



Court Concludes that FEMA's Implementation of the Puget Sound Biological Opinion is Close Enough for Government Work

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On Friday, October 24, 2014, Judge Martinez (Western District of Washington) issued his final order in [National Wildlife Federation v. FEMA, et al.](#), Case No. C11-2044-RSM. Judge Martinez granted the Federal Emergency Management Agency's Motion for Summary Judgment affirming FEMA's approach to implementing the 2008 Biological Opinion issued by the National Marine Fisheries Service (NMFS) regarding the effects of the National Flood Insurance Program on threatened and endangered species (T&E species) and critical habitat in the Puget Sound region (NFIP BiOp).

While ostensibly a significant victory for FEMA, the implications of this decision for local governments and property owners/developers are murky. According to the decision, where an action agency (here FEMA) does not fully implement the specific recommendations from a biological opinion, it is up to the challenging party (here The National Wildlife Federation (NWF)) to demonstrate that the action agency's substitute efforts are arbitrary and capricious. For local governments, however, the benefit of this deference is less clear. Judge Martinez appears to have shifted the obligation to implement the NFIP BiOp's onerous development restrictions from FEMA to each of the 122 Puget Sound jurisdictions that participate in the NFIP.

Background

This litigation dates back to 2004 when NWF first sued FEMA for failing to consult in Washington State regarding the effects of the NFIP on T&E species and their habitat. Judge Zilly (Western District of Washington) agreed and ordered FEMA to initiate consultation under Section 7 of the Endangered Species Act (ESA) with NMFS regarding several components of the NFIP, namely its mapping program, minimum development standards, and Community Rating System.

That consultation resulted in NMFS's issuance of the NFIP BiOp in September 2008, which concluded that FEMA's then-current approach to implementing the NFIP was jeopardizing the continued existence of several endangered salmon species and killer whales. As part of that NFIP BiOp, NMFS proposed a seven element "Reasonable and Prudent Alternative" (RPA) outlining how FEMA could change its implementation of the NFIP to avoid its impacts on T&E species and their critical habitat.

Current Litigation

After three years of negotiations between NMFS and FEMA regarding the meaning of those RPAs, NWF again sued FEMA in the fall of 2011, this time asserting that FEMA had failed to implement the RPAs as written and consequently was continuing to jeopardize T&E species and their habitat. In the spring of 2012, NWF sought an order enjoining FEMA from selling flood insurance in the Puget Sound region until FEMA had more fully implemented the RPAs. Judge Martinez denied that request on the grounds that NWF had failed to demonstrate any irreparable harm to the T&E species or habitat.

Thereafter, NWF and FEMA (supported by the intervenors) filed cross motions for summary judgment. NWF argued that FEMA's implementation of the RPAs was inadequate because it did not conform to the letter of the RPA, particularly the specific development regulations set forth in Appendix D to the NFIP BiOp. NWF asserted that FEMA was relying too heavily on local governments to meet the obligations imposed by the RPA and that local governments were largely continuing to process permits for

floodplain development with little consideration of the NFIP BiOp or the RPA. FEMA, by comparison, argued that it lacks land use authority and can only seek to assist local governments in implementing the RPAs through one of several possible approaches (what FEMA calls the 3 Door approach).

On Friday, Judge Martinez affirmed FEMA's approach and rejected NWF's challenge. In particular, Judge Martinez wrote:

[A]s FEMA notes, it is not a land-use authority and it can only provide guidance, technical assistance, require reporting, and institute enforcement actions, which is what is required of it under the RPA. FEMA believes that it has done, and continues to do, what it can with the authority it has.

The BiOp states that it is the local jurisdiction with permitting authority that must demonstrate to FEMA that any proposed development will not adversely affect protected habitat.

p. 20. The Judge went on to explain that where the local government fails in this duty, the BiOp sets up an elaborate multi-step process through which FEMA is to mitigate for any floodplain habitat impacts not addressed in the local permitting process.

This decision is a clear win for FEMA, but the impact is less clear for NWF or the local governments and property owners who intervened in the suit. While NWF failed in getting the Court to order FEMA to implement the specific development prohibitions and restrictions set forth in the RPA (e.g., no development that has any "adverse effect" within 200 feet of the marine shoreline and within up to 250 feet from high class rivers), the Court's decision does imply that NWF could challenge individual jurisdiction's implementation of the RPA's development standards. This could be a significant shift in the landscape – as the NFIP BiOp is between FEMA and NMFS, and did not include any local jurisdictions in the consultation. This decision appears to make the terms of a federal agency to federal agency ESA consultation and BiOp directly applicable to local governments and local land use decisions *absent* any apparent federal action or federal nexus.

On the other hand, the Judge's decision also recognizes that each community's existing environmental conditions vary and that the BiOp can only require Puget Sound communities to preserve existing floodplain and habitat functions, not create them where they do not exist. Further, the Judge criticized NMFS for creating an entirely new standard – the "no adverse effects" standard – that is neither drawn from the ESA nor well defined in the BiOp itself. ("It is the BiOp, not FEMA, that created the undefined 'no adverse effects' enforcement obligation." P. 21). In so doing, he acknowledged that each local government will not be required to implement the specific development restrictions outlined in the RPA. Instead, Judge Martinez affirmed that each local community is best able to determine how to comply with the general standards (i.e., "no adverse effect") outlined in the RPA within its boundaries.

It remains to be seen whether any party will appeal Judge Martinez's decision to the 9th Circuit Court of Appeals, or *equally important*, whether this decision will change how either FEMA or the 122 NFIP participating jurisdictions in the Puget Sound region enforce or apply the BiOp and RPA to development in the region.

For More Information

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