



**DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION**

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**FEDERAL EMERGENCY MANAGEMENT AGENCY
EIS: 20250118; UIN: EISX-024-70-EHP-1749205091
NATIONAL FLOOD INSURANCE PROGRAM– ENDANGERED SPECIES ACT
INTEGRATION IN OREGON**

**STATE OF OREGON,
BY AND THROUGH ITS DEPARTMENTS OF
LAND CONSERVATION AND DEVELOPMENT, FISH AND WILDLIFE,
TRANSPORTATION, AND THE OREGON WATERSHED ENHANCEMENT BOARD**

COMMENTS ON DRAFT ENVIRONMENTAL IMPACT STATEMENT

The State of Oregon thanks the Federal Emergency Management Agency (FEMA) for the opportunity to review the Draft Environmental Impact Statement (DEIS) for the Draft Oregon Implementation Plan for National Flood Insurance Program (NFIP) – Endangered Species Act (ESA) Integration, dated August 2025. Broadly speaking, the state has three comments:

1. FEMA should not select Alternative 3.
2. If FEMA implements Alternative 2, FEMA should continue to refine the implementation plan.
 - a. Give preference for mitigation as part of larger restoration projects, not small piecemeal mitigation.
 - b. Exempt projects on the Pacific Ocean from requirements for flood storage capacity.
 - c. Require care of replacement trees to ensure survival.
3. FEMA should protect threatened species by reducing permit requirements for habitat restoration projects.

Details on these comments are provided below.

1. FEMA should not select Alternative 3.

Alternative 3 would require cities and counties to apply the no net loss standard to projects that have already demonstrated compliance with the ESA through other avenues. This redundant regulation would have a significant negative impact to the state of Oregon, primarily to the Oregon Department of Transportation (ODOT).

ODOT often constructs and maintains critical transportation infrastructure in special flood hazard areas. ODOT already has a robust program to comply with the ESA for work throughout Oregon, not just in special flood hazard areas. Routine maintenance work and federal aid projects use design criteria and best management practices contained within programmatic ESA documents. These criteria are well-reasoned and time-tested. They comply with the ESA and protect ESA-listed species. This approach provides the predictability and efficiency necessary to construct and maintain critical transportation infrastructure on a broad scale.

The DEIS does not adequately consider reasonably foreseeable effects of Alternative 3 to increase cost and delivery timeframes for transportation projects and maintenance activities. If FEMA selects Alternative 3, the DEIS would need to be revised to include more information on these effects.

The DEIS says that FEMA does not have a reliable estimate of numbers of projects that would comply with the ESA through other avenues. Reliable data is available or could be readily generated in an environmental review. To date in 2025, ODOT has sought 12 floodplain development permits for ODOT actions with a federal nexus within Area 1 (Clatsop County, Columbia County, Tillamook County, and a portion of Washington County). All of these 12 actions used a programmatic ESA consultation. Since 2013, ODOT has processed an average of 32 projects per year under the Federal Aid Highway Program Programmatic Biological Opinion. ODOT also uses the Standard Local Operating Procedures for Endangered Species (SLOPES) from the Army Corps of Engineers for additional projects. Information about all these projects is available in public records.

The DEIS does not adequately describe the impact of Alternative 3 on maintenance and repair. The DEIS states that the no net loss standard would not apply to normal maintenance of streets, sidewalks, roads, and utilities within the existing footprint. Effective maintenance and repair often extends slightly beyond the existing footprint to restore proper function. For example, repairing scour below embankments would go beyond the footprint of embankment at the time of the repair. Under Alternative 3, many routine maintenance and repair actions would be subject to no net loss standards. The increased cost and implementation delays for these maintenance actions would result in deferred maintenance, reduced safety, and less preventative maintenance. This impact to the transportation network is larger than what is described in the Alternative 3 analysis.

Alternative 3 would increase the cost of maintaining mitigation sites, which would reduce the amount of funding for maintaining critical transportation infrastructure.

The DEIS does not adequately describe the impacts of Alternative 3 to architectural resources. Alternative 3 would increase the cost and delivery timeframe for projects to rehabilitate historic structures such as bridges. This would be detrimental to the structural integrity of historic structures.

The DEIS does not adequately describe the impacts of Alternative 3 to fish and aquatic wildlife. Alternative 3 would increase the cost and delivery timeframe for some projects that benefit fish and aquatic wildlife. On average, ODOT leads 26 projects each year that improve fish passage. Alternative 3 would increase the cost and thus reduce the number of these projects that can be completed each year.

FEMA should not select Alternative 3.

