A Legal Examination of No Adverse Impact Flood Risk Management and Floodplain Stewardship

NO ADVERSE IMPACT (NAI) LEGAL WEBINAR

Agenda

- **Webinar Overview & Introductions**
- **Introduction to No Adverse Impact for Attorneys and Floodplain Managers** (Turner)
- **Making the *Common Law* Case for a No Adverse Impact Approach to Floodplain Management** (Murphy)
- **Analysis of Taking Law** (Ruppert)
- **Using the NAI Legal Guide, Next Steps, Q&A**

Instructors

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What Is No Adverse Impact (NAI) Floodplain Stewardship?

ASFPM – NAI Legal Webinar

October 25, 2023

No Adverse Impact (NAI)

No Adverse Impact (NAI) is an approach that ensures that the action of any community or property owner, public or private, **does not adversely impact the rights of others.**

Floodplain Stewardship

Caring for and protecting the beneficial biologic and hydrologic functions of areas where the risk of flooding is expected, while managing human uses to minimize the potential for adverse impacts and flood damage.

WHY NAI?

- Even if we perfectly implement current federal floodplain management standards, damages will increase.

Current approaches deal primarily with how to build in the floodplain rather than how to minimize future damages.



WHY NAI?

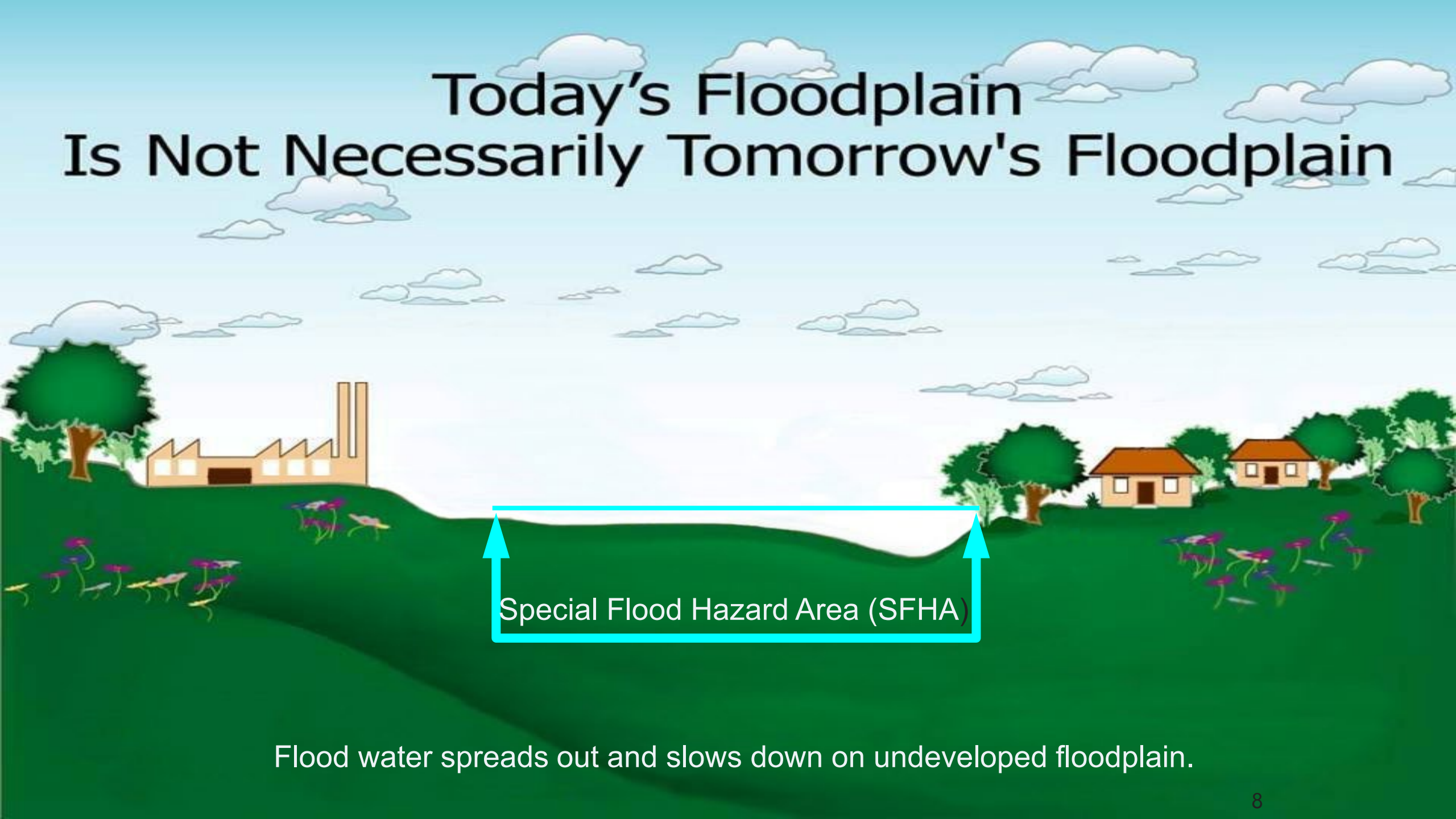
NFIP Limitations:

- Few Restricted Areas
  - Seaward of mean high tide
  - Floodways
- No requirement to protect natural functions of floodplains
- No limits on siting of critical facilities
- Fill in floodplain is allowed and facilitated



