This document collates the Common Floodplain Management Legal Questions into one document.

Contents

[Question 1] Do floodplain regulations, higher standards, or No Adverse Impact requirements expose communities to takings claims or other property rights challenges? 2

[Question 2] How can No Adverse Impact (NAI) approaches be clearly defined, applied consistently, and defended legally? 5

[Question 3] How much legal liability do communities and floodplain managers face for permitting development in flood hazard areas, including liability for downstream or cumulative impacts? 8

[Question 4] What legal authority can communities use to regulate development based on future conditions like anticipated build-out, sea-level rise, climate change, post-fire flooding, and aging infrastructure? 11

[Question 5] What liability exists when floodplain managers rely on sealed engineering studies, elevation certificates, or FEMA approved analyses that later prove inadequate? 13

[Question 6] What legal protections exist for floodplain managers facing personal liability, retaliation, or professional risk for enforcing regulations? 15

[Question 7] Are communities legally vulnerable for allowing floodway encroachments or development that increases BFEs, even when mitigation or no-rise certificates are provided? 17

[Question 8] What legal risks arise from floodplain map revisions, new floodway delineations, or updated flood studies that affect previously approved development? 19

[Question 9] Can communities be held responsible if they repeatedly allow code-compliant rebuilding in floodplains if it increases actual long-term risk? 21

[Question 10] How should conflicts among NFIP, HUD, state laws, building codes, and environmental regulations be resolved to minimize legal risk? 23

DRAFT

[Question 1]

Do floodplain regulations, higher standards, or No Adverse Impact requirements expose communities to takings claims or other property rights challenges?

It depends. Legal challenges are always a possibility.

Regulations, Higher Standards, and NAI Requirements. State and local governments possess broad police power to protect public health, safety, and welfare using development regulations, performance standards, and other tools. Those requirements are generally upheld by the courts if they serve a public purpose, are reasonably necessary, and are not unduly oppressive. Regulations to protect against the harms of flooding typically receive very favorable treatment by courts because the public harms of flooding are so obvious, and regulations aimed at preventing damages from worsening flooding fit within traditional police-power concepts. Still, the underlying police power is subject to constitutional and state-law property protections, so legal challenges are always a possibility.

Well-documented, evidence-based, and well-written NAI requirements help communities avoid both flood losses and successful takings and property-rights claims. Courts have generally upheld floodplain rebuilding and compliance requirements for damaged non-conforming structures, including rules requiring rebuilt structures to meet current floodplain development standards after incurring Substantial Damage. [See e.g., https://no.floods.org/NAI-Legal, IV.C., Summary of Takings.]

Well-considered land use regulations and clear, defensible, open, reasonable, and understandable processes must be established by community consensus and be maintained. Comprehensive planning, public notice(s), and a clear record of objectives are necessary—especially for climate and flood-related regulations—to tie the regulations to important, legitimate public purposes. Communities are on stronger footing when ordinances clearly define thresholds, relationships to other land use and development control provisions, and the evidentiary basis for enforcement.

Communities risk legal challenges from regulation, but also from under-regulation or permitting development that results in flood damage. NAI requirements can operate as a liability reduction tool, preventing government-permitted adverse flooding impacts. [See e.g., https://no.floods.org/NAI-Legal, I.E., The NAI Approach; I.E.5., Reduced Liability.]

DRAFT

Potential Property Rights Challenges. One community's failure to make and document the required determination before enforcing its floodplain rule resulted in a judgment of a taking of property. Lawsuits are hard to avoid in land use regulation, and while well-designed floodplain regulations with higher standards generally withstand legal challenges, like any regulations, they can expose communities to regulatory takings claims, tort lawsuits, and due process challenges. [See e.g., https://no.floods.org/NAI-Legal, II.A. Lawsuits; IV.C., Summary of Takings; II.E.2.d.iv., Evidence Necessary to Declare Damage beyond 50% of Market Value.]

Regulatory Takings Claims. The most significant exposure comes from the Takings Clause of the Fifth Amendment to the U.S. Constitution that requires "just compensation" when a regulation goes so far in restricting the use of property that it is the legal equivalent of the government seizing the property for public purposes.

- Per Se Taking: A taking occurs if a regulation causes permanent physical occupation of property—e.g., permanent or inevitably recurring flooding from government action or infrastructure—or denies all economically beneficial use of the real property. [See e.g., https://no.floods.org/NAI-Legal, IV.B.2., Per Se Takings; IV.B.2.b., Per Se Taking by Elimination of Economically Beneficial Use: The Lucas Case.]
- Regulatory Taking: Most of these challenges are analyzed by the courts using the three-factor *Penn Central* test that evaluates the regulation's economic impact, its interference with "reasonable investment-backed expectations" and the "character of the government actions." [See e.g., https://no.floods.org/NAI-Legal, IV.B.5., Most Regulatory Takings: Penn Central Analysis; IV.B.5.c., Penn Central's 'Character of the Governmental Action' Factor; IV.B.5.d., Facets of 'Character of the Governmental Action'; IV.B.5.d., State of 'Nature of the Governmental Action' Today.]
- Exactions: When a community conditions a development permit on a property dedication or a fee, the exaction must meet the "essential nexus" and "rough proportionality" tests. [See e.g., https://no.floods.org/NAI-Legal, IV.B.4., Exactions; IV.B.4.b., Recommendations and Lessons for Floodplain Managers.]