2. If FEMA implements Alternative 2, FEMA should continue to refine the implementation plan.

a. Give preference for mitigation as part of larger restoration projects, not small piecemeal mitigation.

The implementation plan encourages a watershed-scale approach to no net loss of floodplain functions, but it does not do enough to enable and guide cities and counties to prioritize mitigation sites at the landscape scale. Appropriate siting of mitigation projects is essential to ensure that lost ecological functions and values are effectively replaced. FEMA should encourage cities and counties to use watershed-scale mitigation that aligns with existing local, state, and federal restoration priorities to address limiting factors in the habitat for threatened species. This includes enabling joint mitigation banks, identifying ecologically meaningful offsite mitigation areas, and leveraging ongoing restoration projects to maximize benefits. FEMA should allow and encourage cities and counties to develop a mitigation fund where applicants would fund existing high-priority habitat restoration projects in the watershed in lieu of a single mitigation project. This could increase restoration efficiency, be monitored for any adaptive management needs, and improve long-term ecological outcomes.

Cities and counties will need better guidance on how to incorporate state conservation and restoration planning tools into mitigation planning. The implementation plan references some state data sources (for example the COMPASS database from the Oregon Department of Fish and Wildlife), but it does not address the full range of conservation datasets that could help identify high-value priority areas for mitigation opportunities. FEMA should work with the State of Oregon to create guidance for cities and counties on what data to use to design the best mitigation projects.

b. Exempt projects on the Pacific Ocean from requirements for flood storage capacity.

The model code in Path A would treat all flood zones the same for flood storage capacity. In some flood zones, however, the source of flooding is the Pacific Ocean, not a river. This includes coastal areas with tidal influence, Zone V and VE on flood insurance rate maps. The surface elevation of the Pacific Ocean will not change as a result of fill placed in these flood hazards areas. Furthermore, compensatory storage would be extremely difficult in areas where the ocean is constantly altering the landscape. Therefore, the model code should not require compensatory flood storage capacity as mitigation in these areas.

c. Require care of replacement trees to ensure survival.

The model code in Path A would require applicants to plant new trees to mitigate for trees removed from the special flood hazard area as part of a development. However, not all newly planted trees will survive without care. The model code should include a requirement for applicants to monitor the newly planted trees and provide appropriate care, including replanting if a newly planted tree dies. Without this requirement, mitigation is unlikely to succeed at restoring the floodplain function that is lost when trees are removed.

3. FEMA should protect threatened species by reducing permit requirements for habitat restoration projects.

In 1999, the FEMA Region 10 office issued a “Policy on Fish Enhancement Structures in the Floodway”. The policy reduced the permitting barrier for habitat restoration projects, and thus reduced the impact of the NFIP on threatened species. The policy was in effect when FEMA initiated ESA consultation with the National Marine Fisheries Service (NMFS), and was still in effect when NMFS issued a biological opinion in 2016. On August 14, 2020, FEMA rescinded that policy, which had a negative impact on threatened species. The State of Oregon raised this issue in scoping comments on May 5, 2023. The proposed implementation plan does not fix this problem, and the DEIS does not address this issue. FEMA should use the implementation plan to reduce the permitting requirements for habitat restoration projects.

The permitting requirements have been a burden to habitat restoration in Oregon, including projects by the Oregon Department of Fish and Wildlife (ODFW) and the Oregon Watershed Enhancement Board (OWEB). OWEB is a non-regulatory agency that provides grants for restoration and conservation. Since the 2020 rescission, OWEB has seen a significant increase in the cost of instream and floodplain restoration projects. This is due to the new requirement that grantees complete expensive hydraulic and hydrologic analyses for habitat restoration projects to be permitted locally. FEMA should require cities and counties to permit habitat restoration

projects for species protected under the ESA without a conditional letter of map revision (CLOMR) or letter of map revision (LOMR) provided that no structures will be adversely affected by the project, and that the rise is kept to the minimum practicable while meeting the goals of the project.

FEMA should develop a programmatic approach and direct cities and counties to use the programmatic approach when reviewing common restoration and mitigation practices. This should include pre-approval for projects that meet ecological and floodplain standards. For example, placing large wood to restore stream function should not be treated as introducing new structural development. Fish screens and passage improvements should be recognized as mitigation rather than new development. This will reduce permitting complexity, reduce costs, shorten restoration timelines, and reduce the regulatory burden of the NFIP that slows the pace and scale of habitat restoration for the recovery of threatened species.

FEMA should protect threatened species by reducing permit requirements for habitat restoration projects.

Sincerely,

/s/ Jesse D. Ratcliffe

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