



FEMA

June 13, 2016

In 2009, the U.S. Department of Homeland Security's Federal Emergency Management Agency (FEMA) was sued by the Audubon Society of Portland, the National Wildlife Federation, the Northwest Environmental Defense Center, and the Association of Northwest Steelheaders for failure to consult under Section 7 of the Endangered Species Act (ESA) with respect to the effects of the implementation of the National Flood Insurance Program (NFIP) on certain ESA-listed species in the state of Oregon. On July 12, 2010, the United States District Court, District of Oregon at Salem, required FEMA to consult with the National Marine Fisheries Service (NMFS) on impacts the NFIP was having on ESA listed species. FEMA complied by submitting a Biological Assessment in July of 2011 to NMFS, which concluded the NFIP may affect, but does not adversely affect, the ESA-listed species considered in the assessment.

On April 14, 2016, NMFS provided a Biological Opinion in which they concluded that the implementation of the NFIP in Oregon jeopardizes the continued existence of 18 ESA listed species and adversely modifies their critical habitat. Federal agencies are prohibited by the ESA from causing jeopardy to ESA-listed species or adversely modifying the designated critical habitat of such species. Although the NMFS Biological Opinion's determination is written for FEMA, the Endangered Species Act (ESA) applies to everyone, whether a federal agency, state agency, local jurisdiction, or individual. We all have a legal responsibility to ensure our actions do not cause a take (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct) to threatened or endangered species. Under Section 9 of the ESA, actions or decisions enacted by you and your officials are subject to this take prohibition regardless of federal involvement. Additionally, any person can be subject to criminal or civil penalties for causing a take of threatened or endangered species. NMFS considers the issuance of floodplain development permits that do not avoid or compensate for detrimental impacts on ESA-listed species or their critical habitat as noncompliant with the Endangered Species Act. NMFS identifies certain private floodplain development activities as harmful to listed species, including the addition of fill, structures, levees and dikes, the addition of impervious surfaces, removal of vegetation, and bank armoring. NMFS has determined that these activities impair natural floodplain functions and thereby negatively impact the survival and recovery of ESA-listed species.

With a jeopardy determination, NMFS is obligated to provide a Reasonable and Prudent Alternative (RPA), which are program changes to the NFIP that will allow the program to be implemented in a manner that avoids jeopardy to ESA-listed species and adverse

modification of their critical habitat. For details on these program changes, please see the RPA attached to this letter or the complete NMFS Biological Opinion at <http://www.westcoast.fisheries.noaa.gov/habitat/conservation/index.html>.

As envisioned by NMFS, the RPA is intended to be implemented in stages, with two different sets of program changes that will need to be implemented by FEMA and the NFIP participating communities. The first set of program changes are interim measures found in Element 2 of the RPA, which must be implemented within 2 years of the issuance of the Biological Opinion (April 14, 2018). These measures will remain in place until FEMA and the participating communities implement the second set of program changes (Elements 3-6 of the RPA), which are the permanent program changes to the NFIP required by the RPA. NMFS requires the interim measures in Element 2 to be superseded by the permanent floodplain management criteria in RPA Element 4 that do not require regulatory revisions (such as revising the Code of Federal Regulations) by January 1, 2019. All elements of the RPA that do not necessitate regulatory revisions are to be implemented by September 15, 2019 and complete implementation, including regulatory revisions, is required to occur by January 1, 2021.

The NMFS Biological Opinion authorizes a certain amount of jeopardy or adverse modification to ESA-listed species or their habitat during the time necessary for FEMA and participating NFIP communities to implement the complete RPA. During this interim time and until all permanent RPA elements are in place, your community may either choose to voluntarily impose a temporary moratorium on all floodplain development that adversely impacts ESA listed species or their habitat, or voluntarily implement the interim measures found in RPA Element 2. Oregon DLCDC and FEMA will develop guidance to help your community implement these interim requirements.

FEMA and Oregon DLCDC will be inviting you and other interested stakeholders to participate in workgroups to identify options and methods that communities can implement, with respect to the RPA. These implementation options may include guidance, training, and technical assistance. One example is the development of a model ordinance that would meet FEMA's minimum criteria while also incorporating the requirements of the RPA. Once this model ordinance is finalized, it will be shared with all interested communities.

