



Oregon

Kate Brown, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

Fax: (503) 378-5518

www.oregon.gov/LCD



September 8, 2016

TO: Land Conservation and Development Commission
FROM: Matt Crall, Planning Services Division Manager
SUBJECT: **Agenda Item 4, September 22-23, LCDC Meeting**

NATIONAL FLOOD INSURANCE PROGRAM AND ENDANGERED SPECIES ACT

I. AGENDA ITEM SUMMARY

The Department of Land Conservation and Development (DLCD) staff will present information to the Land Conservation and Development Commission (LCDC or commission) about potential changes in the National Flood Insurance Program (NFIP) in response to a biological opinion on the impact of the NFIP on salmon that are listed as threatened under the Endangered Species Act (ESA). The presentation will cover what is known, and outline areas of uncertainty and issues that still need to be resolved. The commission will not be asked to take any actions.

The first section of this report provides background on the two federal programs, and how they intersect with the biological opinion issued this year. The second section of the report describes the work that DLCD has been doing (and will continue) assisting local governments, and advising federal agencies.

For further information, see the [webpage](#) or contact Chris Shirley, National Flood Insurance Program Coordinator at 503-934-0027 or christine.shirley@state.or.us.

II. BACKGROUND

A. National Flood Insurance Program

The Federal Emergency Management Agency (FEMA) operates the NFIP to provide flood insurance to property owners. Property owners are required to purchase flood insurance if:

- The property is located with a Special Flood Hazard Area shown on a Flood Insurance Rate Map published by FEMA;
- There is a mortgage on the property; and
- The mortgage is held by a federally regulated bank.

Property owners can buy insurance from the NFIP only if their local governments chooses to participate in the NFIP. In Oregon, all thirty-six counties participate, and nearly all cities participate. FEMA requires that participating local governments adopt development regulations in flood hazard areas to reduce the vulnerability to floods. FEMA defines a very detailed set of regulation as a minimum standard, and local governments may choose to adopt stricter standards. It is these development regulation that are the subject of this presentation, not the insurance itself.

B. Endangered Species Act

The ESA requires federal agencies to list species as endangered or threatened when the species faces a significant risk of extinction. For marine species, and species that spend a portion of their life cycle in the ocean, that authority rests with the National Marine Fisheries Service (NMFS), which is part of the National Oceanic and Atmospheric Administration. Starting in 1997, NMFS has listed several species of salmon and steelhead in Oregon as threatened.

As part of the listing, NMFS adopted rules prohibiting anyone from taking the threatened species. “Take” is defined very broadly, and includes actions that cause significant habitat degradation. The ESA also includes a special obligation that applies only to federal agencies. If a federal agency is operating a program, funding a project, or issuing a permit that would affect a listed species, then the agency taking that action must consult with the agency that listed the species. The result of consultation is a biological opinion (BiOp) by the listing agency stating whether or not the proposed action would jeopardize the survival and recovery of the species. If the action would jeopardize the species, then the BiOp includes a “reasonable and prudent alternative” (RPA) that would achieve the same purpose, that can be implemented within existing authority, and that would not jeopardize the species.

C. Intersection of the NFIP with the ESA

In 2009 several environmental advocacy groups sued FEMA for failure to consult with NMFS as required by the ESA. The lawsuit alleged that the availability of insurance enables development along rivers that would not otherwise occur. The lawsuit also alleged that FEMA is a de facto regulator of development along rivers because FEMA establishes the regulation that local government adopt and apply. This development along rivers can harm salmon by degrading floodplain functions and instream habitat.

FEMA agreed that they had not consulted with NMFS, and settled the lawsuit without resolving the question of whether the NFIP was actually harming salmon. The settlement agreement required FEMA to initiate consultation with NMFS, which happened in 2012. Consultation is an internal process between two federal agencies. Nevertheless, DLCD staff looked for opportunities to be involved because of the potential impacts to local planning. At several points in the process, the federal agencies were willing to share draft documents with DLCD, and in turn DLCD shared the drafts with a workgroup of local planners. DLCD then provided comments back to the federal agencies. At other points in the process, the two federal agencies negotiated over drafts without involving DLCD.

