[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.

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.]