[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]

[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.

Potential legal liability theories include:

- **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.]