Tort Liability. Communities may also be sued for civil harms, as when non-regulatory actions increase flooding. The most common torts involving flooding are negligence, nuisance, and trespass.

- Negligence: The most common tort in floodplain management, often involving claims of failed design or maintenance of drainage systems. [See e.g., https://no.floods.org/NAI-Legal, III.A., Negligence.]
- Nuisance: Property owners may sue if community projects like dikes or dams substantially interfere with their use of land. [See e.g., https://no.floods.org/NAI-Legal, III.C., Nuisance.]
- Trespass: Communities may be liable if they approve or develop projects that cause a physical invasion of real property through flooding. [See e.g., https://no.floods.org/NAI-Legal, III.B., Trespass to Land.]

DRAFT

Due Process. Additional exposure may arise if communities ignore the procedural or substantive requirements of the Fourteenth Amendment to the U.S. Constitution.

- Procedural Due Process: Challenges arise when regulations target property without providing the owners adequate notice of hearings and an opportunity to be heard.
- Substantive Due Process: Challenges arises when the community lacks "adequate reasons" for regulating property rights. Such challenges rarely prevail if a "conceivable rational basis" exists.

[See e.g., https://no.floods.org/NAI-Legal, IV.A., Fourteenth Amendment; IV.A.1., Conclusion.]

Real exposure arises, not just from the mere existence of higher standards, but also from how the land use regulations are adopted and applied. Some states provide broader property rights protections than the federal baseline. There are two related principles. First, property rights are not absolute; regulations that protect neighbors and the public from harmful land uses are not "anti-property-rights." Rather, they reflect how we, as a society, balance property rights and responsibilities when they come into conflict with each other. Second, NAI expressly supports approaches that decrease risks of flood losses and the potential for successful property-rights claims against communities. [See e.g., https://no.floods.org/NAI-Legal, IV.B.1., History, Context, and Development.]

Summary. Communities who implement sound flood protections—especially regulatory protections—may be sued, but inaction can create greater long-term liability exposure associated with greater flood risk to life and property. NAI approach-based regulations are more likely to reduce both flooding harms and the potential risk of successful property rights claims against communities who adopt and enforce higher public safety standards. Adopting properly drafted, clear higher standards, and implementing the regulations through appropriate procedures **should** lead to *successful* defense against takings or property-rights liability claims. When these land use regulations are—

- clearly grounded in the community's police powers;
- supported by an evidence-based comprehensive planning record tying the regulation to flood-risk reduction and public welfare;
- decision-makers follow required procedures; and
- regulations are carefully and consistently administered and enforced

—they should be highly defensible.

DRAFT

[Question 2]

How can No Adverse Impact (NAI) approaches be clearly defined, applied consistently, and defended legally?

Community floodplain stewardship should not rely solely on minimum NFIP standards because those minimum standards often fail to adequately address the adverse impacts of flooding. The No Adverse Impact (NAI) approach to floodplain stewardship, founded on the principle that "the actions of one property owner should not be allowed to adversely affect the rights of other members of the community," provides a foundation for communities to adopt higher standards that can better address these adverse impacts.

NAI higher standards should be legally grounded in state and local police powers to protect public health, safety, and general welfare. Usually, this is accomplished by adopting land use regulations supporting floodplain stewardship. Local governments can ensure that NAI and cumulative-impact standards are clearly defined, consistently applied, and legally defended when they adopt objective, evidence-based floodplain regulations grounded in their police powers. Adopting clearly defined standards that exceed minimum NFIP requirements—when consistently applied—can further protect communities against both reasonably foreseeable adverse impacts and legal liability. The Florida Building Code's requirement of one foot of freeboard above Base Flood Elevation is one example. Courts generally have upheld such higher standards when clearly tied to public safety and supported by evidence.

Clearly Defined. Adverse impacts from climate change—including heightened emergency response risks, erosion, increased future flood levels, increased flood velocities, increased infrastructure costs, degradation of natural floodplain functions, sedimentation, urbanization, cumulative watershed impacts, etc.—should be expressly defined with easily understandable terms in a definitions section of the land development regulations. Consultation with subject matter experts to help craft these definitions and adoption of technical guidance by reference during the development of these regulations can be useful, especially in communities and states that have invested in localized future climate modeling and design standards.

The regulations should specify acceptable, measurable thresholds, such as "no increase" in flood elevation, runoff, downstream flood damage, etc., and defensible, higher local standards, including additional required freeboard, conservation zones, riparian buffers, future-conditions flood mapping, etc., to support comprehensive NAI implementation.

DRAFT

Consistently Applied. NAI implementation involves community involvement and buy-in to:

1. identify acceptable levels of impact;
2. specify performance standards; and
3. implement activities that eliminate or reduce identified impacts.

Consistent application is achieved through generally acceptable and clear regulatory language, standardized permitting procedures, engineering analyses, etc., that make the community's requirements clear and understandable. To demonstrate measurement and understanding of potential impacts, proposed projects may require reliable modeling, studies, professional engineering certifications, etc.—as necessary—to demonstrate the proposed development project complies with all applicable adopted community standards.

