically" incorrect."[23] This carefully designed process requires that any challenges to FEMA's mapping must first be brought through the prescribed administrative procedure and then, if the landowner is not satisfied with the result, through district court procedures. A brief review makes plain that this process is sufficiently detailed to provide for meaningful relief to affected parties. Congress provided by statute that, during the ninety-day period following publication of a draft flood map, any owner of property who believes his or her rights will be adversely affected by the proposed determination may appeal to the local government which may then appeal to FEMA. 42 U.S.C. § 4104(b). Such appeals are based on "knowledge or information indicating that the elevations being proposed by the Secretary with respect to an identified area having special flood hazards are scientifically or technically incorrect." *Id.* In considering the appeal, the Director is required to review any scientific data that tends "to negate or contradict the information upon which his

[22] *See also* City of Biloxi v. Guiffrida, 608 F. Supp. 927, 929 (S.D. Miss. 1985).
[23] 42 U.S.C. § 4104 (2000).

proposed data is based." 42 U.S.C. § 4104(e). Any conflict is to be resolved "by consultation with officials of the local government involved, by administrative hearing, or by submission of the conflicting data to an independent scientific body or appropriate Federal agency for advice." *Id.* The Director then publishes his final decision in the Federal Register and notifies the governing body of the community.

The statute also provides for judicial review. It provides that "any appellant aggrieved by any final determination of the Director upon administrative appeal … may appeal such determination to the United States district court …." 42 U.S.C. § 4104(g). The statute further provides that the "sole relief which shall be granted under authority of this section in the event that such appeal is sustained … is a modification of the Director's proposed determination ...." 42 U.S.C. § 4104(b).

Given that this procedure is so detailed, it is obvious that Congress intended it to be the exclusive route for resolution of landowner map grievances. Deferring to Congress, other courts have found this process to be complete. *Reardon v. Krimm*, 541 F.Supp. 187, 189 (D. Kan. 1982). The *Reardon* court noted that

> [t]he limitation on appeals was the product of more debate and testimony than any other portion of the Act when it was being considered in Congress. The decision by Congress to adopt

> such a limited scope of appeal was therefore not a hasty one, nor is it one which may be overlooked by the Court.

*Id.* (internal citations omitted). This Court should similarly find that Congress enacted this detailed and specific appeal process as the best means to accomplish the goal of reducing the costs of floods on the national treasury.

This intent can be further understood by contrasting the facts of the present case with the scope of the provision of the NFIA delineating those state or local laws which the Act does not preempt. In adopting the 1994 amendments to the NFIA, Congress stated in § 584 that "[NFIA] may not be construed to preempt … any law, ordinance, or regulation of any State or local government with respect to land use, management, or control."[24] This language makes clear that state and local police power regulations, including land use regulations, are not preempted. Community and state floodplain plans and regulations regarding land use, management, or control that are more stringent than FEMA's are encouraged because they are consistent with the NFIA's goals of reducing flood losses.[25] These state and local laws assist rather than hinder flood loss reduction efforts and so are expressly not preempted. In contrast, as discussed above, lawsuits based upon state tort

[24] Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103–325, § 584, 108 Stat. 2287 (1994).
[25] National Flood Insurance Program, 44 C.F.R. § 60.1 (d) (2008).

theories challenging the adequacy of FEMA flood maps undermine implementation of the FEMA flood insurance program and state and local floodplain management programs. Congress knows how to protect state laws from preemption but did not exempt state tort claims in the NFIA because of their potential to interfere with the Act.

### 2. State Court Tort Proceedings Would Undermine the Congressionally-Mandated Appeal Process

Two features of the appeal procedure are particularly relevant to this case. First, as discussed above, the grounds and procedures for a FEMA map appeal are carefully prescribed by Congress and FEMA. 42 U.S.C. § 4104. These procedures are uniform for the nation and do not change from state to state as would tort suits under state tort law. Second, the appeal of a mapping decision is before a technical agency with hydrologists and water resource experts. 42 U.S.C. §4104 (e).

State tort liability would eliminate this uniform process created by Congress. State court litigation would subject map contractors to fifty different sets of tort laws and seriously undercut the uniformity of the flood insurance program. State court litigation would also subject map contractors to fifty different standards of professional care.

