

# NO ADVERSE IMPACT FLOODPLAIN MANAGEMENT



## What is No Adverse Impact?

“No Adverse Impact” (NAI) floodplain management is a managing principle developed by the Association of State Floodplain Managers (ASFPM) to address deficiencies in the typical local floodplain management program. Town leaders may believe that adopting the minimum regulatory standards under the National Flood Insurance Program (NFIP) will protect them from liability from both fronts of

concern: developers threatening takings litigation and landowners at possible risk of damage in the next flood. Unfortunately, they may be wrong on both counts. Rather than depending on minimum requirements of federal or state programs, NAI provides tools for communities to help ensure a higher level of protection for their citizens and to prevent increased flood damage now and in the future.



*“No Adverse Impact Floodplain Management” is a managing principle that is easy to communicate and from a policy perspective, tough to challenge. In essence, No Adverse Impact floodplain management is where the action of one property owner does not adversely impact the rights of other property owners, as measured by increased flood peaks, flood stage, flood velocity, and erosion and sedimentation.*

NAI floodplain management is an approach that ensures the action of any community or property owner, public or private, does not adversely impact the property and rights of others. An adverse impact can be measured by an increase in flood stages, flood velocity, flows, the potential for erosion and sedimentation, degradation of water quality, or increased cost of public services. No Adverse Impact floodplain management extends beyond the floodplain to include managing development in the watersheds where increased runoff of storm water and floodwaters originate. NAI does not mean no development. It means that any adverse impact caused by a project must be mitigated, preferably as provided for in the community or watershed based plan.

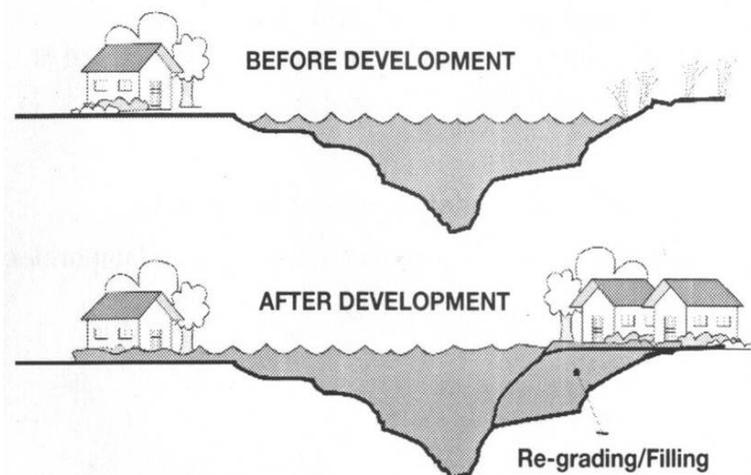
For local governments, No Adverse Impact floodplain management represents a more effective way to tackle their flood problems. The concept offers communities a framework to design programs and standards that meet their true needs, not just the requirements of a federal or state governmental agency. The NAI floodplain management initiative empowers communities (and their citizens) to work with stakeholders and build a program that is effective in reducing and preventing flood problems.

# What is No Adverse Impact? (cont'd)

NAI floodplain management is about communities being proactive—identifying potential impacts and implementing strategies to prevent and mitigate those impacts before they occur.

## What's Wrong with FEMA/ NFIP Minimum Standards?

The Federal Emergency Management Agency (FEMA) has long supported the adoption of higher regulatory standards through the Community Rating System and state or local programs to offer incentives for safer development practices. Communities that fall back on the minimum federal NFIP standards may allow diversion of floodwaters onto other properties, loss of channel conveyance and storage, and an increase in erosive velocities, ALL of which may make the community liable under the Takings Clause or negligence. Ultimately, any new development that is allowed to adversely impact other properties may make the community liable, even if minimum standards are met.



Courtesy of VTDEC River Management Program

*44 CFR 60.1(d) "...community officials may have access to information or knowledge of conditions that require, particularly for human safety, higher standards than the minimum criteria set forth...Therefore any flood plain management regulations adopted by a State or a community, which are more restrictive than the criteria set forth in this part are **encouraged** and shall take precedence." - FEMA NFIP Regulations*

It is important to remember that the National Flood Insurance Program was designed with insurance in mind, and was never intended to be the nation's land use program for floodplain management. Relying exclusively on NFIP minimum standards may lead to:

- ◆ Adverse cumulative impacts of allowing small rises in flood elevation here and there, that accumulate into significant and hazardous changes, subjecting families and businesses to greater flood risks;
- ◆ Increased storm water velocities that worsen erosion, sedimentation, streambank failure, and new stream channel formation; and,
- ◆ Increased destructive potential, as what were once manageable storms become major producers of flood damage and associated disruption and misery.



