



## FEMA Adopts Significant Changes to the National Flood Insurance Program (“NFIP”) Under the Rubric of a “Clarification”

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For more than a decade, the Federal Emergency Management Agency (“FEMA”) has been in a dispute with several environmental groups and unable to reach agreement with the National Marine Fisheries Service (“NMFS”) and the U.S. Fish and Wildlife Service (“FWS”, and collectively with NMFS, the “Services”) regarding the effects of the National Flood Insurance Program (“NFIP”) on Endangered Species Act (“ESA”)-listed species and their designated critical habitat.

Environmental groups have sued FEMA in at least six states, ranging from Washington to Florida, for failing to consult with the Services pursuant to ESA Section 7(a)(2) regarding the effects of FEMA’s implementation of the NFIP on ESA-protected resources. In 2012, FEMA agreed, as part of a settlement of one of those suits, to review the environmental consequences of its implementation of the NFIP nationwide, including potential modifications intended to demonstrate compliance with the ESA.

On May 25, 2018, FEMA issued a [“Record of Decision”](#) concluding that review process and announcing FEMA’s decision to modify the NFIP to “demonstrate compliance with the ESA.” Although FEMA has concluded that the NFIP has “no effect” on ESA species or their designated critical habitat, FEMA nevertheless has decided to implement two actions to allay claims that the NFIP negatively affects ESA-listed species and their habitat.

*While FEMA has couched these actions as modest “clarifications” of its existing regulations, in fact these actions represent a significant shift in policy and have substantial ramifications for NFIP participating jurisdictions (more than 22,000 cities and counties across the United States) and floodplain property owners. NFIP participating jurisdictions and floodplain property owners will be required to prove the negative – that no other federal or state permits are required – before any floodplain permit may be issued.*

FEMA announced in the ROD that it will:

- Require a[n NFIP participating] community to **obtain and maintain document of compliance** with the appropriate Federal or State laws, including the ESA, as a condition of issuing floodplain development permits to develop in the floodplain.
- Condition certain LOMC [Letter of Map Change] requests (i.e., map revisions) upon the community, or the project proponent on the community’s behalf, submitting **documentation of compliance** with the ESA.

While FEMA has couched these actions as modest “clarifications” of its existing regulations, in fact these actions represent a significant shift in policy and have substantial ramifications for NFIP participating jurisdictions (more than 22,000 cities and counties across the United States) and floodplain property owners. FEMA’s existing regulations provide that “any man-made change to improved or unimproved real estate” in the floodplain requires a floodplain permit issued by the local jurisdiction. With the new requirements announced in the ROD, NFIP participating jurisdictions and floodplain property owners will be required to prove the negative – *that no other federal or state permits are required* – before any floodplain permit may be issued.

## Background Regarding the NFIP

Congress passed the National Flood Insurance Act in 1968 creating the NFIP. At the core of the NFIP is an agreement between the federal government and local communities: the federal government (through FEMA) will offer federally backed flood insurance for sale to property owners in those local jurisdictions that adopt FEMA-prescribed land use/zoning restrictions aimed at reducing flood risk and flood damages. FEMA's "NFIP minimum floodplain management criteria" require, amongst other things, that property owners and communities use FEMA's Flood Insurance Rate Maps ("FIRMs") to determine which properties are within the regulatory floodplain, build or elevate structures above the anticipated water surface elevation in a 100-year flood, and otherwise take actions to reduce flood risk and prevent flood damage. See 44 CFR Part 60, Subpart A, for a complete list of requirements.

As part of the NFIP, FEMA develops and publishes its FIRMs (Flood Insurance Rate Maps) that identify which properties are located within the "Special Flood Hazard Area" (the 100-year floodplain) and their relative risk classification for insurance purposes. Property owners may apply through their local jurisdiction to modify a FIRM using FEMA's Letter of Map Change ("LOMC") process. Changes may be made to correct technical errors in the FIRMs, as well based on physical changes to the land or hydrology.

FEMA's actions announced in the ROD implicate both the NFIP minimum floodplain management criteria and FEMA's map change processes.

## Modifications Adopted By FEMA and their Consequences

Under the existing NFIP minimum floodplain management criteria, FEMA requires local jurisdictions participating in the NFIP to "[r]eview proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law . . ." 44 CFR 60.3(a)(2). For at least the last 15 years, FEMA had interpreted this provision as requiring local jurisdictions to condition approval of floodplain permits on applicants obtaining all other necessary/required federal or state permits. This most often has been memorialized in a simple permit condition stating that the applicant was required, as a condition of permit approval, to obtain all other necessary/required federal and state permits. FEMA, National Flood Insurance Program (NFIP) Floodplain Management Requirements, A Study Guide and Desk Reference for Local Officials 7-25 (2005).

