



# Community Liability and Property Rights:

*As Mayor or County Commissioner, should you worry about your liability in the event of a flood?*

May, 2003

## Is Your Community Liable?

When individuals are damaged by flooding or erosion they often file law suits against governments claiming that the government has caused the damages, knowingly allowed actions which contributed to the damages, or failed to provide adequate warnings of natural hazards.

Courts and legislative bodies have expanded the basic rules of liability to make governments responsible for actions which result in, or increase, damages to others. Courts have, according to common law, followed the adage "use your own property so that you do not injure another's property." This adage characterizes the overall landowner rights and duties related to common law nuisance, trespass, strict liability, negligence, riparian rights, surface water law rights, surface water law duties, and statutory liability

Most successful suits against communities result from actions such as construction or inadequate maintenance of dams, levees, roads, and bridges which increase flood damages on other lands.

## What is Common Law Liability?

In the legal research paper "No Adverse Impact Floodplain Management and the Courts", Jon Kusler, Esq. concludes that under common law, no landowner, public or private, has the right to use his/her land in a way that substantially increases flood or erosion damages on adjacent lands.

Communities that cause or permit an increase in flood or erosion hazards may be liable for monetary damages to injured individuals. Increased flood and erosion hazards can be caused by construction projects undertaken, or permitted, by a local government.



If large areas of the floodplain are filled or the watershed developed, then there will be an increase in the land area needed to store flood waters. This means that your home or business may be impacted.

**Landowners damaged by flooding are also suing governmental entities that fail to adequately administer or enforce floodplain regulations, particularly where an issued permit resulted in damage to other lands.**

***Cootey v. Sun Inv., Inc., 690 P.2d 1324, 1332 (Haw., 1984): Hawaiian Supreme Court held that a county may be liable for approving a subdivision with inadequate drainage.***



## Liability Under "Common Law"

Lawsuits are most commonly predicated upon one of four causes of action:

**Negligence:** All individuals have a duty to other members of society to act reasonably in a manner not to cause damage to other members of society. The standard of conduct is that of a reasonable person in the circumstances. Negligence is the primary legal basis for public liability for improper design of hazard reduction measures such as flood control structures, improperly prepared or issued warnings, and inadequate processing of permits.

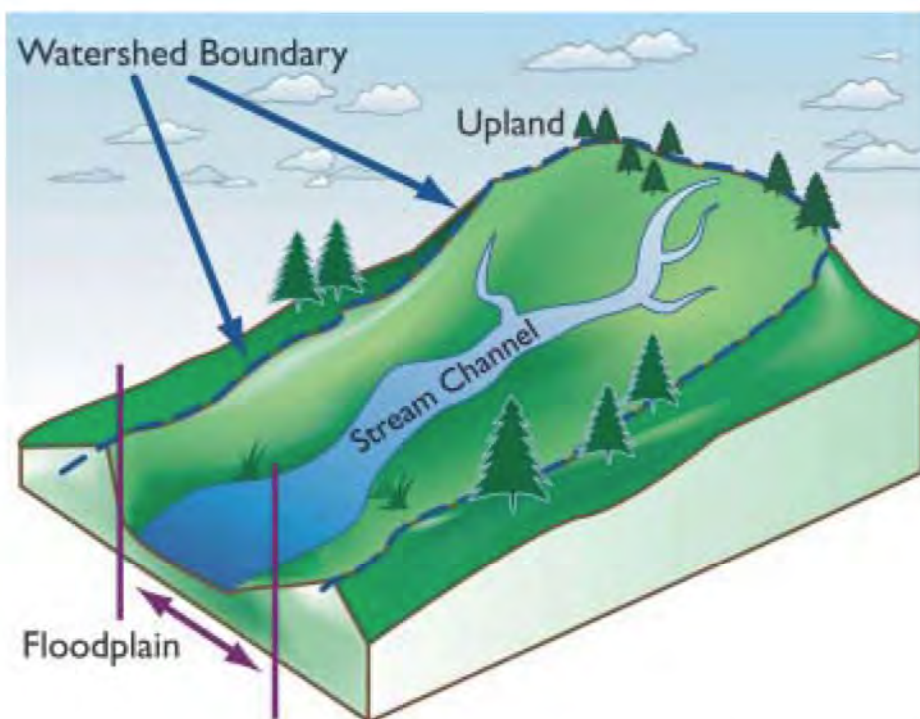
**Nuisance:** No landowner, public or private, has a right to use his/her land in a manner that substantially interferes, in a physical sense, with the use of adjacent lands. "Reasonable conduct" is usually no defense against a nuisance suit.