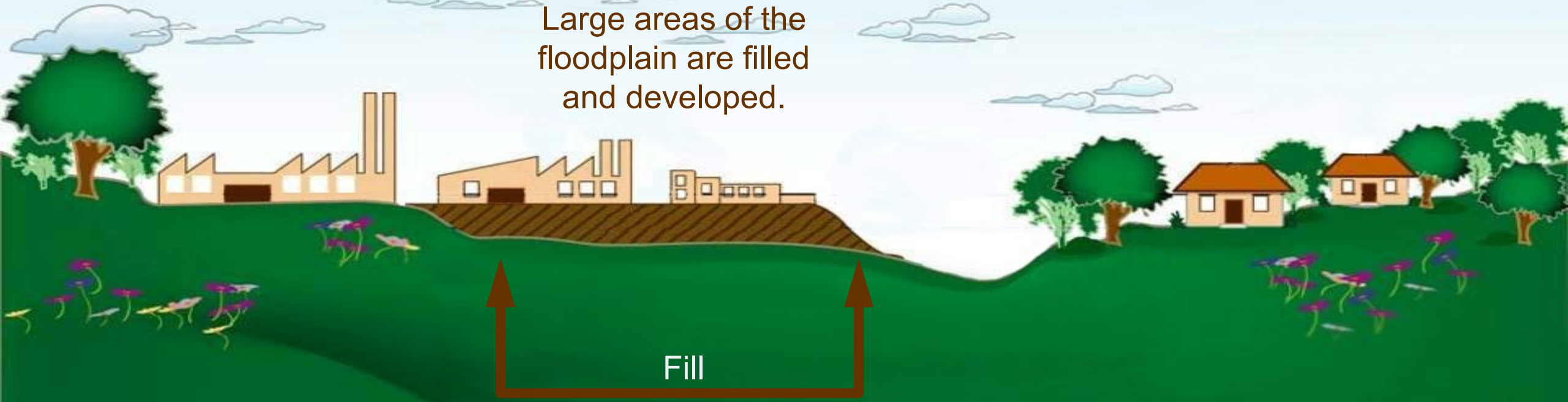


Today's Floodplain Is Not Necessarily Tomorrow's Floodplain



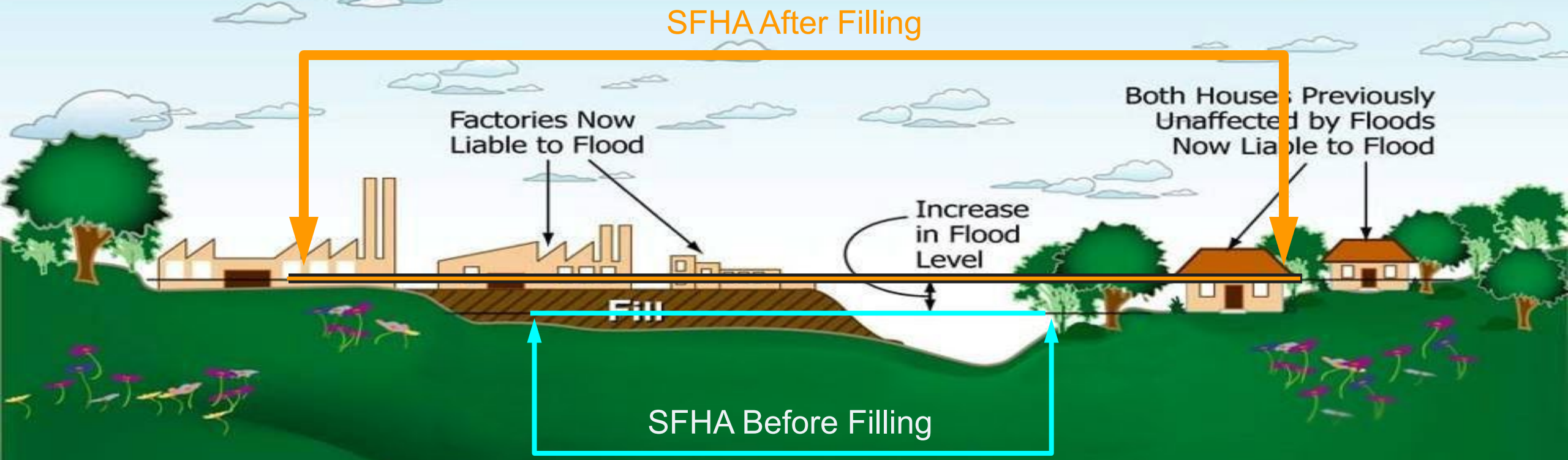
Flood water spreads out and slows down on undeveloped floodplain.

Today's Floodplain Is Not Necessarily Tomorrow's Floodplain



If you allow fill in the floodplain,
you change the dynamics of the floodplain.

Today's Floodplain Is Not Necessarily Tomorrow's Floodplain



If floodplains are filled, there is an increase in the land area needed to store and convey flood waters.
This means your home or business may be impacted.

WHAT IS NAI?

NAI does not mean NO development!

NAI means that adverse impacts are identified and mitigated.

What is NAI?

The true strength of the No Adverse Impact approach is that it encourages local decision making to ensure that future development impacts will be identified, considered on a watershed-wide basis, and mitigated.



It is a truly comprehensive strategy for reducing flood losses and costs.

How to Implement NAI?

Identify ALL the impacts of a proposed development or program

- Drainage, storage
- Sediment, erosion
- Access
- Flood Safety



Determine which properties or community members will be impacted

Devise and implement a strategy for mitigating anticipated adverse impacts

How to Implement NAI?

NAI is a principle - not a specific set of standards

The NAI concept can be incorporated into all community activities

NAI Toolkit and How-To Guides present ideas for integrating NAI into local programs to provide a higher level of flood protection

Each NAI program is unique – It is tailored to the community's specific situation

Community Activities That Can Incorporate NAI

- Hazard Identification (Mapping)
- Planning
- Regulations & Standards
- Mitigation
- Infrastructure
- Emergency Services
- Education & Outreach



NAI Summary

Every piece of property has some element of flood risk

NAI is a principle that leads to a flood risk reduction process

How-To Guides for Local Communities are great resources!



*NAI How-to Guides, the NAI Toolkit and other resources are at www.floods.org – click on the NAI page



no.floods.org/LegalGuide



A Caveat:

This presentation is neither intended to be, nor may it be taken as legal advice. For legal advice, consult with an attorney licensed to practice in your jurisdiction and demonstrating expertise in applicable subject matter.

Statements of fact and opinions expressed are those of the presenters individually and are not the opinions or positions of ASFPM, the University of Florida, or William and Mary University.