Pursuant to the ROD, FEMA now intends to require NFIP participating communities to **obtain and maintain document of compliance** with the ESA as a condition of issuing floodplain development permits or advancing proposed floodplain map amendments. FEMA outlines the documentation requirements to demonstrate compliance with the ESA in its Final Nationwide Programmatic Environmental Impact Statement ("NPEIS"). See [Appendix A](#) for a relevant excerpt from the NPEIS. Although FEMA claims to rely on existing regulatory authority to impose this ESA compliance obligation, its cited regulation, 44 C.F.R. 60.3(a)(2), only requires documentation of "necessary permits." As the Services have explained, there is no necessary ESA permit.

FEMA has effectively rewritten 44 CFR 60.3(a)(2) to require not only that all necessary permits have been received, but also documentation demonstrating that any potentially necessary federal or state permit *is not in fact required*. This will require communities to prove the negative—that a proposed floodplain development project *does not* have the potential to cause a "take" of ESA-listed species.

This represents a significant new burden on NFIP participating communities, particularly for those in states with significant coastal and riverine systems that produce wide-scale flood zones, such as Washington, Oregon, California, and Florida, and which are home to numerous ESA-listed species. Most NFIP participating communities lack the technical expertise to determine whether a floodplain development project triggers any obligations under the ESA. These new requirements will also burden property owners who largely assume that if they comply with existing land use and stormwater

requirements, they have taken adequate steps to avoid affecting ESA-listed species or their designated habitat.

FEMA's new requirements will almost certainly have a chilling effect on local jurisdictions and project applicants, leaving both confounded by what documentation is "enough" to satisfy FEMA's new documentation requirements.

### **What's Next?**

The same environmental groups that first sued FEMA in the 1990s and early 2000s in Florida and Washington for failing to consult under the ESA regarding the effects of the NFIP on ESA listed species and designated critical habitat may file one or more lawsuits challenging FEMA's ROD. These lawsuits are expected to challenge FEMA's conclusion, under ESA Section 7(a)(2), that the NFIP has "no effect" on ESA-listed species or designated critical habitat. If environmental groups challenge FEMA's conclusion, local jurisdictions, property owners, and various industry groups may need to consider intervening to try to ensure that the new requirements rolled out in the ROD are not made more restrictive by the courts.

### **For more information**

If you are interested in learning more about changes affecting the NFIP, please contact [Molly Lawrence](mailto:mol@vnf.com) at [mol@vnf.com](mailto:mol@vnf.com).

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## Appendix A: Documentation Required

In the *National Flood Insurance Program Final Nationwide Programmatic Environmental Impact Statement* (Sept. 2017) (“NPEIS”), FEMA provides an outline of the documentation required to meet the new “obtain and maintain documentation of compliance” standard adopted in the ROD. The NPEIS explains:

Whether it is the community or the project proponent that assumes the responsibility for documenting compliance with the ESA, one of the following should be documented:

1. No potential for “take” exists (meaning that the project has no potential to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or attempt to engage in any such conduct) to threatened and endangered species. The project proponent will be responsible for the determination of whether the project has potential for take. The determination is not required to come from, or be concurred on by, the Services.

OR

2. If the property proponent determines a “take” may or will occur, they can contact the Services to discuss potential changes to the project so there is no potential for “take.”

OR

3. If Options 1 or 2 are not possible, and the Services determine that the project may or will result in a “take” of ESA-listed species, an Incidental Take Permit may be submitted showing that the project is covered by the permit.

NPEIS, p. 2-13. The NPEIS states “there are many ways to comply with these ESA documentation requirements,” including:

- Obtain documentation that no ESA-listed species or designated critical habitat are present in the proposed project area.
- Obtain documentation that ESA-listed species or designated critical habitat are present, but there will be no “take” as a result of the proposed floodplain development.

The NPEIS goes on to explain that to provide evidence of no “take,” the project proponent may complete an assessment including the following information:

- A description of the project area;
- A description of any habitat (or floodplain functions) in the project area, including the presence of ESA-listed species or designated critical habitat;
- A description of the project including the process or methodology used to construct the project; and
- An assessment of the effects that the project will have on the ESA-listed species, designated critical habitat, and floodplain functions previously identified

NPEIS, p. 2-14. “If an assessment is completed and it is determined that the project as proposed could cause a ‘take,’ the project proponent or community can document compliance by showing that they obtained an incidental take permit from the Services pursuant to Section 10 of the ESA.” NPEIS, p. 2-14.