Legally Defensible. Courts are more likely to uphold comprehensive floodplain stewardship regulations framed to prevent reasonably foreseeable harm. Governments may face liability for approving development that increases flooding or stormwater impacts on neighboring properties. In addition, approving development without applying the logic of NAI can lead to significant, long-term fiscal liability for infrastructure costs. Adopting and enforcing NAI standards may reduce governmental liability exposure by demonstrating reasonableness and adhering to defensible higher standards. Regulations perceived to arbitrarily restrict development—e.g., excessive moratoria, blanket prohibitions with no variance provisions, etc.—are more likely to fail judicial scrutiny.

NAI standards are especially defensible when supported by scientific and engineering evidence. The importance of modeling and measurable impacts cannot be stressed enough. Improved technology allows communities to measure potential flood impacts more accurately, making it increasingly difficult to justify failure to account for cumulative impacts.

Summary. To survive legal scrutiny, regulations should:

- clearly identify prohibited impacts;
- define adverse impacts in measurable terms;
- establish measurable performance standards;
- require appropriate individualized, scientific cumulative-impact analyses and engineering documentation of proposed development impacts;
- apply standards uniformly through transparent permitting procedures;
- support regulations with clear, factual findings regarding climate impacts, flood risk, and protection of neighboring properties; and
- maintain a reasonable relationship between projected development impacts and regulatory requirements.

Regulatory takings claims, and their accompanying legal scrutiny, can be a significant potential subset of legal defensibility. Floodplain stewardship regulations are more likely to withstand regulatory takings challenges when they:

- do not eliminate all economically viable use of property;
- avoid physical invasions of property;
- are roughly proportional to projected impacts when the regulations require an exaction, e.g., a conveyance of public access or fee; and
- are justified by documented public safety concerns that may include modeled future conditions.

So, a community's consensus-driven, clearly defined and described floodplain regulations, may face legal challenges but are legally defensible and should prevail against such legal challenges.

[*See* https://no.floods.org/NAI-Legal, IV.B.3.a.ii. Proximate Cause; IV.C. Summary of Takings.]

DRAFT

[Question 3]

How much legal liability do communities and floodplain managers face for permitting development in flood hazard areas, including liability for downstream or cumulative impacts?

Permitting. Under NFIP standards, communities must regulate and permit development in the Special Flood Hazard Area (SFHA) or—if FEMA has not developed a Flood Insurance Rate Map (FIRM) for that area—in flood-prone areas generally. In regulatory floodways, projects generally must not cause more than one foot of cumulative rise, and cumulative impact analyses may be required. Failure to enforce these requirements can expose a community to claims that it negligently allowed harmful development. Reliance on minimum NFIP standards alone may not be enough to ensure that development projects do not increase flood heights or obstruct flood flows, because NFIP minimums may still permit harmful development practices, including reducing floodwater conveyance areas, filling flood storage areas, or increasing flood velocities—all of which can adversely affect neighboring properties and downstream communities.

Sources of Legal Liability. Communities can be, and have been, successfully sued when a decision to allow development in the SFHA caused harm to others. Knowingly permitting a project that causes harm or additional flooding to existing properties may give rise to community liability under tort law, constitutional property protections, or statutory obligations to protect private property rights.

Jurisdictional Variation. Court jurisdictions are split on how readily such liability will be found. Some jurisdictions lean towards a rule that a community permitting development that causes flooding of pre-existing development bears liability for the resulting flood damage, and allow property owners to file tort or takings claims. The basis of liability may be a claim of negligence for administrative failures, such as the inadequate or inconsistent processing/review of permits.

However, other jurisdictions are hesitant to imply community liability for review of permit applications since such a rule could discourage communities from reviewing and issuing permits at all for fear of potential liability.[1]

Potential legal liability theories include:

[1] For a state overview of governmental immunity and community tort liability prepared by Matthiesen, Wickert, and Lehrer, S.C., Attorneys at Law, *see* MUNICIPAL/COUNTY/LOCAL GOVERNMENTAL LIABILITY CHART (00177647).DOC.

- **Negligence** for failing to exercise reasonable care in managing or permitting floodplain development;
- **Trespass or nuisance** where flooding physically invades neighboring property;
- **Inverse condemnation or takings claims** where government action substantially interferes with property rights;
- **Liability for cumulative impacts** when permitted development incrementally increases flood heights, velocities, erosion, or drainage problems over time.

Under tort law, community development decisions are generally judged according to a "standard of care" grounded in foreseeability and measurable impacts. Generally, courts will hold litigants to a "reasonability" standard—what similarly situated communities would do under similar conditions—and those society-wide expectations evolve with society over time. Additionally, lawsuits related to flooding are expected to increase as climate, urbanization, and sea-level rise intensify flood hazards and overwhelm existing drainage infrastructure. Communities that fail to account for future conditions or cumulative watershed impacts may therefore face growing exposure to negligence and takings claims.

Because modern hydrologic modeling and engineering tools can quantify flood impacts more accurately than in the past, communities may have difficulty arguing to a court that downstream flooding or cumulative impacts were unforeseeable. Lawsuits can be expensive even when communities ultimately prevail in court, making proactive floodplain stewardship and stronger regulatory standards important risk-management tools.

Governmental Immunity. Federal, state, and local governments—as well as their agencies and employees—may be protected from being sued for damages without their consent. While the broader term "sovereign immunity" typically applies to the state and federal entities themselves, "governmental immunity" refers specifically to their political subdivisions, such as cities, counties, and school districts. However, community protections under governmental or sovereign immunity are weakening in most jurisdictions and vary from state to state.