Overview

- Past Is Not Prelude Anymore
- Big Picture Thinking on Floodplain Stewardship
- Legal Frameworks for Floodplain Stewardship and No Adverse Impacts Planning and Implementation
- Intro to the initial NAI Legal Guide

Making the *Common Law* Case for a No Adverse Impact (NAI) Approach to Floodplain Stewardship

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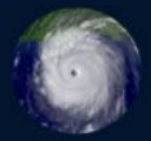
Billion-Dollar Disasters BY THE NUMBERS (1980–2020)


DROUGHT


FLOODING


FREEZE


SEVERE STORMS


TROPICAL CYCLONE


WILDFIRE


WINTER STORM

For more info:
www.ncdc.noaa.gov/billions/

1980 The year NOAA started tracking billion-dollar disasters

119 Number of billion-dollar events from 2010-2019



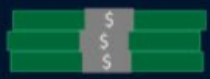
22 Number of U.S. billion-dollar disasters in 2020—the most on record



7.0 Average number of billion-dollar disasters per year since 1980

285 Number of billion-dollar disasters in the U.S. since 1980

$1.875 TRILLION Total cost of the 285 billion-dollar disasters



7 Number of billion-dollar tropical cyclones that struck the U.S. in 2020



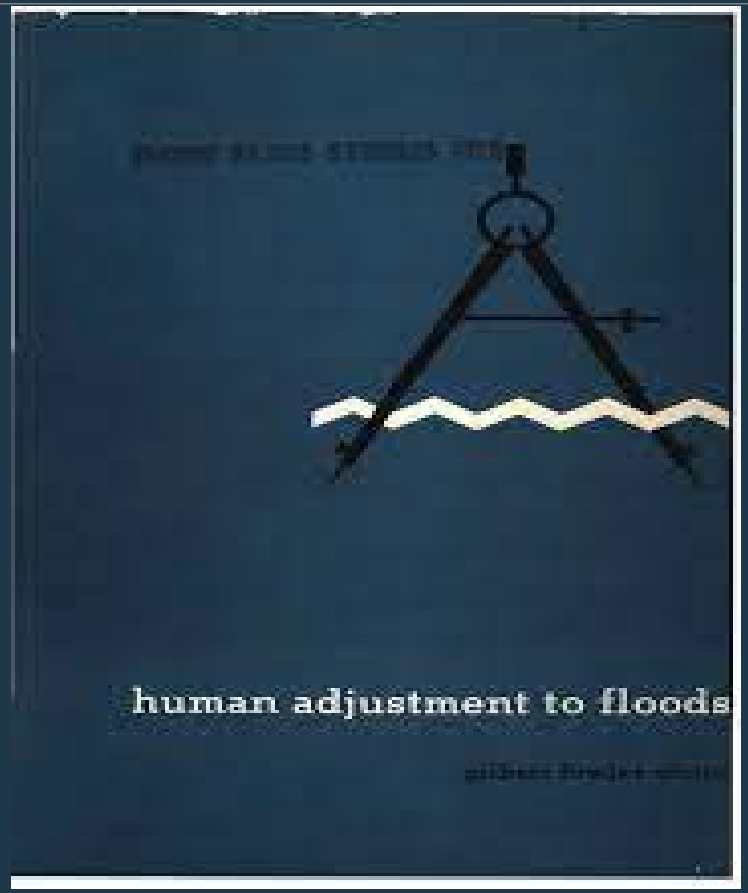
15.1 Average number of billion-dollar disasters per year since 2015