Great Brook, Plainfield, VT

# NAI Strategies

No Adverse Impact watershed management relies on a combination of development planning, standards, and review to ensure that proposed and anticipated development will not adversely impact other property interests through increased runoff, velocities, or degradation. Since each community is unique – and no one knows your community better than you, the local official – NAI provides the flexibility for each community to adapt strategies to fit unique community interests, watershed dynamics, political will, vision, and goals.

Your community can adapt the following approaches to meet your unique management needs:

- ☑ Develop hazard mitigation actions in a Pre-Disaster Mitigation Plan to reduce losses from flooding;
- ☑ Create mutual aid agreements to aid in flood warning and response; and,
- ☑ Implement higher standards to achieve no increase in flood damage through the use of restrictions on impervious cover, no net fill, freeboard requirements, and additional setbacks to take erosion into account.

Under the NAI approach, the developer and community work together to:

- ☑ Identify the impacts of proposed development;
- ☑ Notify potentially impacted property owners;
- ☑ Explore design alternatives to avoid adverse impacts; and,
- ☑ Develop appropriate mitigation measures that are acceptable to locals, neighbors, and the community as a whole.

# The NAI Legal Framework

*“NAI is a PRINCIPLE that leads to a PROCESS that is legally acceptable, non-adversarial, understandable, and palatable to the community as a whole.”*

*- Edward A. Thomas, Esq.; Floodplain Manager, Disaster Response and Recovery Specialist, and Attorney*

NAI does not take away property rights – it protects them by preventing one landowner’s activities from harming others. NAI is not an arbitrary or inflexible denial of development rights, or blanket no-growth strategy. It is a performance-based standard consistently favored by courts when challenged. While no strategy can completely eliminate all possible legal challenges, following the NAI approach to floodplain and watershed management can help to:

- ◆ Reduce the number of lawsuits filed against local governments;
- ◆ Greatly increase the chances that local governments will win legal challenges arising from their floodplain management program;
- ◆ Reduce or eliminate the chances of surprising or alienating developers who want to do business, but find little or no guidance until project design is well underway;
- ◆ Ensure that critical facilities, such as hospitals, schools, police, fire and EMS facilities, are well above current and future flood elevations and fully accessible during flood events;
- ◆ Educate community leaders, families, and businesses regarding the community’s flood risks and how to stay safe in a flood.

*(cont’d on page 4)*

# The NAI Legal Framework (cont'd)

The legal system has long recognized and supported the local community duty to identify hazards and prevent harm. Courts throughout the nation, including the US Supreme Court, have consistently shown great deference to governments acting to prevent loss of life or property, even when protective measures restrict some uses of private property. Recent decisions confirm that:

- ◆ Communities have the legal authority to manage flood risks and development;
- ◆ Communities have the legal responsibility to do so, and may be liable for any harm resulting from failure to exercise that responsibility; and,
- ◆ Property owners who increase flooding or erosion, or violate reasonable watershed or floodplain standards, are intruding on the property rights of others. The community is seen as the first line of defense against this intrusion.

For more information on this subject, please go to the ASFPM website at [www.floods.org](http://www.floods.org) and view the many resources under the No Adverse Impact link.



## Additional fact sheets include:

- #1 Floodplain Basics
- #2 Protecting Property Rights to Reduce Local Liability
- #3 Living with Inadequate Maps
- #4 Using Freeboard and Setbacks to Reduce Flood Damage
- #6 Protecting Lives & Property Through the NFIP Community Rating System.

## For more information, contact:

### **VTDEC River Management Program**

[www.vtwaterquality.org/rivers/htm/rv\\_floodhazard.htm](http://www.vtwaterquality.org/rivers/htm/rv_floodhazard.htm)

### **Vermont Law School's Land Use Institute**

<http://www.vermontlaw.edu/elc/landuse/>

### **Two Rivers-Ottawaquechee Regional Commission**

[www.trorc.org](http://www.trorc.org)

*Produced by the Two Rivers-Ottawaquechee Regional Commission in cooperation with Vermont Law School's Land Use Institute, and the Vermont Department of Environmental Conservation, with Samantha Riley Medlock, CFM V.L.S. '08, as principal author. This paper is a general discussion of legal issues but is not legal advice, which can only be provided by an attorney licensed to practice in Vermont.*