Reducing Exposure. Because exclusive reliance on minimum NFIP standards may be insufficient to protect communities from liability exposure, adopting a No Adverse Impact (NAI) approach to floodplain stewardship with stronger floodplain development regulations, like Florida's mandatory one-foot of "freeboard;" conducting cumulative-impact analyses; and participating in FEMA's Community Rating System (CRS) program can reduce both flood damage and legal exposure. The NAI approach is both a legal and policy strategy to reduce liability exposure and improve community resilience, but regulatory implementation should be well-documented and always follow best practices derived from the Supreme Court's jurisprudence:

- Clearly relate regulation to preventing harm. (Lingle v. Chevron)
- Avoid interfering with an owner's right to exclude. (Loretto v. Teleprompter)
- Avoid denial of all economic uses. (Lucas v. South Carolina Coastal Council)

- Consider Transferable Development Rights, similar residual rights and uses, and alternative development options to retain economic land use value. (Penn Central v. New York City)
- Maintain a close relationship between permit conditions and harm avoided. (Nollan v. California Coastal Commission– Dolan v. Tigard – Sheetz v. El Dorado)
- Do not negotiate with permit applicants. (Koontz v. St. Johns River Water Management District)

Summary. Legal liability for permitting development in flood hazard areas varies greatly depending on the jurisdiction, as do governmental immunity provisions. Communities can minimize potential liability by:

- participating in the NFIP;
- adhering to floodplain regulations;
- adopting higher standards for development in the floodplain;
- participating in the CRS program; and
- transferring potential risk of community liability through general municipal or public entity liability insurance.

[*See* https://no.floods.org/NAI-Legal, II.E.2.e. Liability for Problems Due to Permitting.]

DRAFT

[Question 4]

What legal authority can communities use to regulate development based on future conditions like anticipated build-out, sea-level rise, climate change, post-fire flooding, and aging infrastructure?

Legal Authority. Communities may regulate for anticipated future conditions under their state-delegated police power to protect public health, safety, and welfare. That authority is broad enough to support prospective flood risk and land use controls, provided the regulation serves the public generally, uses reasonably necessary means, and is not unduly oppressive. Local authority ultimately depends on each state's delegation of power, especially whether the community operates under Home Rule or the more restrictive Dillon's Rule. [See e.g., https://no.floods.org/NAI-Legal, II.E.1., State Police Powers; II.E.2., Local Governments; II.E.2.a., Dillon's Rule vs. Home Rule.]

Approaches to Future Conditions.

- **Adopt standards exceeding minimum NFIP requirements.** Communities may expand regulated flood-prone areas beyond FEMA map boundaries; require higher protection levels such as freeboard; limit uses or density; and regulate through floodplain, subdivision, zoning, building-code, site-planning, road, drainage, and natural-resource rules. These tools can account for anticipated build-out, watershed development, storm intensity, sea-level rise, and inadequacies in aging drainage or flood-protection infrastructure. [See e.g., https://no.floods.org/NAI-Legal, I.E, The NAI Approach; I.D., Limitations of Minimum NFIP Standards.]

- **Use future-conditions mapping.** A community may adopt maps of anticipated hazard areas, e.g., areas with projected future risks from watershed development, stronger storms, and higher seas—even before they are incorporated into FEMA's FIRM. The community may then use them either to require a higher level of protection or as advisory information promoting more resilient development. [See e.g., https://no.floods.org/NAI-Legal, I.E.9, Climate Adaptation.]

- **Plan first, then regulate consistently.** Comprehensive planning is the forward-looking foundation for zoning and related controls. Including climate change and sea-level rise in the comprehensive plan establishes an action framework, documents the community's objective when regulations affect property rights, gives notice, and allows public participation. A current plan also helps demonstrate that zoning decisions conform to articulated community objectives. [See e.g., https://no.floods.org/NAI-Legal, II.E.2.b., Local Land Use Regulations.]

- **Apply zoning, subdivision, special-use, and conditional-permit authority.** Planning and zoning regulate the use, scale, location, and conditions of development. Special or conditional permits allow communities to approve otherwise permissible uses only when stated criteria and conditions are satisfied; variance processes should be tightly coordinated with floodplain regulations and reserved for genuine, exceptional hardship. Conditions should be based on the project's identified impacts and applied under clear local standards. [See e.g., https://no.floods.org/NAI-Legal, II.E.2.b., Local Land Use Regulations; II.E.2.c., Special Use / Exception Permit or Conditional Use.]

- **Preserve hazardous areas and natural protective functions.** Conservation zoning can restrict new development in floodplains, riparian buffers, wetlands, erosion zones, and other sensitive areas while directing growth to safer locations. Similarly, setbacks, erosion-hazard mapping, and riparian-buffer requirements can address changing river systems and anticipated erosion. [See e.g., https://no.floods.org/NAI-Legal, I.E.7., Greener Floodplain; I.E.2., More Effective Programs and Projects.]

- **Require compliant rebuilding after damage.** Communities may require nonconforming structures that are substantially damaged—where repair or reconstruction exceeds 50% of pre-damage value—to rebuild in compliance with current floodplain and zoning requirements. This is particularly relevant after fire or other disasters. Future-hazard and rebuilding authorities provide the relevant legal framework for post-fire hydrology. [See e.g., https://no.floods.org/NAI-Legal, II.E.2.d., Rebuilding Limitations and Amortization of Non-conforming Uses.]