50 Number of states that have had at least one billion-dollar disaster

124 Number of billion-dollar disasters that have impacted Texas since 1980—the most of any state

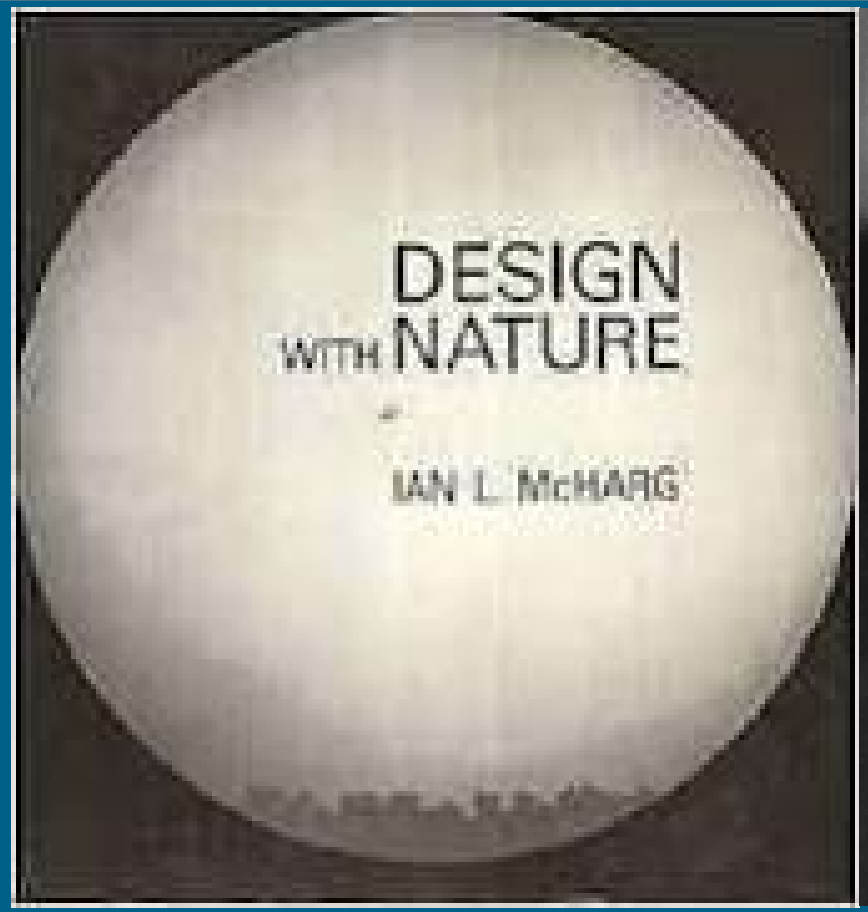


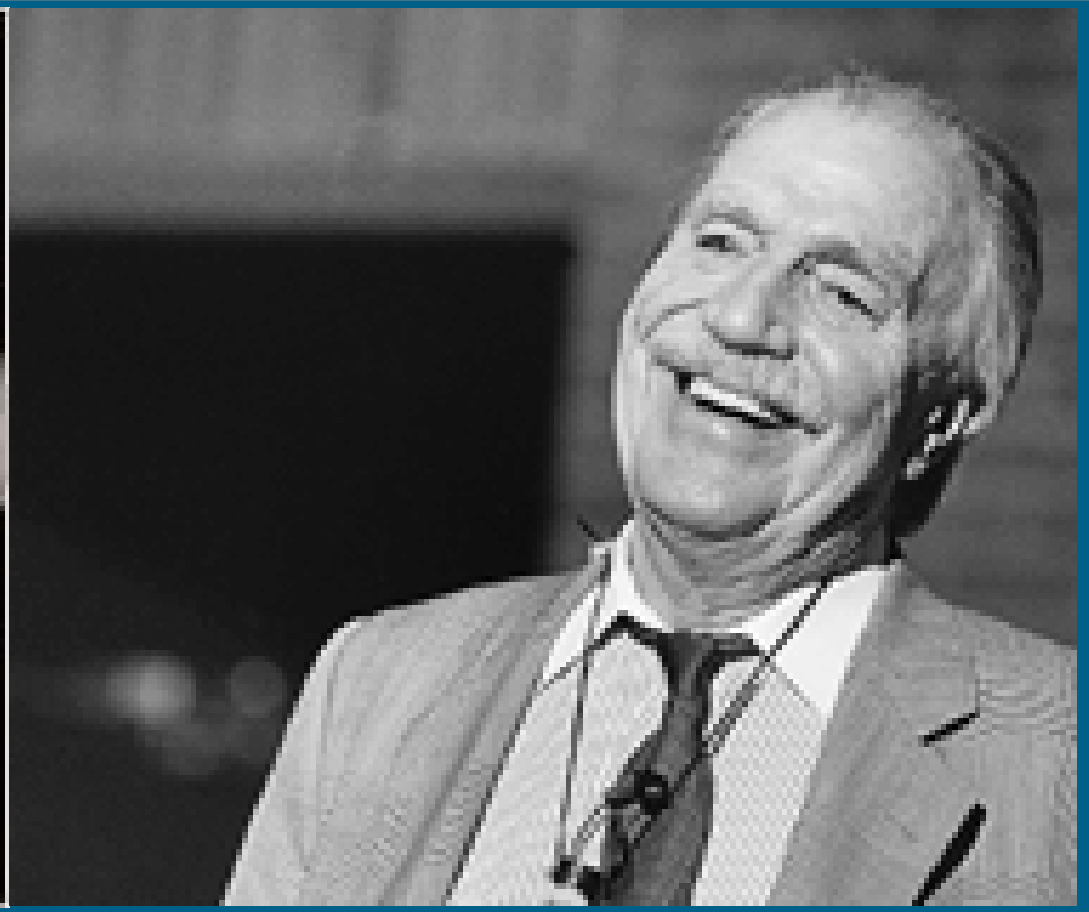
Gilbert White, *Human Adjustment to Floods* (1945)





Ian McHarg, *Design with Nature* (1969)





Gilbert White, *Human Adjustment to Floods* (1945)

"It has become common in scientific as well as popular literature to consider floods as great natural adversaries which man seeks persistently to overpower. . . . This simple and prevailing view neglects in large measure the possible feasibility of other forms of adjustment."

National Flood Insurance Program (NFIP)