The RPA comprises six elements or sections, and a full copy of the RPA is provided as an attachment to this letter. Element 1 involves notice, education, and outreach regarding the outcome of FEMA's consultation with NMFS on the implementation of the NFIP in Oregon. This letter is part of that requirement for FEMA to provide Notice of the Biological Opinion and RPA. RPA Element 1 encourages communities to send data or information on locally identified flood-related hazards due to erosion or inundation, including anticipated flooding patterns influenced by build-out, climate change or sea level rise, which are not currently reflected on effective Flood Insurance Rates maps (FIRMs) to the FEMA Region X office by August 12, 2016. In addition, the RPA recommends that substantially improved and new structures (as defined in the RPA) placed in the Special Flood Hazard Area should be elevated by methods other than fill, and that proponents of projects that involve adding fill exceeding 50 cubic yards should pursue CLOMR-Fs prior to LOMR-Fs to ensure ESA

compliance is obtained prior to undertaking floodplain development. This element also requires FEMA to provide guidance to communities regarding elevating structures in a manner that minimizes the adverse effects to natural floodplain functions. For information on elevating structures, please see the attached Frequently Asked Question document - Elevating Structures Without Fill.

In Element 2 of the RPA, NMFS has laid out a set of Interim Measures expected to be implemented within 2 years and requires that all development in the SFHA be mitigated to achieve no net loss of natural floodplain functions. Element 2 includes requirements for mitigation ratios, impervious surfaces, stormwater, floodplain management standards, riparian buffers, LOMCs and CLOMCS, and floodplain development permit reporting. FEMA will be working to provide you with guidance regarding how to achieve the requirements listed in RPA Element 2.

Additionally, to help minimize the time and effort imposed upon your staff resulting from the floodplain development permit reporting requirement, FEMA intends to use a Microsoft Excel based reporting tool that will be sent to each community to track all new development occurring in floodplains. Once the interim RPA requirements are in place, if communities issue floodplain development permits without reporting said development or without mitigating for adverse effects on ESA listed species or their habitat, FEMA will be required, in coordination with NMFS acting under their own authority, to initiate appropriate enforcement action.

Element 3 requires use of revised mapping protocols and methodologies for the stated purpose of improving the identification of special hazard areas. The RPA also requires several additions to the Flood Insurance Rate Maps, including the future conditions floodplain, erosion zones, and channel migration zones.

Element 4 requires revisions to the floodplain management criteria to, among other things:

- Include a generally applicable ESA performance standard;
- Prohibit almost all development in an area known as the High Hazard Area (floodway, V-Zone, LiMWA, erosion zone);
- Prohibit re-drawing of the floodway to accommodate floodplain development;
- Require a 60 year erosion setback area with very limited uses (agricultural, open space, temporary structures); and
- Significantly restrict subdivisions of lots.

Element 4 also requires extensive compensatory mitigation requirements in the areas where floodplain development is not otherwise prohibited. FEMA will be working to provide you with guidance regarding how to achieve the requirements listed in RPA Element 4.

Element 5 requires data collection and describes reporting requirements needed to accurately track floodplain development impacts and RPA implementation. Element 6 speaks to compliance and enforcement requirements of the RPA and the associated timelines for compliance.

FEMA recognizes that many of you have already been implementing measures that compensate/mitigate floodplain development actions affecting ESA-listed species and their habitat. However, for others, these requirements may pose an additional workload on your community. We will work diligently with you, State resource agencies, and NMFS to offer guidance and resources that will help facilitate this transition. We will keep you advised and look forward to working with interested stakeholders to develop our strategy for implementation. If you have any questions, please email FEMA-R10-ESAccomments@fema.dhs.gov or contact Scott Van Hoff, Senior NFIP-ESA Specialist at 425-487- 4677.

Sincerely,

Mark Carey,
FEMA Region X Mitigation Division Director

cc: FPA
State NFIP Coordinator
Kim Kratz, NMFS

Attachments: Oregon NFIP Reasonable and Prudent Alternative (RPA)
FAQ- Elevating Without Fill

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