[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.]

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