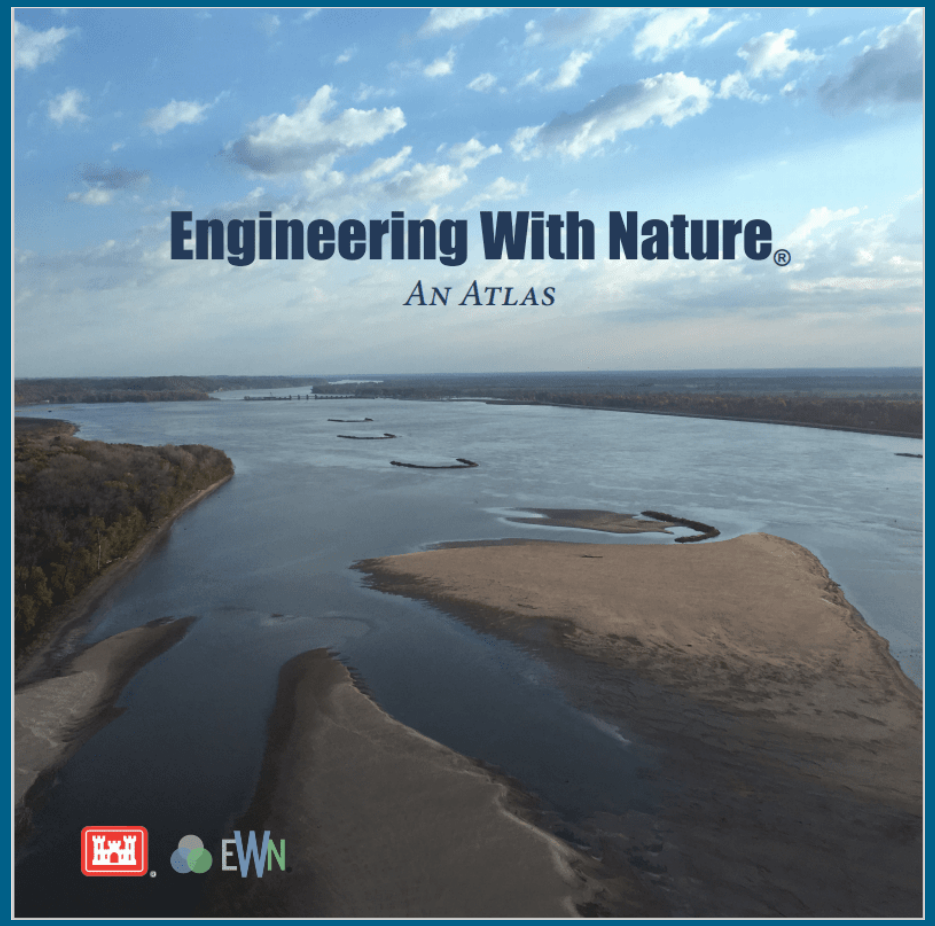


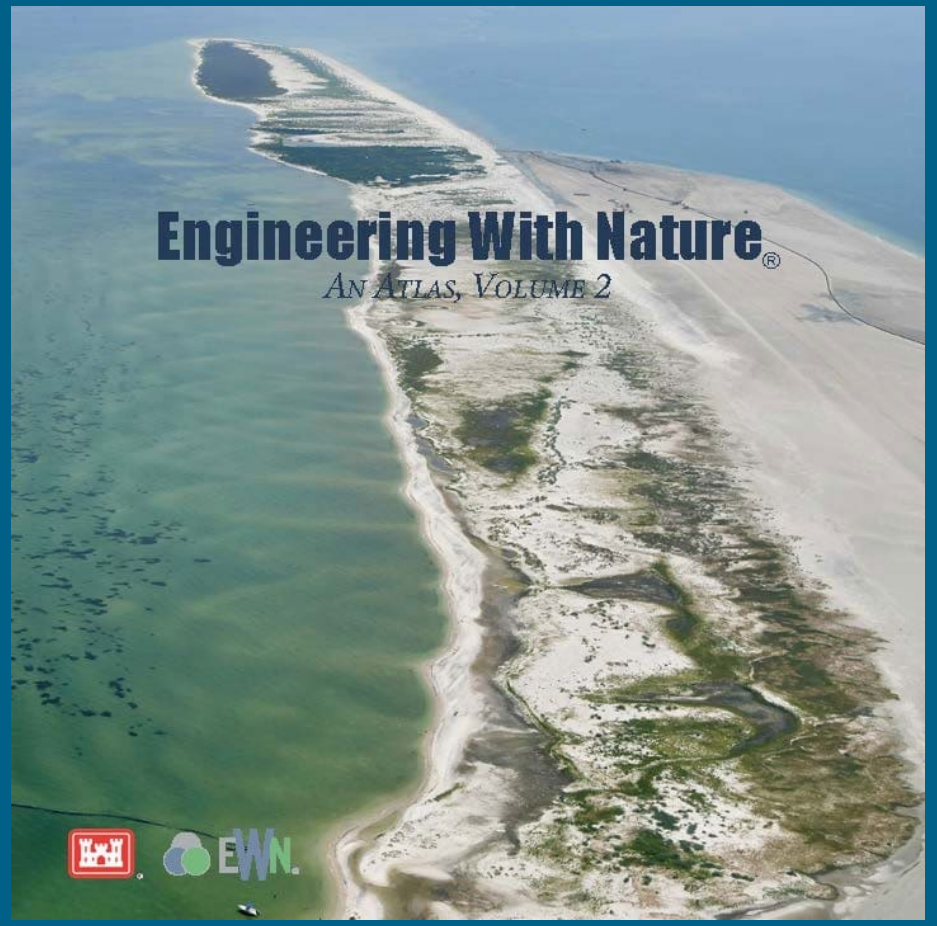
THERE'S THE FLOODPLAIN. NOW WHERE DO WE GO FROM HERE?

Floodplain Husbandry



Engineering with Nature





Common Law Liability—CAUSES OF ACTION

Under common law, no landowner—public or private—has the right to use their land in a manner that substantially increases flood or erosion damages (i.e., adverse impacts) on adjacent lands; if so, liability.

Flood liability lawsuits are commonly based upon one (1) or more of four (4) causes of action in Tort:

- Negligence
- Nuisance
- Trespass
- Law of Surface Water

A Civil Wrong for Which the Law Provides a Remedy

Intentional Torts
Not our focus
(exception: trespass)

Negligence

Duty of Care

Breach

Causation

Damages



But, SOVEREIGN IMMUNITY



Common Law Causes of Action: NEGLIGENCE

What is the "standard of care" for reasonable conduct?

Evolving from a Floodplain Management perspective:

- The standard of conduct is that of a reasonable person in the circumstances.

- This is the primary legal basis for public liability for:
  - Improperly designed flood control structures
  - Improperly prepared or issued warnings
  - Inadequately processed permits



Ill. Farmers Insurance Co. v. MWRD of Greater Chicago



Ill. Farmers Insurance Co. v. MWRD of Greater Chicago



Common Law Causes of Action
NUISANCE

http://floodlaw.com/wp-content/uploads/2015/09/nuisance-flooding.jpg

Common Law Causes of Action: NUISANCE



No landowner, public or private:

- has a right to use his/her land in a manner
- that substantially interferes, in a physical sense,
- with the use of adjacent lands.

"Reasonable conduct" is usually not a defense against a nuisance suit.

Common Law Causes of Action
TRESPASS



Landowners can succeed in trespass suits for:

- certain types of public and private actions
- that result in physical invasion of private property
- Including increased flooding or drainage.

Common Law Cause of Action:
LAW OF SURFACE WATER

In most states landowners cannot substantially damage other landowners



- **by blocking the flow of diffused surface waters,**
- **increasing that flow, or**
- **channeling that flow to a point**

other than the point of natural discharge.

Landowners are liable for damages caused by interference with the natural flow of surface water when their actions are 'unreasonable'.

Governmental and Sovereign Immunity

The government/sovereign (=crown) cannot be sued without its consent.