- **Design and maintain infrastructure for foreseeable future risk.** Rising climate risks make future flooding more foreseeable. For new or rebuilt drainage infrastructure, the guide advises designing for reasonable projections of increased rainfall intensity and sea-level rise; aging sewers and drainage systems that are not properly maintained may create negligence exposure. [See e.g., https://no.floods.org/NAI-Legal, III.A.1.c., Causation and Foreseeability.]

The principal legal limits are equally important. Communities should build a clear evidentiary record linking each measure to public safety and future risk; draft precise standards; apply them consistently; and avoid arbitrary action. Permit exactions or dedications must have an essential connection and rough proportionality to the development's projected impacts.[^9] These safeguards help distinguish lawful prospective regulation from an unconstitutional taking or an unsupported permit condition. [See e.g., https://no.floods.org/NAI-Legal, II.E.1., State Police Powers; IV.B.4., Exactions.]

DRAFT

[Question 5]

What liability exists when floodplain managers rely on sealed engineering studies, elevation certificates, or FEMA approved analyses that later prove inadequate?

An engineer's seal, elevation certificate, or FEMA-approved analysis is not an automatic shield from liability. The answer is jurisdiction-dependent: liability turns on the government's own legal duty and conduct, causation, resulting damage, and available immunities—not merely on whether the manager relied on a professional or federally approved document. [See e.g., https://no.floods.org/NAI-Legal, III.A.1., Elements of Negligence; II.E.2.e., Liability for Problems Due to Permitting.]

For the local government or floodplain manager, many jurisdictions do not impose negligence liability merely because staff reviewed an engineer's certification and issued a permit. In *Richardson*, where county review for code compliance did not make the county responsible for redoing the private engineer's work, the licensed private engineer was the more appropriate defendant when the system later failed. This reasoning strongly supports reliance on a sealed engineering study or elevation certificate when the manager follows the prescribed permitting process and has no independent duty to detect the defect. [See e.g., https://no.floods.org/NAI-Legal, II.E.2.e., "Liability for Problems Due to Permitting.]

That protection is not universal to all states. Some courts find a duty to use reasonable care in reviewing development plans, and inadequate permit review or inspection can support negligence liability—especially where a "special relationship" exists between the government and the injured owner. A community may also face tort or takings claims if it authorizes development that foreseeably causes increased flooding or other damage; compliance with the permit process is generally not a defense against a takings claim. Whether a permit decision is protected as discretionary or, instead, treated as a ministerial application of required facts and rules, is another jurisdiction-specific question. [See e.g., https://no.floods.org/NAI-Legal, II.E.2.e., Liability for Problems Due to Permitting; III.A., Negligence.]

A sealed study does not make the engineer strictly liable merely because the analysis later proves inadequate. Rather, engineers and architects are generally held to the profession's reasonable-care standard in negligence, contract, or implied-warranty actions. [See e.g., https://no.floods.org/NAI-Legal, III.D.1., Federal Sovereign Immunity.] Engineer's liability ordinarily requires proof that the professional failed to meet the applicable professional standard, and that the deficiency caused actual loss. Industry custom is evidence of due care, not conclusive proof; expert evidence may show that customary practice itself was inadequate. [See e.g., https://no.floods.org/NAI-Legal, III.A.1.a., Duty of Care.]

FEMA approval similarly does not necessarily transfer or eliminate responsibility for a local permitting decision. Claims over FEMA mapping and flood-risk information can be barred by sovereign-immunity and related federal-law protections. But that does not prevent a claimant from pursuing a local government, developer, or private engineer if that party's own action or omission caused the harm. [See e.g., https://no.floods.org/NAI-Legal, III.D.1., Federal Sovereign Immunity.]

Summary. Good-faith reliance on a properly prepared, sealed, or FEMA-approved document is important evidence against negligence, and in many jurisdictions it may defeat a claim based solely on plan review. It is not categorical immunity. Exposure remains where the manager or government

- had and breached an independent duty,
- negligently reviewed or enforced requirements,
- affirmatively caused or foreseeably worsened flooding, or
- failed to perform a mandatory ministerial duty.

A plaintiff must still prove duty, breach, causation, and damages, and sovereign or governmental immunity and the public-duty doctrine may bar some claims. [See e.g., https://no.floods.org/NAI-Legal, III.A.1., Elements of Negligence; III.D.4.b., Discretionary versus Ministerial Actions; III.D.5., Public Duty Doctrine.]

DRAFT

[Question 6]

What legal protections exist for floodplain managers facing personal liability, retaliation, or professional risk for enforcing regulations?

Floodplain managers have several meaningful—but limited and jurisdiction-dependent—legal protections when enforcing regulations:

- **Governmental and sovereign immunity.** A local government is generally immune when acting in a governmental capacity to protect public health, safety, and welfare. Regulatory floodplain enforcement commonly fits that public function, though immunity can vary by state and may not cover proprietary activities. [See e.g., https://no.floods.org/NAI-Legal, III.D.4.a., Governmental vs. Proprietary Actions.]

- **Discretionary-function protection.** High-level policy, planning, and discretionary decisions are more likely to be immune from tort liability. By contrast, ministerial or operational actions may be subject to liability. This distinction is fact-specific and often unclear, so documented adherence to governing regulations and procedures is important. [See e.g., https://no.floods.org/NAI-Legal, III.D.4.b., Discretionary versus Ministerial Actions; III.D.7, Summary.]

