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# Avoiding Legal Pitfalls When Implementing No Adverse Impact (NAI) Floodplain Stewardship Regulations

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# Overview

- ❖ **Making the Case for a No Adverse Impact Approach to Floodplain Management**
- ❖ **Avoiding Legal Pitfalls When Implementing No Adverse Impact (NAI) Floodplain Stewardship Regulations**
- ❖ **Using the NAI Legal Guide & Next Steps**

# NAI Legal Guide Collaborators

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## **Thomas Ruppert, Esq.**

Assistant Provost for Coastal Resilience and Director of the Virginia Coastal Resilience Collaborative at William & Mary

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Principal / Owner, HALO Strategic Planning; Co-chair ASFPM NAI Policy Committee

## **Janet Thigpen, CFM**

Flood Mitigation Specialist, Southern Tier Central Regional Planning & Development Board, NY  
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Policy Analyst, Coastal States Organization



# A Caveat:

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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, Florida Sea Grant, or the University of Florida.



# What Is No Adverse Impact (NAI) Floodplain Stewardship?

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# No Adverse Impact (NAI)

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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

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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 damages.



# WHY NAI?

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

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





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*Boats damaged by Hurricane Ian on San Carlos Island, Florida on Oct. 15, 2022. The Category 4 storm was estimated to have caused more than \$60 billion in private insured losses just in Florida. Thomas O'Neill / NurPhoto via Getty Images*

# 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



# WHAT IS NAI?

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NAI does not mean **NO** development!

NAI means that adverse impacts are identified and eliminated or mitigated.



# What is NAI?

The true strength of the NAI approach:  
It encourages local decisionmaking 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.**



# Community Activities in which to Incorporate NAI approach:

- 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](http://www.floods.org) – click on the NAI page





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**No Adverse  
Impact Legal  
Guide**

[Common Terminology](#)
[About the NAI Legal Guide](#)

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## No Adverse Impact Legal Guide

The **No Adverse Impact Legal Guide for Flood Risk Management** (a.k.a., the **NAI Legal Guide**) provides legal resources to inform the decisions of community representatives and municipal attorneys who design, implement, and defend NAI programs. It includes:

- Detailed resources for legal professionals, and
- Legal essentials for floodplain managers and community officials.

This Guide supplements other NAI documents that present tools and guidance for integrating NAI principles into local regulations, policies, and programs. It will help readers to understand, anticipate, and manage legal issues that may arise when a community implements activities that enhance flood resilience, especially when those activities exceed state and federal requirements for floodplain management.



The **No Adverse Impact Legal Guide for Flood Risk Management** is found at <https://no.floods.org/NAI-Legal>

[no.floods.org/LegalGuide](https://no.floods.org/LegalGuide)

Use this link to view/download the entire *NAI Legal Guide*:

**No Adverse Impact Legal Guide for  
Flood Risk Management**

This Guide is divided into five sections that can be viewed/downloaded individually using the links below.

- Section I – Introduction to No Adverse Impact**
  - I.A. Local Implementation of NAI
  - I.B. A Legal Foundation for NAI
  - I.C. The National Flood Insurance Program (NFIP)
  - I.D. Limitations of Minimum NFIP Standards
  - I.E. The NAI Approach
- Section II – Introduction to Legal Concepts for No Adverse Impact**
  - II.A. Lawsuits
  - II.B. Venue – state courts, federal district courts, and federal court of claims
  - II.C. Property
  - II.D. Sovereign Submerged Land
  - II.E. Land Use Limitations
- Section III – Torts**
  - III.A. Negligence
  - III.B. Trespass to Land
  - III.C. Nuisance
  - III.D. Governmental and Sovereign Immunity from Liability
- Section IV – The Constitution and Its Protection of Property Rights**
  - IV.A. Fourteenth Amendment
  - IV.B. Fifth Amendment
  - IV.C. Summary of Takings
- Section V – Federal Laws**
  - V.A. Generally
  - V.B. Executive Orders: Floodplain Stewardship




# 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 on adjacent lands; if they do so, liability for negative results from their actions may attach.

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

- Negligence
- Nuisance
- Trespass, and to a lesser extent,
- The 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**



# Governmental and Sovereign Immunity

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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





# We the People

of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

## Article. 1

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

"Takings" in the U.S.

Constitution

Representatives and electors shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of years, and including Indians not taxed, three fifths of all other Persons. The Number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative, and until such Enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York seven, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina six, and Georgia three.

When vacancies happen in the Representation from any State, the Executive thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers, and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years, and each Senator shall have the Qualifications requisite for Senators of the most numerous Branch of the State Legislature. The Senate shall have the sole and exclusive Power of Impeachment, and try all Cases of Impeachment. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

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

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided. The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.



# AVOIDING A SUCCESSFUL TAKINGS CLAIM BASED ON REGULATION

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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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# LEGAL RESEARCH FINDINGS:

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Almost no cases\* of governmental liability in a takings claim against a community's denial of use where the proposed use would have 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 Council*, 505 US 1003 (1992)  
(NOTE: *very limited* holding and applicability in floodplain context; only 1.6% of Lucas claims successful)



# Overarching Conclusion

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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 actions

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!!!!!! Don't give a court bad facts.**



# Next Steps

- ❖ **More legal content is already on the way**

What else should be included – coastal law, state law?

