



Oregon Communities and Developers Face Significantly Heightened Standards Following ESA Consultation on National Flood Insurance Program

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On April 14, 2016, the National Marine Fisheries Service (NMFS) released its Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion regarding the Federal Emergency Management Agency's (FEMA) implementation of the National Flood Insurance Program (NFIP) in Oregon (Oregon BiOp).

Similar to the 2008 Biological Opinion issued by NMFS regarding the NFIP in the Puget Sound region (the Puget Sound BiOp), the Oregon BiOp concludes that the Oregon NFIP allows and encourages floodplain development that jeopardizes the continued existence of 16 ESA-listed anadromous fish species and Southern Resident killer whales, and results in the destruction or adverse modification of critical habitat for the fish species. In contrast to the Puget Sound BiOp, where NMFS permitted FEMA to rely heavily on local governments to implement more restrictive floodplain development standards, the Oregon BiOp takes a different approach to the "reasonable and prudent alternative" (RPA), and directs FEMA to change significant portions of the NFIP at the national level. Specifically, NMFS directed FEMA to change mapping protocols and the minimum floodplain regulatory criteria that all local jurisdictions must adopt to participate in the NFIP (enabling residents and businesses within their jurisdictions to purchase flood insurance through the NFIP) and to enforce NMFS's proposed new national standards against local governments in Oregon.

The magnitude of the Oregon BiOp is startling. If implemented as written, it could force local governments in Oregon, and ultimately other jurisdiction around the country, to apply much more restrictive development standards to larger floodplain areas to maintain eligibility to participate in the NFIP. For both public and private property owners and developers near a river or coast line, these changes could effectively prohibit the majority of development options, significantly reducing the value of previously high priced lands.

The Oregon BiOp includes a six element RPA, which directs FEMA to implement a series of immediate and longer term changes to the operation of the NFIP. In the short term, RPA Element 2 directs FEMA to require local jurisdictions in Oregon participating in the NFIP to adopt "interim measures" intended to protect floodplain habitat and listed species while FEMA adopts changes nationally to the NFIP. These measures include requiring that all development in the 100-year floodplain in Oregon be mitigated to achieve "no net loss of natural floodplain functions" through a combination of compensatory flood storage (at ratios higher than 1:1), and eliminating or mitigating for the use of impervious surfaces (roofs, driveways, sidewalks, etc.) in the floodplain. Further, Element 2 directs FEMA as an interim measure to identify a "riparian buffer zone" (RBZ) in Oregon measured 170 feet horizontally from the ordinary high water mark of perennial or intermittent streams, and limit the types of development allowed in the RBZ to: (1) water dependent uses, (2) habitat restoration activities, (3) activities that result in a beneficial gain for the listed species or habitat, and (4) activities that will have no adverse effects on listed species or habitat, i.e., activities that will not degrade or limit natural floodplain functions in any way. The BiOp sets forth a narrow definition for "water dependent uses": "a use that cannot perform its intended purpose unless located or carried out in proximity to water." The Oregon BiOp directs that FEMA must complete implementation of Element 2 by March 15, 2018.

Concurrent with implementing the interim measures in Element 2, RPA Elements 3 and 4 direct FEMA to change both its floodplain mapping program and the minimum floodplain development criteria at the national level. If FEMA opts to move forward with implementation of these Elements as currently written, they will represent a dramatic shift in the requirements and operation of the NFIP. Specifically, Element 3 directs FEMA to begin mapping erosion prone areas as “E Zones” on FEMA’s Flood Insurance Rate Maps (FIRMS) and to designate them “high hazard areas.” (FEMA has not previously mapped E Zones.) These E Zones would encompass the entire channel migration zone (CMZ) for most rivers except where the CMZ has been disconnected by existing infrastructure or development. Further, Element 3 directs FEMA to begin depicting the “Area of Future Conditions Flood Hazards” on its FIRMS, including accounting for climate change and anticipated future development/build out. Element 3 also directs FEMA to expand the boundary of the regulatory “floodway,” to accelerate issuance of updated floodplain maps and to use more elaborate floodplain modelling techniques (e.g., multi-dimensional and unsteady state hydraulic models), and to require ESA-compliance for proposed FIRM amendments.

Element 4 directs FEMA to incorporate an “ESA performance standard” into its minimum floodplain management criteria, and then to develop region specific guidance based on the particular ESA listed species and designated habitat in each region. This element would have the effect of applying ESA-based protection standards to purely local floodplain development permits – permits which are not currently subject to ESA consultation requirements. Element 4 further directs FEMA to change its regulations to prohibit new development or substantial improvements in “high hazard areas,” defined as the expanded regulatory floodway and E Zones (per Element 3), except for (a) open space uses, (b) habitat restoration activities, (c) low intensity recreational uses, (d) water dependent uses (as defined above), and (e) bioengineered bank protection, all subject to appropriate mitigation. The Oregon BiOp calls for FEMA to implement Elements 3 and 4 no later than January 1, 2021, with earlier interim deadlines.

If implemented as written, the Oregon RPA will significantly expand the mapped floodplain and tighten regulations applicable to floodplain development within Oregon, and ultimately across the country, through changes to FEMA’s floodplain mapping and minimum floodplain regulation criteria. FEMA has signaled significant concern with the Oregon BiOp’s RPA to NMFS, the State of Oregon and local communities, and has suggested to local jurisdictions that they await further direction from FEMA before jumping ahead and trying to implement the RPA as written.

Overall, the Oregon BiOp appears to be the next step in an ongoing “show down” between FEMA and NMFS that is likely to result in significant changes to the way floodplains around the country are mapped and regulated. For more information regarding the Oregon BiOp and its RPA, please contact [Molly Lawrence](#).

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