Tort liability would also undermine the expert process that FEMA, states, and local governments rely upon. Floodplain mapping is a

technically complex process. State courts generally lack the expertise to second-guess the expert judgment of FEMA and its expert contractors. State court litigation would shift the determination of a map's technical and scientific adequacy from an expert agency (or a court operating with findings from an expert agency) to a non-expert state court jury. If state law causes of action are available, plaintiffs will have an opportunity to avoid the expert forum prescribed by Congress and to gain access to a non-expert jury determination of facts as an alternative. If a landowner could avoid 4104(b) map appeal procedures by pursuing state tort claims, this would effectively render the statutory procedures and regulations largely meaningless. This would be a serious obstacle to implementation of the NFIP. For this reason alone, the court should consider claims which attempt to circumvent the appropriate appeal process, such as Columbia Venture's claims in this case, as preempted by the NFIA.

### 3. Columbia Venture's Claims Were Appropriately Addressed Through the NFIP Appeal Process in this Case

In the case at issue, the carefully delineated appeal process is sufficient to address Columbia Venture's claims. Though Columbia Venture's state tort claims cite misdeeds of the contractor, Columbia Venture's concerns are actually based on FEMA's scientific and technical findings, Joint Appendix at 155, 157–58, which are addressable by the

federal appeal process. 42 U.S.C. §4104(b). Columbia Venture claims civil conspiracy, professional malpractice, injurious falsehood, and unfair trade practices. Joint Appendix at 198–202. The core substantive complaint underlying all of these actions is the same: a FEMA floodplain determination to which Columbia Venture objects. The district court properly noted that these tort claims all boil down to disputes over the scientific and technical methods and models. Joint Appendix at 372. They are the types of claims that Congress exclusively intended for the NFIP appeal process to address and the appeal process is sufficient to provide a complete remedy. Therefore, any additional state claims should be preempted.

Furthermore, a state court tort proceeding would allow Columbia Venture to relitigate in state court the scientific and technical adequacy of FEMA maps contrary to the intent of Congress. Not only are Columbia Venture's claims of the type that NFIA was crafted to address, they have, in this case, already been addressed through the NFIA appeal process. Columbia Venture has used the process prescribed by Congress to challenge FEMA's flood determinations at the site in question, and on November 18th, 2005, the district court vacated FEMA's base flood elevation determinations for failure to comply with procedures required by federal law. Joint

Appendix at 64.[26] State tort claims would not only undermine the appeal process which has already taken place, but it would provide Columbia Venture with an unfair chance to relitigate an issue which has already been resolved in the proper forum.

## II. Courts have found preemption in similar circumstances

Courts have broadly supported conflict preemption to preserve the delicate balance of values created by Congress and represented by federal law. For example, the Supreme Court in *Hines v. Davidowitz* held that Congress was best suited to address laws that required complex balancing. *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).[27] In this case, the district court found that Congress struck just such a balance in crafting NFIA. Joint Appendix at 370. The Supreme Court in *Hines* further found that there is no bright line for finding preemption, but rather there must be a careful analysis of the interplay between the federal and state laws. *Hines*, 312 U.S. at 67. Where the relationship reflects "…repugnance; difference; irreconcilability; inconsistency; violation; curtailment; [or] interference," the state law is preempted. *Id*. Since then, the Supreme Court has often found that state

[26] This process is still pending. While the end result may not yield the outcome which Columbia Venture seeks, it will yield the appropriate outcome, because the result will have been reached through the proper procedural channels. This remedy is the complete resolution intended by Congress.

[27] *See also* Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board et al., 315 U.S. 740, 749 (1942) ("The delicacy of the issues which were posed [in *Hines*] alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system.")

laws are preempted when they fall in the shadow of a comprehensive federal regulation such as the NFIA.[28]

Courts are all the more likely to find that state laws are preempted when a federal implementing agency interprets it enabling statute as preempting state law.[29] FEMA's interpretation of the NFIA and its own regulations are entitled to "great deference" and a "presumption of validity." *City of Wenatchee v. U.S.*, 526 F.Supp. 439, 441–42 (E.D. Wash. 1981). In this case, FEMA, the implementing federal agency, argues that the NFIP preempts state tort claims against map contractors. Joint Appendix at 251. This Court should carefully consider FEMA's arguments that state tort liability interferes with their ability to implement NFIA. *Id.* at 260–64.