- **Public-duty doctrine in some states.** Where adopted, this doctrine can bar negligence claims based on a manager's duty to the public at large, because no individual duty is owed to a particular claimant. It does not protect against breach of a ministerial duty owed to someone with a direct, distinctive, and special interest. [See e.g., https://no.floods.org/NAI-Legal, III.D.5., Public Duty Doctrine.]

- **Qualified immunity for constitutional claims.** Federal, state, and local officials may invoke qualified immunity in constitutional-rights cases. It shields officials from civil damages when their actions did not violate a clearly established statutory or constitutional right that a reasonable person would have known. Successful qualified immunity may end the lawsuit before discovery. Absolute immunity exists only for narrow categories, such as judges, prosecutors, legislators, and certain high executive officials—not ordinarily floodplain managers. [See e.g., https://no.floods.org/NAI-Legal, III.D.1.b., Absolute and Qualified Immunity.]

- **Federal employees acting within their scope of employment.** Under the Federal Tort Claims Act, when a federal employee commits a tort within the scope of employment, the United States ordinarily becomes the defendant and pays any damages rather than the employee. This protection is specific to federal employees

DRAFT

and subject to statutory limits and exceptions. [See e.g., https://no.floods.org/NAI-Legal, III.D.1.b., Absolute and Qualified Immunity.]

These protections are not complete shields from personal exposure. State officials may be personally liable under 42 U.S.C. § 1983 for constitutional violations because vicarious liability does not apply to those claims. [See e.g., https://no.floods.org/NAI-Legal, III.D.2.a., State Sovereign Immunity.]

Retaliation and professional risk, and specific whistleblower or anti-retaliation protection for floodplain managers who enforce regulations is beyond the land use focus of these narratives. State or community employees may use § 1983 to assert civil-rights claims, but these narratives are based on the NAI Legal Guide that does not analyze retaliation claims or provide employment-law safeguards. [See e.g., https://no.floods.org/NAI-Legal, III.D.2.a., State Sovereign Immunity.]

Summary. The principal protections are immunity doctrines and scope-of-employment protections—not a standalone guarantee against employer retaliation or career consequences.

DRAFT

[Question 7]

Are communities legally vulnerable for allowing floodway encroachments or development that increases BFEs, even when mitigation or no-rise certificates are provided?

A community can remain legally vulnerable if it permits floodway encroachments or other development that increases BFEs or causes additional flooding, notwithstanding a mitigation measure or a "no-rise" certification.

No-Rise Certificates. A no-rise determination is relevant only if it reliably establishes that the proposed floodway project causes no increase in flood heights. Development along a channel may not obstruct flows so as to increase flooding on other properties and that a project in a regulatory floodway cannot cause any increase in flood heights. Thus, if a permitted encroachment actually increases BFEs, it is inconsistent with that stated floodway standard; a certificate does not cure an inaccurate analysis or resulting harm. [See e.g., https://no.floods.org/NAI-Legal, I.C., The National Flood Insurance Program (NFIP).]

More broadly, compliance with minimum NFIP requirements is not a complete liability shield. Minimum NFIP standards allow at-risk development and may allow reduced conveyance areas, filled valley storage, and increased flood velocities—each capable of adversely affecting others. Communities that inadequately protect residents and property from known hazards may face legal challenges. A no-rise analysis focused on water-surface elevation may therefore fail to address other material effects, such as velocity, erosion, storage loss, cumulative impacts, or future watershed and climate conditions. [See e.g., https://no.floods.org/NAI-Legal, I.D., Limitations of Minimum NFIP Standards.]

Legal Vulnerability. Potential claims depend on the facts and governing state law, but there are several routes to liability. Local governments have been successfully sued where allowing development in flood-prone areas harmed others, and a community that knowingly approves harmful development may be held accountable alongside the developer. [See e.g., https://no.floods.org/NAI-Legal, I.B., A Legal Foundation for NAI.] Negligence may arise where a duty and breach cause foreseeable damages; increased knowledge and modeling make flood-related impacts more foreseeable. [See e.g., https://no.floods.org/NAI-Legal, III.A.1., Elements of Negligence.] Government-caused or government-worsened flooding can also support an inverse-condemnation/takings claim if the required causation and severity standards are met. [See e.g., https://no.floods.org/NAI-Legal, IV.B.3., Elements of Inverse Condemnation/Regulatory Taking.] There is also case authority for potential governmental liability arising from approval of subdivisions, drainage plans, and related development that increased flooding on private property. [See e.g., https://no.floods.org/NAI-Legal, III.D.4.b., Discretionary versus Ministerial Actions.]

Mitigation. Mitigation can reduce risk, but it is not automatically dispositive. *Ideker Farms* states that, in certain circumstances, government environmental mitigation may create takings liability if flooding after mitigation is higher than before it—even if total flooding remains lower than before the original flood-control project. Accordingly, mitigation must be evaluated against the legally relevant baseline and its actual downstream effects, not merely its intended net benefit. [See e.g., https://no.floods.org/NAI-Legal, IV.B.3., Elements of Inverse Condemnation/Regulatory Taking (discussion of *Ideker Farms* and mitigation-related increased flooding).]

