

# **National Waterways Conference Floodplains Update**

**Impacts to Water Resources Facilities  
and Infrastructure**

**Molly Lawrence**

**September 23, 2021**

# Current and Evolving Topics

---

- NFIP Reauthorization – set to expire *again* Sept. 30, 2021
- Resurrection of the Federal Flood Risk Management Standard (FFRMS)
- NFIP and the Endangered Species Act
- Mapping updates: the hazards of Coastal High Hazard (V/VE) zones
- Other miscellaneous updates



# Part 1: NFIP Reauthorization

# NFIP Background

---

- Congress adopted the National Flood Insurance Act in 1968
- Based on a “Grand Bargain”: FEMA will make flood insurance available in communities that adopt floodplain management standards at least as restrictive as FEMA’s minimum standards (44 C.F.R. §60.3)
- *Goal: Reduce hazards to humans and structures from flooding events*

# Inherent Tensions

---

- While participation is allegedly voluntary, the “flood insurance purchase requirement” has made NFIP participation effectively **mandatory**
- Flood disasters are *really expensive* – insurance premiums never fully cover insurance payouts. Bailed out three times *so far*
- Conflict between fiscal conservatives + “dry” states versus coastal/riverine states
- Result: *Congress compelled to reauthorize the NFIP, but wishes it could do something different*

# Current Effort to Reauthorize the NFIP

---

- NFIP Extension Act of 2021 introduced on Sept. 13, 2021.
  - Authored by Senators Bill Cassidy, (R-LA), John Kennedy (R-LA), Cindy Hyde-Smith (R-MS), and Bob Menendez (D-NJ). One year extension.
- Short term extension through December 3, 2021 approved as part of House Continuing Resolution
- NFIP provisions in Infrastructure Bill: House Financial Services Reconciliation Text
  - Cancel outstanding NFIP debt
  - \$3 billion for floodplain mapping



## **Part 2: Resurrection of the FFRMS**

# Timeline of the Federal Flood Risk Management Standard (FFRMS)

---

- January 2015: Obama issued EO 13690 establishing the FFRMS; amended EO 11988
- October 2015: Water Resource Council approved final implementing Guidelines
- August 2017: Trump withdrew the FFRMs in EO 13807 regarding infrastructure permitting
- January 2021: Biden withdrew EO 13807 effectively reinstating EO 13690
- May 2021: Biden issued EO 14030 regarding Climate-Related Financial Risk
  - Expressly reinstated EO 13690 (FFRMs)
  - Affirmed Guidelines for implementing FFRMS