In addition, a number of courts have found conflict preemption in situations closely analogous to the present one. For example, the court in *Scherz v. South Carolina Ins. Co.* observed that "…the Court gives weight to FEMA's view that state law extracontractual claims relating to [Standard Flood Insurance Policies] 'interfere with the statutory scheme and frustrate

[28] *E.g.* Gade v. National Solid Wastes Management Association, 505 U.S. 88, 98-99 (1992); Bogs v. Bogs, 520 U.S. 833, 843 (1997).

[29] *See, e.g.* Udall v. Tallman, 380 U.S. 1, 16 (1965) ("[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."); Emery Min. Corp. v. Secretary of Labor, 744 F.2d 1411, 1415 (10th Cir. 1984) ("It is settled that an agency's interpretation of its enabling statute and its own regulations is entitled to deference"); National Home Equity Mortg. Ass'n v. Face, 64 F.Supp.2d 584, 590 (E.D.Va.,1999) ("[T]he OTS' determination that the Parity Act does preempt these state laws is entitled to deference because it is a reasonable agency interpretation of the Parity Act.").

the intent of Congress…'" *Scherz v. South Carolina Ins. Co.*, 112 F.Supp.2d 1000, 1010 (C.D. Cal. 2000). Similarly, the court in *Peal v. North Carolina Farm Bureau Mut. Ins. Co*. addressed the question of whether a claim under North Carolina's Unfair and Deceptive Trade Practices Act was preempted by NFIA and found that, even though "there could be little doubt that it is possible to comply with both North Carolina and federal law," the state law was still preempted because it "frustrate[d] the goals of NFIA." *Peal v. North Carolina Farm Bureau Mut. Ins. Co.*, 212 F. Supp.2d 508, 516 (E.D.N.C. 2002).

The court in *Peal* went on to explain how the application of the state bad faith law confounded NFIA's objectives:

> First, exposing [write-your-own insurance, "WYO"] companies to fifty different versions of bad faith liability would decrease the willingness of insurance companies to participate in the NFIP. With fewer WYO companies, FEMA itself would be required to issue more policies, which, in turn, would cause increased program costs… Second, subjecting WYO companies to fifty different bad faith statutes would undermine Congressional intent to have a uniform system… Third, allowing state law extra-contractual claims against WYO companies would increase the financial burden on the federal government.

*Id*. at 516–17.

*Peal* parallels the case at issue and this Court should affirm the decision below for the same reasons used by the court in *Peal*. The bulk of

cases addressing the issue of state tort claims versus federal remedies apply similar reasoning and likewise find that the state tort claims are preempted.[30] In fact, courts have been reluctant to recognize state tort claims where there is a remedy provided by a federal statute.[31]

In another analogous context, courts have consistently refused to hold that the National Flood Insurance Act creates a private cause of action when banks provide inaccurate flood information to lenders[32] or when flood data suppliers provide inaccurate information to the banks. *Ford v. First American Flood Data Services, Inc.*, No. 1:06CV00453, 2006 WL 2921432 at *3 (M.D.N.C. Oct. 10, 2006). The court in *Segall v. Rapkin* found that not only was a private cause of action not authorized by the Act, but that it was inconsistent with the intent of the Act and could interfere with the goals of NFIA. *Segall v. Rapkin*, 875 F. Supp. 240, 241 ("Indeed, to allow plaintiffs to hold [surveyor] liable under Section 4001 would discourage future surveyors from reporting their views concerning flood levels to FEMA").[33] As in the current case, allowing causes of action not intended by Congress