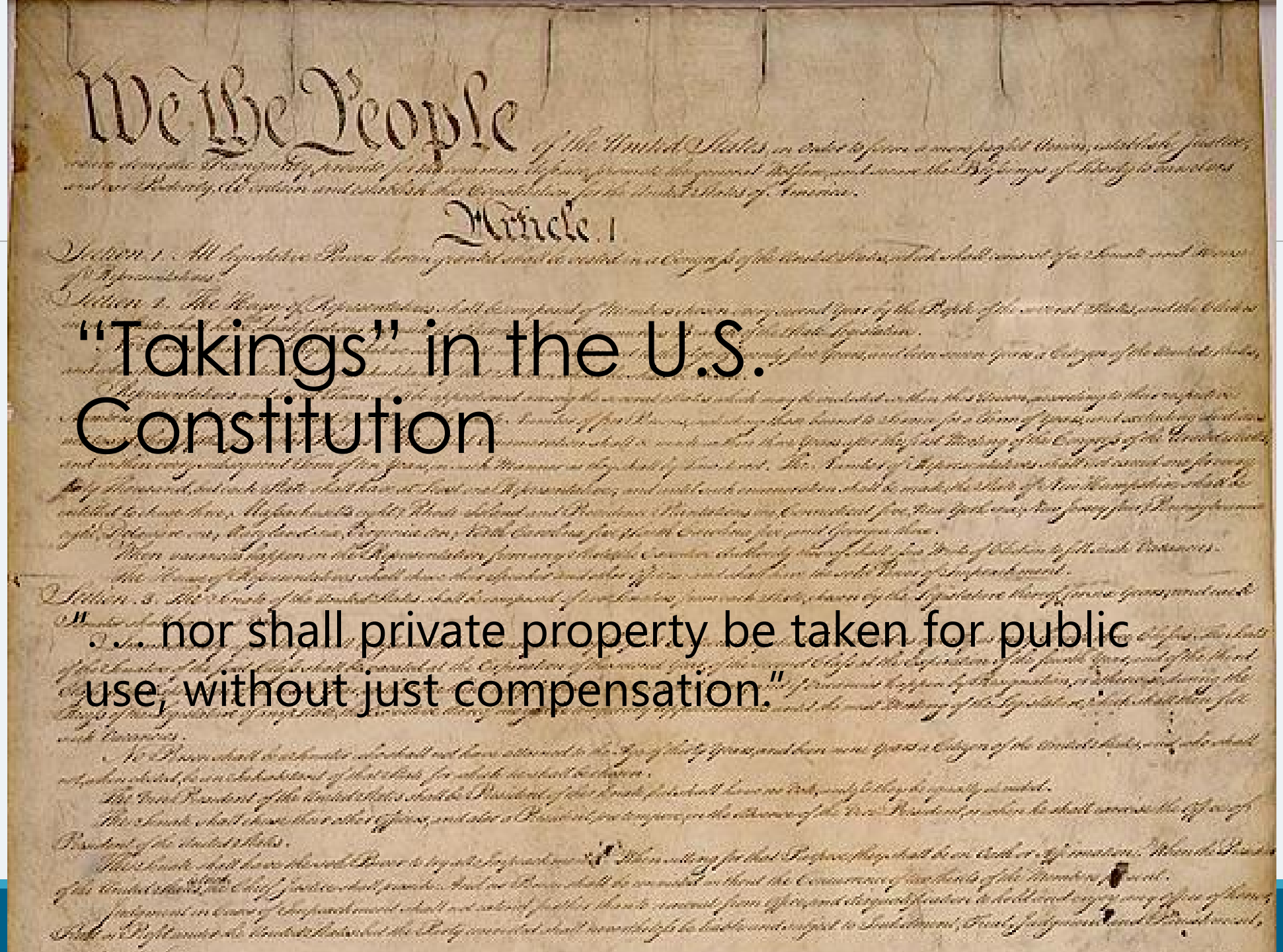
Courts will typically use one (1) of four (4) tests:

1. Governmental v. Proprietary Function Test
2. Ministerial/Operational v. Discretionary Functions/Acts Test
3. Planning v. Implementation
4. Non-justiciable v. Justiciable

Analysis of Takings Law

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"Takings" in the U.S. Constitution

". . . nor shall private property be taken for public use, without just compensation."