D. Biological Opinion

The consultation process resulted in a [biological opinion \(BiOp\)](#) written by NMFS and given to FEMA on April 14, 2016. In the BiOp, NMFS documents their conclusion that the NFIP jeopardizes several threatened or endangered species. Most of the document addresses salmon and steelhead, but the document also finds an adverse effect on green sturgeon, eulachon (more commonly known as smelt), and orca. NMFS concluded that development in floodplains displaces important habitat, which fish utilize during floods, and degrades instream water quality and hydrologic conditions.

Because the BiOp is a jeopardy opinion, it includes an RPA that NFMS determined would be sufficient to prevent jeopardy. The BiOp is a scientific “opinion” of NFMS, and a recommendation to FEMA. The RPA is not a federal regulation, and is not directly applicable to local governments. Rather, it is recommendation from NMFS to FEMA describing one option for modifying the NFIP so that it does not continue to jeopardize listed species. FEMA will respond to the BiOp by making changes to the NFIP, but the exact changes are not yet known. FEMA has raised concerns that some of the recommendation in the RPA are beyond their authority. FEMA may implement some elements of the RPA exactly as written. Other elements may be implemented in a modified way, or replaced by actions within FEMA’s authority. To the extent that FEMA deviates significantly from the RPA, there is the possibility of additional lawsuits alleging that the NFIP still violates the ESA.

The elements of the RPA are summarized below, and the [complete text of the RPA](#) is available online.

1. RPA Element 1. Notice, Education, and Outreach.

NMFS recommends that FEMA develop an education and outreach strategy for RPA implementation and provide notice to all affected NFIP participating communities in Oregon (232 cities and counties) regarding the substance of the RPA. FEMA should work with DLCD to provide clear, concise, and timely information to local governments.

2. Element 2. Interim Measures.

Some elements will take over 10 years to fully implement; therefore NMFS recommends that FEMA adopt interim regulations to slow the rate at which development degrades the habitat necessary for species survival and recovery. The RPA states that these interim measure alone are inadequate to avoid continued decline of threatened fish populations and loss of habitat, and thus they would be replaced with Elements 3 and 4 over time. The key concept within Element 2 is mitigation. Development within designated flood hazard areas would be accompanied by mitigation “to achieve no net loss of natural floodplain function.” The RPA calls for FEMA to have local governments implement these standards by April 2018; however, FEMA has not yet provided specific guidance on what will be required of local governments, nor set a date by which these standards will be mandatory for NFIP communities. FEMA intends to prepare this guidance using input from state and local governments, and provide it by spring of 2017.

3. Element 3. Mapping Flood and Flood-Related Hazard Areas.

NMFS recommends that FEMA implement new standards to identify and map flood hazard and erosion hazard areas. Key changes include:

- Using more complex flood models;
- Mapping of 90th percentile values of 100-year flows as the base flood elevation instead of the 50th percentile that is currently used;
- More conservative floodway calculations that are likely to result in wider floodways;
- Mapping channel migration zones; and
- Projecting how climate change will increase hazards areas in the future.

Element 3 will impact local governments only after FEMA adopts some or all of the changes to the mapping protocols, and then produces new maps using the new protocols. If and when that happens, local governments would be required to adopt the new flood hazard maps and use them to regulate development.

4. Element 4. Floodplain Management Criteria.

NMFS recommends that FEMA develop new NFIP criteria and revise existing criteria for floodplain management. Local governments would then adopt the revised criteria. Revisions requested in Element 4 include:

- Limits on development and some uses in high hazard areas (frequently flooded or subject to flood related erosion);
- Restriction on lot divisions that create buildable parcels entirely within the SFHA;
- Limits on the creation of new impervious surfaces in the SFHA; and
- Mitigation standards for adverse impacts associated with floodplain development and removal of riparian vegetation.