- ❖ **Content for floodplain managers...**

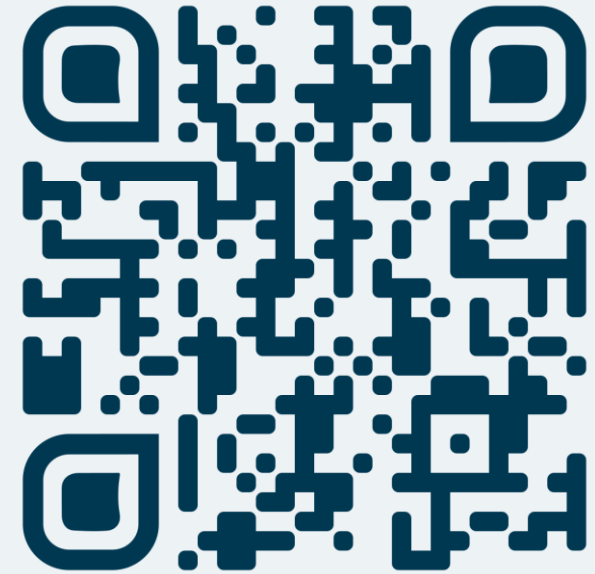
Is on the way, but current audience focus is attorneys

- ❖ **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)**
- ❖ **Thomas Ruppert (Legal)**
- ❖ **Jeff Stone, Research Director**  
ASFPM Flood Science Center, [jeff@floods.org](mailto:jeff@floods.org)



[no.floods.org/LegalGuide](https://no.floods.org/LegalGuide)







# Questions?

FOR THE

#GATORGOOD

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University of Florida



# This Partnership Proposal will:

- **Develop a cadre of educators prepared to:**
  - **“train the trainer” and**
  - **provide training for floodplain administrators and other individuals pursuing “CFM® credentialing, training, and maintenance**



# This Partnership Proposal will:

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- **Develop a graduate certificate in Professional Floodplain Stewardship (PFS) focused on professional development and employment opportunities for HBCU graduates currently underrepresented among coastal and riverine floodplain professionals and policy-makers/decision-makers.**



# Developing Basic Training for Certified Floodplain Professionals in Florida

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## Outline

### 6 months

- **Gather class information for Train the Trainer (TTT) class**
  - Use ASFPMs TTT class materials as a guide
    - 2<sup>nd</sup> line review of material
  - Create .pptx for TTT manual
- **Gather class information and materials for basic training**
  - Use FEMA 273, FEMA 480, and Florida Building Code as guides (among others)
  - Format pptx and develop modules
  - Identify subject matter experts (SMEs) to review basic training module content
    - 2<sup>nd</sup> line review of material



# Developing Basic Training

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## Outline – cont.

### 6-12 months

- Finish review of Train the Trainer (TTT) materials for Instructors Guide
- Create Student Manual
  - 2<sup>nd</sup> line review of material
- Teach 1<sup>st</sup> TTT class and reassess



# Developing Basic Training

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## Outline – cont.

### 12-18 months

- Teach 1<sup>st</sup> Basic Training class and reassess
- Teach 2<sup>nd</sup> TTT class and reassess

### 18-24 months

- Teach 2<sup>nd</sup> Basic Training class and reassess
- Reassess the whole process
- Document process and substance to share with other ASFPM chapters



# NEXT STEPS:

Develop a **Graduate Certificate in Professional Floodplain Stewardship (PFS)** focused on comprehensive understanding of natural and beneficial functions of floodplains, earth science dynamics, economics, insurance, legal and regulatory requirements, professional development, and employment opportunities for graduates **currently underrepresented among coastal and riverine floodplain professionals and policy-/decision-makers.**



# Design, develop, and deploy five (5) three-credit hour courses – generally:

1. **Fundamental of Floodplain Stewardship** (NFIP basics, policies, and regulations)\*
2. **Economic perspectives and legal processes**, (economics, insurance, law, mitigation, and public policy)
3. **Floodplain ecology and processes** (Earth science, coastal and riverine wetlands)
4. **Impacts of human occupation and social perspectives** (design, engineering, planning)
5. **Climate science & Capstone project** (resilience to coastal and other climate change impacts)





# Working Curriculum Outline: Fundamental of Floodplain Stewardship (NFIP basics, policies, and regulations)\*

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## Course Introduction

History of Floodplain Management

Introduction to Ecological Principles and Processes

Addressing, Defining, and Understanding Hazards and Risks

Mitigating Flood Losses

Mitigation Programs



# **Working Curriculum Outline: Floodplain ecology and processes** (Earth science, coastal and riverine wetlands)

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**Coastal, Stream and River Ecology**

**Coastal, Stream, and River Mechanics Framework**

**Glaciation and Erosion Processes**

**Meteorological Processes**

**River Basins and Tectonics**

**Wetlands**



# **Working Curriculum Outline: Economic perspectives and legal processes, (Economics, insurance, law, mitigation, and public policy)**

## **Stream Management Framework**

### **Effects of Land Use**

### **The Costs of Disasters and Flooding**

### **Insurance**

### **The Economics of the NFIP**

### **Land/Water Management and Restoration**



# Working Curriculum Outline: Impacts of human occupation and social perspectives (Design, development, engineering, planning, etc.)

Land Cover and Use

Stormwater Management

Water Quality

Advanced Mitigation

Low-Impact Design and Development (LID)

Green Stormwater Infrastructure

Bio-char, Bio-mass, and Bio-solids



# **Working Curriculum Outline: Climate science & Capstone project** (Resilience to coastal and other climate driven impacts)

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**Assessing Community Resilience**

**The Paling Perspective Scale**

**Class Exercise Tasks**

**Capstone Internship Project with Climate Perspective**

**Professional Floodplain Stewardship Exam**



# Professional Floodplain Stewards who:

- Promote natural and beneficial functions of coastal and riverine floodplains
- Guide development to avoid adverse impacts on adjacent properties and coastal and riverine floodplains
- Understand and address disproportionate climate impacts on the frontline communities they represent





# Questions?

FOR THE

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# The Paling Perspective Scale