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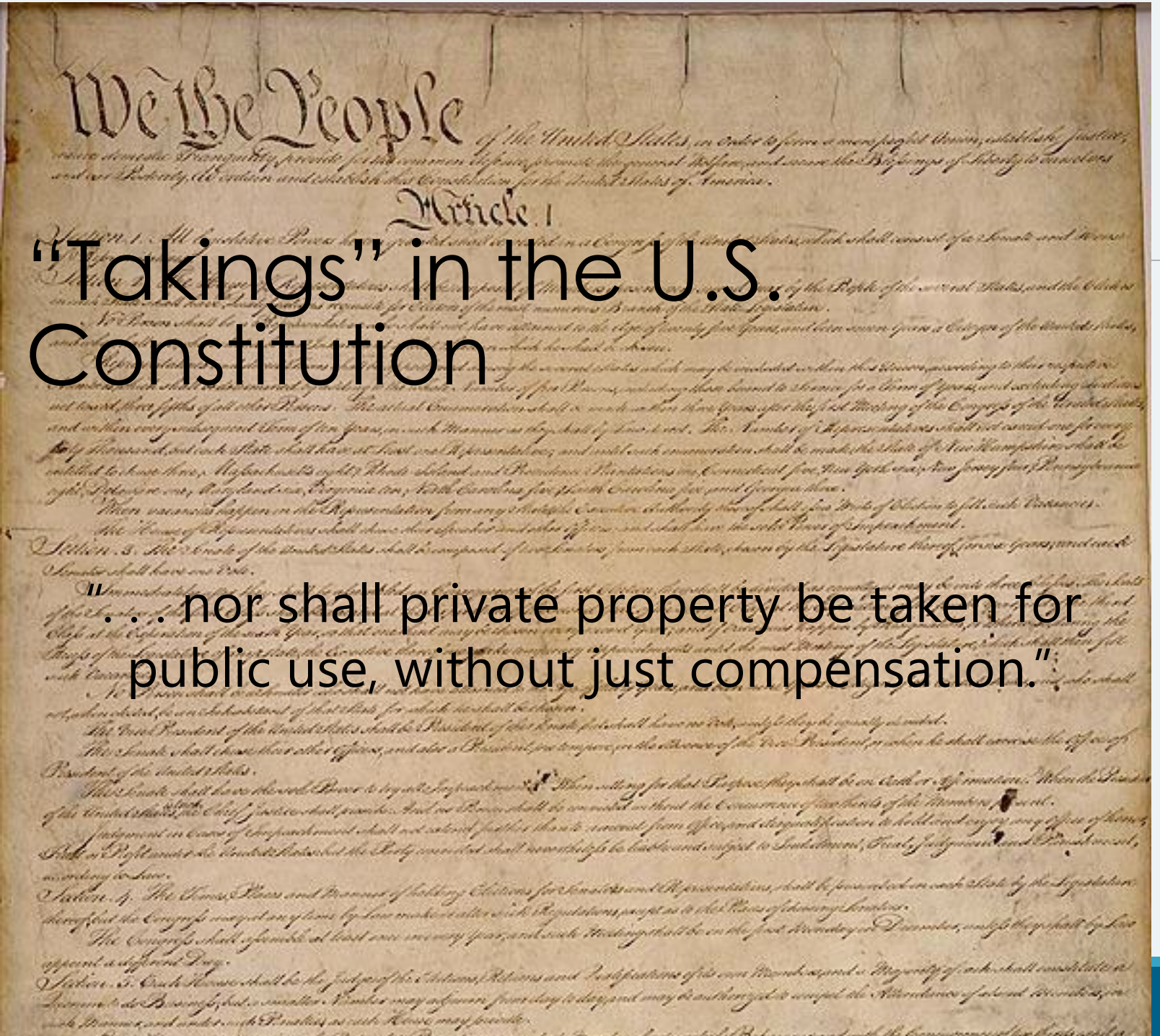
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IV.C. Summary of Takings



"Takings" in the U.S. Constitution

"... nor shall private property be taken for public use, without just compensation."

Invasion without intent to take title = inverse condemnation

Regulation going "too far" = regulatory taking

All regulatory takings = inverse condemnation, but not all inverse condemnation = regulatory taking

Analysis of Most Regulatory Takings: The *Penn Central Case*

1978 case established key 3-part test:

1. Economic impact of the regulation on the property owner
2. The "reasonable investment-backed expectations" of the property owner
3. The nature of the government action

Each of these over the past decades has developed its own series of factors and aspects; extreme complexity in some cases

The Good: Lots of Case Law Supporting NAI

Beverly Bank v. Illinois Department of Transportation

- Illinois Supreme Court upheld state regulation prohibiting residential structures in regulatory floodway

State's argument focused on protecting health, safety, and welfare including

- Risk to first responders
- Risk to property owners who would be stranded
- Increased expenditure of public funds

The Good

Columbia Venture, LLC v. Richland County, 776 S.E.2d 900 (S.C. 2015)), reh'g denied (Oct. 9, 2015), cert. denied, 136 S. Ct. 1458 (2016).

- Court emphasized the "**important public purposes of mitigating the social and economic costs of flooding that are served by the County's ordinances**."
- Also highlighted the "**safety-enhancing character of the government action**" of regulating the floodway.

The Bad

After the U.S. Supreme Court's *Koontz* decision (2013)

- Conflicting decisions about its application:
- *F.P. Development v. Charter Township of Canton*: All generally applicable fee-based mitigation permit requirements fail the extension of *Koontz* to monetary exactions
- Contra:
- *Knight v. Metropolitan Government of Nashville & Davidson County* and *Ballinger v. City of Oakland* both found *Koontz* did not apply, but for different reasons

The *Really* Ugly

Series of appellate state cases in NY encouraging and rewarding land speculation in long-classified and undevelopable wetlands

Ideker Farms series of cases

- USACE "channelized" Missouri River, creating valuable farmland
- Due to ESA, USACE ordered to mitigate harms
- Increased water levels after ESA led to lawsuits
- RESULT: Taxpayers must pay AGAIN

LEGAL RESEARCH FINDINGS:

Almost no cases* of gov't liability in a takings claim against a community's denial of use where the proposed use would have had substantial offsite impacts or threatened public safety.

Courts have broadly supported restrictive regulations for high-risk flood areas based upon public safety, nuisance prevention, public trust and other concerns.

*The dramatic departure from this general rule: *Lucas v. South Carolina Coastal Com'n*, 505 US 1003 (1992) (NOTE: *very* limited holding & applicability in floodplain context; only 1.6% of *Lucas* claims successful)

AVOIDING A SUCCESSFUL TAKINGS CLAIM BASED ON REGULATION

Clearly relate regulation to preventing harm. (***Lingle***)

Avoid interfering with owner's right to exclude. (***Loretto***)

Avoid denial of all economic uses. (***Lucas***)

Consider Transferable Development Rights, similar residual rights and uses, alternative development options to retain economic land use value. (***Penn Central***)

Close relationship between permit conditions and harm avoided. (***Nollan-Dolan***)

Do not propose anything or negotiate with permit applicants. (***Koontz***)

DO NOT rush through land use changes or zoning changes in response to public opposition to a particular project *after* its proposal or acquisition of land for a project acceptable under current zoning without overwhelming evidence of the need to protect public health and safety or prevent a clear nuisance

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What *IS* "Property"?

To paraphrase Wesley Hohfeld: "Property is a set of relationships among people *with regard to things*."

"Property" includes rights; such rights inherently also include duties (that protect others' rights)

"Property rights" = decisions on how to allocate rights and duties

Change is the Constant

"Quiet enjoyment" and industrialization: conflict driving changes in property law

Early U.S. law: no "takings" for mere regulation of available use of land. Only for legal taking, and physical impacts to actual property or recognized property rights.