5. Element 5. Data Collection and Reporting.

NMFS recommends that FEMA collect data on floodplain development and report annually to NMFS. FEMA would require local governments to gather this additional information and report to FEMA using a standardized reporting form or online system.

6. Element 6. Compliance and Enforcement.

NMFS recommends that FEMA use existing auditing and technical assistance processes to ensure participating communities comply with new FEMA guidance and standards developed in response to the RPA.

III. DLCD ROLE

DLCD has been the statewide coordinator for NFIP for several decades, serving as an intermediary between FEMA and local governments. DLCD staff help local governments meet the requirements of the NFIP, and audit local floodplain management programs to ensure continued compliance. Outreach and education is also part of DLCD's role. DLCD provides training to and answers questions from local government staff, property owners, surveyors, engineers, real estate agents and others. This work is funded through an annual grant from FEMA.

Over the past several years, FEMA has provided additional funding for DLCD staff to address the federal ESA consultation. The work increased dramatically after the BiOp was released. Two specific examples are described below.

A. Regional Meetings

DLCD coordinated ten meetings in June and July in areas of the state covered by the BiOp. Staff from FEMA and NMFS made presentation and answered questions. Over 227 people attended the meetings. The purpose of the meetings was twofold:

1. Provide more clarity on what the interim measures in the RPA require, what they do not require, and FEMA's approach to addressing the RPA; and
2. Listen to questions, concerns and suggestions voiced by local governments, consultants and individuals who would be affected by changes to the NFIP.

One valuable outcome of the meetings was that staff from NMFS, FEMA and DLCD all heard the same questions, and could see just how much confusion exists about the elements of the RPA. Some of the confusion could be resolved at the meetings with clarifications from NMFS, FEMA or DLCD. Midway through the series of meetings, NMFS issued a "[Questions & Answers](#)" document to address several issues that came up repeatedly. There were other question that could not be fully answered at the meetings, and DLCD is compiling a list to follow up with FEMA and NMFS.

Another valuable outcome was that FEMA provided more clarity about implementing the RPA. FEMA has determined that the interim measures in Element 2 are within their authority, that it will take two or three years to implement the interim measures in Element 2, and that it will be staff in the Region 10 office who will do this work. The mapping changes in Element 3 and program changes in Element 4 are projected to take a minimum of 8 years to consider, with the work being done by staff at the headquarters in Washington D.C.

B. Workgroups

DLCD is establishing several workgroups to gather information and assess options for implementing the interim measures. DLCD will provide the results of these workgroups to FEMA for consideration as FEMA implements the interim measures. The workgroups and initial descriptions are listed below. More information is [available online](#) including lists of the questions that the workgroups could address and expected products.

1. Permitting Process

This workgroup will focus on the local permitting process for development in the special flood hazard area.

2. Assessing and mitigating habitat impacts

This workgroup will focus on the mechanics of reviewing projects for their potential impact on floodplain functions that support salmon and their habitat. It will explore the benefits and limitations of applying existing strategies for habitat protections to a local permitting process.

3. Legal

This workgroup will review how ESA, state laws and state administrative rules interact. The group will investigate local government obligations that will be triggered by code amendments that make development in floodplains more difficult to permit, due to added cost, added process, or possible new limits on the type of development allowed. It will also seek a better understanding of the intersection between a local government's direct obligation and options under the ESA and new NFIP directives that resulted from the biological opinions in Washington and Oregon.

4. Mapping

This work group will focus on the challenges of identifying landscape features described in the RPA Element 2 for use by local governments in applying various mitigation standards.

IV. ATTACHMENTS

None. Additional information is available online:

http://www.oregon.gov/LCD/Pages/NFIP_BiOp.aspx