Summary. The defensible approach is to require credible, cumulative, site- and watershed-specific analysis; reject any floodway proposal that produces a rise; and ensure mitigation prevents—not simply offsets or redistributes—adverse impacts. Prevention of increased flood levels, velocities, and erosion hazards as a key means of reducing governmental liability. [See e.g., https://no.floods.org/NAI-Legal, I.E.5., Reduced Liability.] Immunities and defenses may apply in jurisdictions, but they are fact- and law-dependent and do not eliminate the underlying exposure to suit. [See e.g., https://no.floods.org/NAI-Legal, III.D., Governmental and Sovereign Immunity from Liability.]

DRAFT

[Question 8]

What legal risks arise from floodplain map revisions, new floodway delineations, or updated flood studies that affect previously approved development?

Updated flood data can create risk both for the approving government and for the affected developer. The consequences are fact- and jurisdiction-specific; a prior approval is important, but it is not necessarily a permanent right to develop or rebuild under superseded flood-hazard assumptions.

- **Regulatory- or temporary-takings claims.** If a revision, new floodway, or study leads the government to bar, materially restrict, or suspend previously approved development, the owner may assert that the restriction is a compensable taking. The principal test weighs economic impact, interference with reasonable investment-backed expectations, and the character of the government action. A temporary restriction can also require compensation if it is ultimately found to be a taking. [See e.g., https://no.floods.org/NAI-Legal, IV.B.5., Most Regulatory Takings: Penn Central Analysis, and IV.B.6., Temporary Takings.]

- **Due-process and vested-rights challenges.** A change that defeats an owner's previously lawful, substantially advanced project may invite a claim that the government acted arbitrarily or impaired a vested right—particularly absent a demonstrated health-and-safety rationale. Targeted actions affecting identifiable owners also may require notice and a meaningful opportunity to present evidence. [See e.g., https://no.floods.org/NAI-Legal, IV.A., Fourteenth Amendment; II.E.1., State Police Powers.]

- **Nonconforming-development and rebuilding disputes.** Once a revised delineation makes existing development nonconforming, later repair, substantial improvement, or post-disaster reconstruction may have to meet current requirements; in some circumstances, rebuilding may be prohibited. The guide's Oswalt discussion shows the risk to government of applying a 50-percent-damage rule without the ordinance-required determination and reliable supporting evidence: the resulting condemnation was held compensable. [See e.g., https://no.floods.org/NAI-Legal, II.E.2.d, "Rebuilding Limitations and Amortization of Non-conforming Uses.

- **Liability for allowing development to proceed despite the new risk information.** If officials honor or issue approvals after updated information indicates that a project will increase flooding on other property, neighbors may sue the permitting authority in negligence, nuisance, inverse-condemnation, or takings theories. Courts differ on when

permit approval creates liability, but following the permitting process is generally not a defense to a takings claim. [See e.g., https://no.floods.org/NAI-Legal, II.E.2.e., Liability for Problems Due to Permitting.]

- **Floodway-specific restrictions are defensible, but not cost-free to administer.** Development in a regulatory floodway generally may not increase flood levels. In *Columbia Venture*, a court rejected a taking claim over restrictions that frustrated planned development, stressing the owner's awareness of preliminary FEMA maps and the public-safety purpose of floodway regulation. That decision illustrates that an updated map does not itself establish liability; documented risk, broadly applicable rules, and a genuine flood-protection purpose materially strengthen the government's position. [See e.g., https://no.floods.org/NAI-Legal, IV.B.5.b., Reasonable Investment-Backed Expectations, (discussing *Columbia Venture, LLC v. Richland County*); IV.B.5.d., Facets of 'Character of the Governmental Action.']

Summary. The central legal exposure is not the map revision itself, but how the government applies it to existing approvals: arbitrary or procedurally deficient reversal can generate due-process or takings exposure, while allowing harmful development to proceed can generate flood-damage liability. Clear transition rules, reliable technical findings, and individualized determinations required by the governing ordinance reduce both risks.

DRAFT

[Question 9]

Can communities be held responsible if they repeatedly allow code-compliant rebuilding in floodplains if it increases actual long-term risk?

Liability. Potentially. Code compliance is important evidence, but it is not an absolute shield where a community repeatedly permits rebuilding that foreseeably increases flood risk or harms others. Minimum NFIP standards permit development in flood-prone areas and provide only limited protection. Communities relying solely on those standards may face legal challenges if they inadequately protect residents and property from known hazards; minimum standards may not stop, and may only minimally reduce, long-term flood losses. "Code-compliant" rebuilding can still leave a community exposed if the applicable code is inadequate for known present or future conditions. [See e.g., https://no.floods.org/NAI-Legal, I.D., Limitations of Minimum NFIP Standards.]

Potential liability depends on the governing jurisdiction and facts. A community may face negligence or takings claims when its permits contribute to additional flooding or damage. Some jurisdictions hold local governments responsible for development approvals that cause flooding of existing property, while others are less willing to impose liability. [See e.g., https://no.floods.org/NAI-Legal, II.E.2.e., Liability for Problems Due to Permitting.] Negligence requires proof of duty, breach, causation, and actual damages; foreseeability of harm and the practicality of precautions are central considerations. [See e.g., https://no.floods.org/NAI-Legal, III.A., Negligence, and § III.A.1., Elements of Negligence.]

