

Draft Community Implementation Strategy for the Interim Measures of the April 14, 2016 NMFS Biological Opinion for Oregon¹

Implementation of the Biological Opinion in Oregon

On April 4, 2016, the National Marine Fisheries Service (NMFS) analyzed the effects of the NFIP on species listed as threatened or endangered under the Endangered Species Act (ESA) and issued a Biological Opinion (NWR-2011-3197). The Biological Opinion concluded that the implementation of the NFIP in Oregon, as currently established, is likely to jeopardize the continued existence of 16 anadromous fish species and the Southern Resident killer whales, all of which are listed as threatened or endangered under the ESA, and result in the destruction or adverse modification of designated or proposed critical habitat for the 16 anadromous fish species. A Reasonable and Prudent Alternative (RPA) included within the Biological Opinion proposed measures to avoid jeopardizing listed species and avoid adversely modifying critical habitats. In order to meet these requirements for change in NFIP implementation, FEMA must change the minimum requirements for NFIP participation for communities in Oregon.

Timing and Approach to RPA Implementation

As envisioned by NMFS, the RPA is intended to be implemented in stages, with two different sets of program changes that would 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 by FEMA 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 to be implemented by January 31, 2021. NMFS anticipates that several years will be needed to incorporate and implement the conditions prescribed in the RPA. Therefore, the RPA recommends a phased approach to implementation.

¹ The draft implementation strategy laid out in this document is being offered for the purpose of soliciting the state's input on the strategy for implementation of the National Marine Fisheries Service's Reasonable and Prudent Alternative for the implementation of the National Flood Insurance Program in Oregon. This document is only a draft; it does not constitute a final implementation plan for any purpose, including compliance with federal laws such as the National Environmental Policy Act. Moreover, the content of this document is not intended to reflect FEMA's internal strategy with respect to the program, legal, or regulatory mechanisms necessary to bring about these proposed program changes; that strategy is still under development.

Draft Implementation Strategy for the Interim Requirements of the RPA

To meet the requirements of the first stage of implementation (interim measures), FEMA is offering the following three proposed options to meet the new minimum requirements for NFIP participation:

1. Local governments may enact regulations to only allow development that meets the criteria specified in the Biological Opinion by adopting the Model Ordinance included at Appendix A; or
2. Local governments may utilize the Biological Opinion and FEMA guidance documents to include elements in the community's comprehensive plan, zoning regulations, and/or development review processes that meet or exceed the minimum requirements for habitat protection. A Checklist for Programmatic Compliance has been created to assist communities in developing the documentation to show how existing rules and regulations, when combined with the NFIP, would ensure protection to the 17 ESA-listed species and the habitat of 16 of those species, is included as Appendix B.
3. Local governments may demonstrate compliance with the requirements of the interim measures of the Biological Opinion on a permit-by-permit basis through review of habitat impact assessments completed by each permit applicant.

Option 1, once adopted, provides the simplest and most streamlined compliance pathway for a municipality. Communities that adopt and enforce the Model Ordinance in Appendix A will be considered to be in compliance with the interim measures of the Biological Opinion.

Option 2 provides an opportunity for localities to propose alternative methodologies to achieve no net loss of natural floodplain and habitat functions from proposed development. If a community can establish to FEMA that the effects of its programs and regulations currently in place achieve at least the same level of floodplain and habitats protection that the adoption of the Model Ordinance would have, then the community will be considered to be in compliance with the ESA.

Alternatively, a community may demonstrate how their funded restoration activities will offset the anticipated impacts of future development. This analysis must demonstrate how the beneficial activities outweigh the anticipated impacts. A Checklist for Programmatic Compliance has been created to assist communities in developing the documentation to show how existing rules and regulations, when combined with the NFIP, would ensure protection to the 17 ESA-listed species and the habitat of 16 of those species, is included as Appendix B. The application submitted by the jurisdiction must specifically identify any existing regulations that serve to meet the requirements of the Biological Opinion and fully explain how all requirements of the interim measures of the Biological Opinion are met under the community comprehensive plan and related local planning regulations. If community regulations need to be amended, or additional regulations need to be adopted, language from the noted section in the Model Ordinance can be used.

Option 3 would require the local jurisdiction to review and approve a habitat assessment prior to issuance of each floodplain development permit. Under this option, the community would require each applicant for a permit to develop in the floodplain to determine, through a habitat assessment, that the proposed development meets or exceeds the protection measures outlined in the interim measures of the Biological Opinion. The Habitat Assessment Guide and the Habitat Assessment Worksheet are included herein as Appendix C and D. Each of these habitat assessments must describe the pre-project environmental baseline conditions and the estimated direct, indirect, interrelated, interdependent, and cumulative effects of the proposed action on any potentially present NMFS-administered ESA-listed species and/or their designated critical habitats. Under this option, the community's permitting officials must undertake a parcel-by-parcel review of all proposals to develop in the floodplain. This would require specialized training and knowledge among the local staff, or contract support, or other technical assistance from neighboring communities, tribes, or the state. It is highly recommended that communities who choose this option grant themselves the substantive authority to require habitat assessments. Sample language can be found in Appendix E.

The appendices included herein provide additional supporting guidance for communities as follows:

Appendix A: Model Ordinance

Appendix B: Checklist for Programmatic Compliance

Appendix C: Habitat Assessment Guidebook

Appendix D: Habitat Assessment Worksheet

Appendix E: Sample Ordinance Language for Requiring Habitat Assessments

Note: These Appendices are being finalized and are not ready for release at this time.

Once the strategy becomes a final plan, all communities must choose one of these options by **XXXX xx.xxxx** and notify FEMA Region 10 of the selection in writing at the following address:

FEMA Region 10
Mitigation Division
130 228th Street SW
Bothell, Washington 98021

Outreach and Technical Assistance

FEMA will provide outreach and technical assistance to assist the Oregon communities in understanding these proposed options and their responsibilities going forward. FEMA is providing the State of Oregon the draft Community Implementation Strategy for a two week comment period. It is expected that the State's comments on the proposed draft options will provide the critical feedback necessary to inform FEMA's determination of future alternatives and the appropriate level of federal environmental review, in accordance with the National

Environmental Policy Act (NEPA). Upon completion of the NEPA review and determination, the Final Plan will be distributed, followed by a series of workshops that will discuss the NFIP and its correlation to the ESA, as well as the three compliance pathways available to NFIP participating communities. FEMA will also hold a number of meetings with locations selected such that each affected community would be within a reasonable distance to allow attendance at one or more meetings. Additionally, FEMA will provide supporting guidance documents, including the guidance listed above, a series of Frequently Asked Questions, and technical guidance documents.

FEMA will also provide ongoing technical assistance and guidance to the Oregon communities in implementing their chosen option. New guidance will be developed, and existing guidance refined, as FEMA learns more about the needs of the Oregon communities in meeting these program requirements. FEMA will look to partnership opportunities with the state, the communities, and stakeholder groups to help effectively implement these program requirements at all levels,

Reporting Requirements

The RPA also requires FEMA to collect data on floodplain development projects approved by communities. To that end, FEMA will develop a reporting tool to facilitate the submission of floodplain development information from each affected community. The data collected will also help FEMA identify communities that may need additional assistance in implementing the measures of the RPA, which may be provided through Community Assistance Visits and review of community floodplain management programs. Additional information regarding the timeline for reporting and the content that must be reported will be provided once the Reporting Tool is approved through the Paperwork Reduction Act review.