Shift from very strict "*quiet enjoyment*" to a standard that found no liability for "disturbances" from standard practices in industries deemed important to the public interest.

Demonstrates "elastic nature of property rights" (Justice Stevens' dissent in *Lucas v. South Carolina Cstl. Com'n.)*

"all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community"

- Mugler v. Kansas, 123 U.S. 623 , 665 (1887)

Supreme Court noted that in Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667, (1878), it had upheld an ordinance that shut down a fertilizer plant operating in a location that was previously expressly authorized because the use "had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people"

- Mugler v. Kansas, 123 U.S. 623 , 666-67 (1887)

More Change

***Pennsylvania Coal Company vs. Mahon*, 260 US 393 (1922).**

VERSUS

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (S.Ct., 1987)

Almost identical facts: subsidence from coal mining; regulations to prevent

SCOTUS found taking in 1922 but not in 1987

Overarching Conclusion

Conflicting case law on takings; it's all over the place

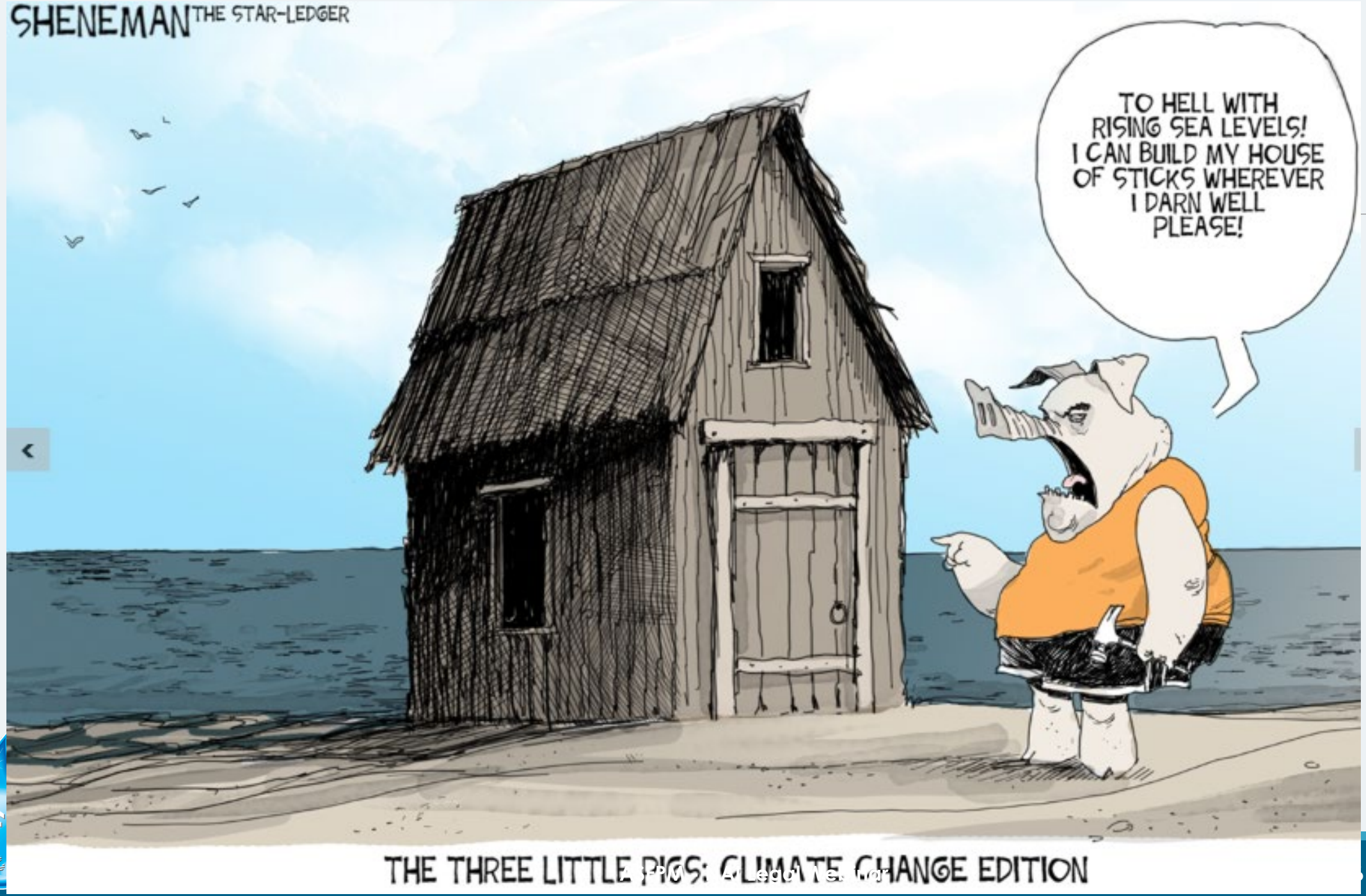
Extreme complexity has developed around *many* factors

Provides opportunity—and *need*—to very carefully frame

Courts can use complexity and framing to get where they want

Good faith, careful, thoughtful regulation done through transparent, appropriate processes are quite safe, even when the impacts to property are severe

Bad facts make bad law!!!!!! <u>Don't give a court bad facts.</u>


SHENEMAN THE STAR-LEDGER
TO HELL WITH RISING SEA LEVELS! I CAN BUILD MY HOUSE OF STICKS WHEREVER I DARN WELL PLEASE!
THE THREE LITTLE PIGS: CLIMATE CHANGE EDITION

Next Steps

- **More legal content is already on the way**
  What else should be included – coastal law, state law?
- **Content for floodplain managers…**
  Is on the way, but currently written for attorneys
- **How can the legal guide be improved?**
  Let us know – see contacts below

Contacts for general inquiry and legal content:

- **Terri Turner (NAI)**
- **Janet Thigpen (NAI)**
- **Jerry Murphy (Legal)**
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