[30] *E.g.* C.E.R. 1988, Inc. v. The Aetna Casualty & Surety Co., 386 F.3d 263, 272 (3d Cir.2004), Gibson v. Am. Bankers, 289 F.3d 943, 943 (6th Cir. 2002).
[31] *E.g.* Wright v. Allstate Ins. Co., 415 F. 3d 384, 389–90 (5th Cir., 2005); Skritchfield v. Mutual of Omaha Ins. Co., 341 F. Supp. 2d 675, 680–81 (E.D. Tex. 2004). *Cf.* Spence v. Omaha Indemnity Ins. Co., 996 F. 2d 793, 796 (5th Cir., 1993) (failing to explicitly find preemption when claim addressed private company action that could not be remedied through NFIP procedures).
[32] *E.g.* Segall v. Rapkin, 875 F. Supp. 240, 241 (S.D.N.Y., 1995); Lehamann v. Arnold, 484 N.E.2d 473, 481 (Ill. App. Ct. 1985); Ford v. First American Flood Data Services, Inc., No. 1:06CV00453, 2006 WL 2921432 at *3 (M.D.N.C. Oct. 10, 2006).
[33] *See also* Lehamann v. Arnold, 484 N.E.2d 473, 483–84 (Ill. App. Ct. 1985) (finding that a private cause of action could undermine the "comprehensive administrative scheme").

would thwart the goals of NFIA and therefore these causes of action must be proscribed.

Similarly, courts have declined to use the Act to create a standard for asserting state tort claims, like those alleged by Columbia Venture.[34] The court in *Ford v. First American Flood Data Services, Inc.* noted the absence of "a single case in which either a federal or state court has allowed a state law cause of action based on a violation of the Act." *Ford v. First American Flood Data Services, Inc.*, No. 1:06CV00453, 2006 WL 2921432 at *5 (M.D.N.C. Oct. 10, 2006). The court went on to find that the plaintiff's state claims could not stand because the only duty owed to the plaintiff by the contractor arose under the federal NFIA, providing no basis for a state tort or contract claim. *Id.*[35] This suggests that claims beyond what Congress provided for in the Act are not only unnecessary, but are impermissible.

These parallel and analogous cases share a focus on the intent of Congress in crafting the NFIA and all advise against allowing causes of action not contemplated by Congress. In the present case, it's clear that Congress intended claims like Columbia Venture's to be addressed only through the NFIA. By examining these similar cases, it is evident that there

[34] *E.g.* Dollar v. Nationsbank of Ga., N.A., 534 S.E.2d 851, 853 (Ga.Ct.App.2000), Jack v. City of Wichita, 933 P.2d 787, 793 (Kan.Ct.App.1997), R.B.J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n, 315 N.W.2d 284, 290 (N.D.1982).
[35] *See also* R.B.J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n, 315 N.W.2d 284, 290 (N.D. 1982).

is ample precedent to support the decision of the district court in this case that Columbia Venture's state tort claims challenging the determinations of a federal mapping contractor are preempted by the NFIA.

## CONCLUSION:

For the foregoing reasons, this Court should affirm the decision below and dismiss Columbia Venture's claims.

Respectfully submitted,

/s/ David K. Mears

David K. Mears*
Environmental and Natural
Resources Law Clinic
Vermont Law School
164 Chelsea Street, PO Box 96
South Royalton, VT 05068
(802) 831-1627
*Attorney for Amicus Curiae*
*Association of State Floodplain Managers*

Jon Kusler
Associate Director
Association of State Wetland Managers
1434 Helderberg Trail
Berne, NY 12023
(508) 872-1804
*Of Counsel*

* I would like to express appreciation to Vermont Law School Student Clinician Lydia Fiedler who contributed substantially to the development of this brief.

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

**No.** 08-1318 **Caption:** Columbia Venture, LLC v. Dewberry & Davis, LLC

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(s) David K. Mears

Attorney for Ass'n St. Floodplain Mgrs.

Dated: 12/03/08

# CERTIFICATE OF SERVICE

**All Case Participants Are CM/ECF Participants**

I hereby certify that on Dec. 3, 2008 , I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

James Y. Becker, Manton M. Grier, Sarah M. Montgomery, &
Hamilton Osborne, Jr.
HAYNSWORTH, SINKLER & BOYD, PA
1201 Main Street, 22nd Floor
Columbia, SC 29201

James F. Lee Jr. & Jonathan Peter Rolfe
LEE & MCSHANE, PC
1211 Connecticut Avenue, NW, Suite 425
Washington, DC 20036-0000

s/ David K. Mears