Repeated approvals. Repeated approvals can strengthen foreseeability and causation arguments, especially where the community has evidence that rebuilding or associated development worsens flood levels, velocities, erosion, runoff, or other measurable risks. Foreseeable harm need not be intended, and an authorized government action can remain a proximate cause when it starts a foreseeable and predictable chain leading to loss. [See e.g., https://no.floods.org/NAI-Legal, IV.B., Fifth Amendment (discussing foreseeability in takings law).] Improved flood and climate modeling also makes it harder to characterize foreseeable risks as unforeseeable "Acts of God." [See e.g., https://no.floods.org/NAI-Legal, III.A.1.e., Force Majeure or 'Act of God.']

Compliance. Compliance matters. Many jurisdictions do not impose negligence liability merely because a government reviewed a compliant permit and a private party's work later failed; permit review should not make the government the guarantor of private engineering. Following the permitting process will not usually defeat a takings claim, and that liability may arise from inadequate permit review or approval when resulting development causes increased flooding. [See e.g., https://no.floods.org/NAI-Legal, II.E.2.e., Liability for Problems Due to Permitting.]

Summary. A community cannot assume that repeated, code-compliant rebuilding eliminates responsibility. Where actual long-term risk is known or measurable, the prudent legal-risk approach is to:

- reassess whether minimum standards remain adequate,
- document the risk analysis, and
- adopt *and* enforce higher, evidence-based floodplain standards designed to prevent increased impacts on people and property.

[See e.g., https://no.floods.org/NAI-Legal, I.E., The NAI Approach; I.E.5., Reduced Liability.]

DRAFT

[Question 10]

How should conflicts among NFIP, HUD, state laws, building codes, and environmental regulations be resolved to minimize legal risk?

Resolving Conflicting Regulations. Conflicts among regulations should be resolved through coordinated compliance—not by treating NFIP minimums as a ceiling or assuming one local rule silently overrides another. The manager should pay attention to the requirements triggered by federal assistance and to clear local implementation.

1. **Identify every applicable requirement and the authority behind it.** NFIP construction standards are a minimum baseline, but they do not address all flood risks. Local governments should integrate flood-risk controls across zoning, subdivision, building-code, site-planning, natural-resource, and stormwater rules, subject to the limits of authority delegated by state law. [See e.g., https://no.floods.org/NAI-Legal, I.D., Limitations of Minimum NFIP Standards; I.E., The NAI Approach; II.E.2.b., Local Land Use Regulations—Planning.]

2. **Apply the stricter lawful, risk-reducing requirement where standards can be met together.** Support higher local floodplain standards when they advance local objectives of flood safety and reduced damage. The courts have favored flood-elevation requirements over otherwise conflicting setbacks and height rules because flood rules protect health, safety, welfare, and public and private resources. [See e.g., https://no.floods.org/NAI-Legal, I.E., The NAI Approach; II.E.2.d., Rebuilding Limitations and Amortization of Non-conforming Uses—Conflicting Zoning Requirements.]

3. **Resolve true local conflicts expressly and prospectively.** Adopt or amend the floodplain ordinance to state which provisions control when it conflicts with zoning, reconstruction, or building requirements. Land development code or ordinance language making floodplain requirements supersede conflicting local regulations is recommended; clear text reduces uncertainty for applicants, officials, and courts. Conversely, ambiguous local rules invite litigation, because courts begin with and enforce the plain language of the ordinance. [See e.g., https://no.floods.org/NAI-Legal, II.E.2.d., Rebuilding Limitations and Amortization of Non-conforming Uses.]

4. **Do not use variances as an informal conflict-resolution device.** Follow state and local appeal procedures, provide a designated body to resolve differing interpretations, and grant floodplain variances only for good cause and exceptional hardship. A variance that falls below flood-elevation requirements should be unusual, not a routine accommodation for conflicts with other development rules. [See e.g.,

https://no.floods.org/NAI-Legal, II.E.2.c., Special Use / Exception Permit or Conditional Use.]

5. **For HUD- or otherwise federally assisted actions,** complete the applicable federal floodplain/environmental process in addition to NFIP and state/local compliance. Executive Order 11988 ("E.O. 11988") applies to federally undertaken, financed, or assisted construction and calls for early public review, alternatives analysis, impact identification, minimization of harm, preservation of floodplain values, documented findings, and implementation consistent with minimization plans and flood-insurance requirements. [See e.g., https://no.floods.org/NAI-Legal, V.B.2.a., Executive Order 11988; V.B.2.b., Floodplain Management Guidelines for Implementing E.O. 11988.] Where wetlands are implicated, E.O. 11990's avoidance-and-minimization direction also applies; projects should not proceed in wetlands, absent no practicable alternative and harm-minimizing measures. [See e.g., https://no.floods.org/NAI-Legal, V.B.2.d., Relationship between E.O. 11988 and 11990.]

6. **Document the decision.** Record the applicable standards, state-law authority, alternatives considered, reasons for any priority determination, environmental findings, permit conditions, and interdepartmental review. This is especially important because approving development that harms other property can expose the permitting authority to negligence claims. [See e.g., https://no.floods.org/NAI-Legal, II.E.2.e., Liability for Problems Due to Permitting.]

Summary.

- Comply with all applicable federal, state, environmental, and local requirements;
- use the more protective lawful standard when they are compatible; and,
- for genuine local-rule conflicts,
    - resolve them through explicit ordinance language,
    - coordinated review, and
    - a documented decision—not ad hoc permitting.

DRAFT