**Trespass:** Landowners can file trespass suits for certain types of public and private actions which result in physical invasion of private property such as increased flooding or drainage.

**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 their interference with the natural flow of surface water when their actions are 'unreasonable'.

## Reasonable Conduct

The overall issue, in most instances, is the reasonableness of an action by the community or property owner. Due to advances in technology and products, there is an increasingly high standard of care for "reasonable conduct". The "act of God" defense is seldom successful because even rare flood events are now predictable. As technology advances, the techniques and approaches also advance for "reasonable conduct" by engineers and other professionals. Governments are negligent if they fail to exercise the same "reasonable conduct" expected of technical professionals.



*All land area in the watershed drains toward the stream channel; construction in any part of the watershed can impact other properties.*

# Community Liability and Property Rights:

*Does Your Community Need to Worry?*

May, 2003

## Can Your Community Protect Itself From Legal Action?

Your community can protect itself from liability by incorporating the No Adverse Impact approach and making sure that the actions taken in the floodplain, and throughout the watershed, do not lead to adverse impacts on neighbors and neighboring communities. Adverse impacts need to be mitigated to prevent transferring the problems to another property or community.

Your community can incorporate the No Adverse Impact approach in Hazard Identification/Floodplain Mapping, Education/Outreach, Planning, Regulations/Development Standards, Corrective Actions, Infrastructure, and Emergency Services.

Courts have broadly and consistently upheld performance-oriented floodplain regulations including those that exceed minimum FEMA standards. Regulations that require additional freeboard, establish setbacks, impose tighter floodway restrictions, or very tightly regulate high risk areas have consistently been upheld by the courts.

## Your Community May Not Be Protected, Even By Adopting the Minimum Federal Standards

The National Flood Insurance Program requires the adoption of a minimum set of floodplain management criteria in order for communities to be eligible for flood insurance, certain types of disaster assistance, and other federal support. The minimum standards reduce overall flood damages for new construction and may be appropriate for the purposes of managing the flood insurance fund, but FEMA has long supported the adoption of higher standards through its regulations and through programs such as the Community Rating System.

Current NFIP standards for floodplain management allow the following. These impacts may result in successful common law or "takings" suits despite community compliance with minimum federal standards.

- floodwaters to be diverted onto other properties;
- channel and overbank conveyance areas to be reduced;
- essential valley storage to be filled; and
- velocities changed with little or no regard as to how these changes impact others in the floodplain and watershed.

In general, if your community permits development that results in an adverse impact, your community may be liable, even if you meet the minimum federal standards.

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***"Kusler was unable to find a single case where a landowner prevailed in a regulatory takings suit against a municipality's denial of use, where the proposed use would have had any substantial offsite impacts or threatened public safety."***



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## Contact Us...

Association of State  
Floodplain Managers

2809 Fish Hatchery Road  
Madison, WI 53713  
608-274-0123  
608-274-0696 fax

WebSite: [www.floods.org](http://www.floods.org)  
Email: [asfpm@floods.org](mailto:asfpm@floods.org)



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## What is No Adverse Impact?

The Association of State Floodplain Managers recommends a No Adverse Impact approach as a general guide for landowner and community actions throughout the watershed, not just in the floodplain regulated by the federal standards.

In essence, **No Adverse Impact floodplain management is an approach which assures that the action of one property owner or a community does not adversely impact the properties and rights of other property owners**, as measured by increased flood peaks, flood stage, flood velocity, erosion, sedimentation, and costs now and costs in the future. The true strength of the No Adverse Impact approach is that it encourages local decision-making to ensure that future development impacts will be considered and mitigated - a comprehensive strategy for reducing flood losses and costs.

## Want the Legal Reference or More Information?

"No Adverse Impact Floodplain Management and the Courts" will be available on the ASFPM WebSite this summer ([www.floods.org](http://www.floods.org)). It is a peer reviewed legal document that presents detailed information and case law supporting the concepts presented in this flyer. The document is being written as a resource and reference for attorneys.

An additional reference is the NAI Tool Kit which lists specific actions that a community can take to support the No Adverse Impact approach. The NAI Tool Kit will also be available on the ASFPM WebSite this summer.

Other NAI material is already available on the WebSite, [www.floods.org](http://www.floods.org).

*ASFPM will soon be producing another flyer updating "Community Liability and Property Rights" where "takings" and other issues will be discussed*