# What Does the FFRMS Do?

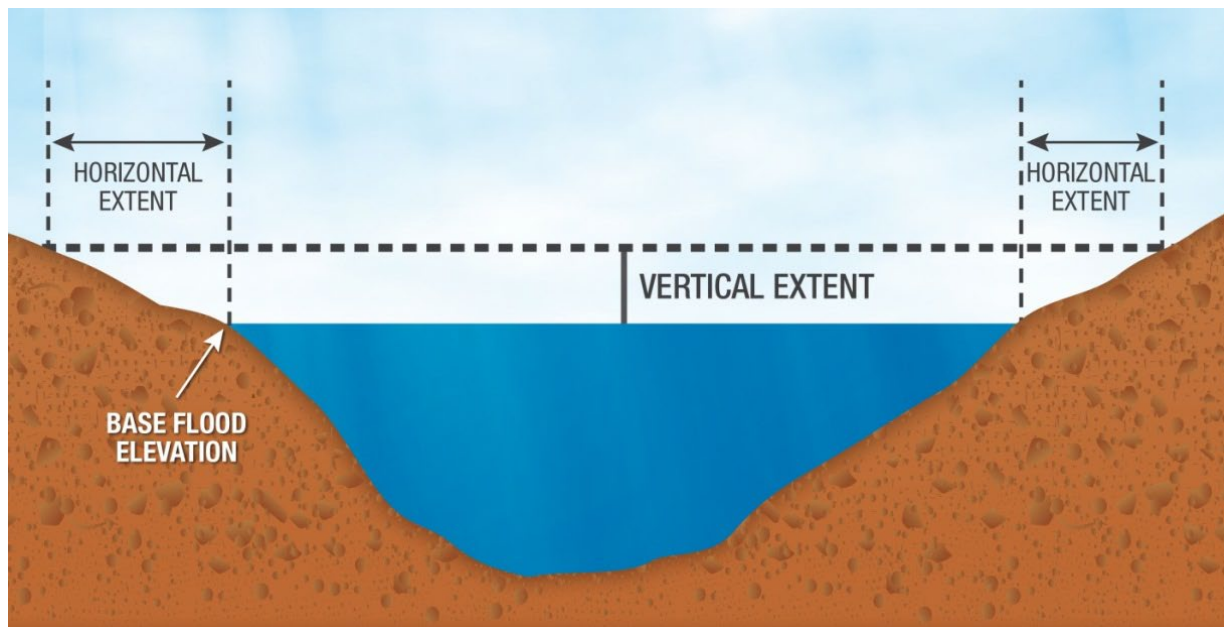
---

- Creates a new floodplain definition for federally funded projects
- Proposes revisions to the 8-step “practical alternatives analysis” in 44 CFR Part 9 for any federally funded action that is proposed within or may affect the floodplain
- Requires greater public notice and opportunity to weigh in on federal funded actions located within or that may affect the floodplain
- Strongly discourages fill in the floodplain
- “Critical action facilities” = FFRMS recommends higher 500-year floodplain standard
- All other federal actions (not federally funded) = remain subject to 1% annual chance floodplain
- Limited exceptions

# Expanded Definition of the Floodplain

Gives federal agencies three options for defining the FFRMS floodplain.  
All EXPAND the floodplain compared to FEMA 1% floodplain

- Climate Informed Science Approach (CISA)
- Freeboard approach (BFE + 2-3 feet)
- The 0.2% annual chance or “500 year” floodplain approach



# Practical Implications?

---

- The practical implications of this EO appear wide-ranging
- Applies to approximately 55 federal agencies
- Each agency permitted to choose own standard
- Agency may choose different standard for different types of actions = likely to be confusing
- *No change to NFIP standards or rates*

# Status of Implementation

---

## USACE:

- Section 404 and Section 10 permits not subject to EO 13690's higher floodplain standards.
- Continue to use EO 11988 = the 1% annual chance floodplain.

## FEMA:

- Interim policy (effective until August 2022) implementing the FFRMS
- Requires the use of freeboard approach for non-critical actions funded with HMA dollars
- Sets ASCE 24-14 as the minimum design and construction standards (BFE + 1 to 2 ft)
- Notes need to update 44 CFR Part 9 for complete implementation of the FFRMS



## **Part 3: NFIP and the Endangered Species Act**

# NFIP Evolution due to ESA Challenges

---

- Series of suits around the country challenging FEMA's ESA compliance
- Monroe County, Florida (1990s-2008) re: Key Deer
- Washington State (2004) re: T&E salmon/steelhead & Orca whales
- Ordered to consult under Section 7(a)(2) regarding the effect of the NFIP on T&E species and designated critical habitat
- Settlements in other jurisdictions – including Oregon, California, Arizona, and New Mexico

# Effects of ESA Challenges

---

- State specific BiOps in Washington and Oregon – and coming in California
- FEMA initiated nationwide programmatic NEPA review (as settlement of several ESA suits)
- Also attempted to initiate nationwide programmatic ESA consultation
- Nationwide Programmatic EIS issued November 3, 2017
- Record of Decision issued May 24, 2018

# Effects of ESA Challenges

---



- In both Nationwide Programmatic Biological Evaluation and the Nationwide Programmatic EIS, FEMA concluded that the NFIP has **no effect** on threatened and endangered species or designated critical habitat.\*\*\*
- FEMA determined that private floodplain development may cause injuries to T&E species, but the **NFIP is not responsible** for the injuries created by private floodplain development
- **Nevertheless**, FEMA decided to adopt changes to the NFIP to respond to concerns that the NFIP is not ESA compliant.

\*\*\* *FEMA determination of no effect rejected by Federal District Court in California. Effect TBD.*



# FEMA's Record Of Decision (May 2018)

---

- FEMA adopted several changes to the NFIP, including:
  - *Clarified* that pursuant to 44 C.F.R. § 60.3(a)(2), **a community must obtain and maintain documentation 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
  - *Clarified* that the issuing of certain Letter of Map Change (LOMC) requests (i.e. map revisions) is **contingent on the community, or the project proponent on the community's behalf, submitting documentation of compliance with the ESA\*\*\***

# What does documentation require?

---

Either the community or project proponent assumes the responsibility for documenting one of the following:

- (1) No potential for “take” exists
  - 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
- (2) If the project 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”
- (3) If options 1 or 2 are not possible, and the Services determine that the project may or will result in “take,” an Incidental Take Permit may be submitted

Can use existing Section 7 consultation – but ensure that broad enough to capture floodplain impacts.

# Summary

---

Under FEMA's "current" interpretation of 44 CFR 60.3(a)(2), FEMA requiring:

- In states not subject to NFIP BiOps, "documentation of compliance" with the ESA
- In states with NFIP BiOps (Washington, Oregon and soon California), local jurisdiction implementation of the RPA from the BiOp
- FEMA recently reinitiated efforts at a nationwide programmatic consultation with NMFS and USFWS. *Status Unknown.*

# Recommendation:

## *Don't Accept FEMA's First Offer*

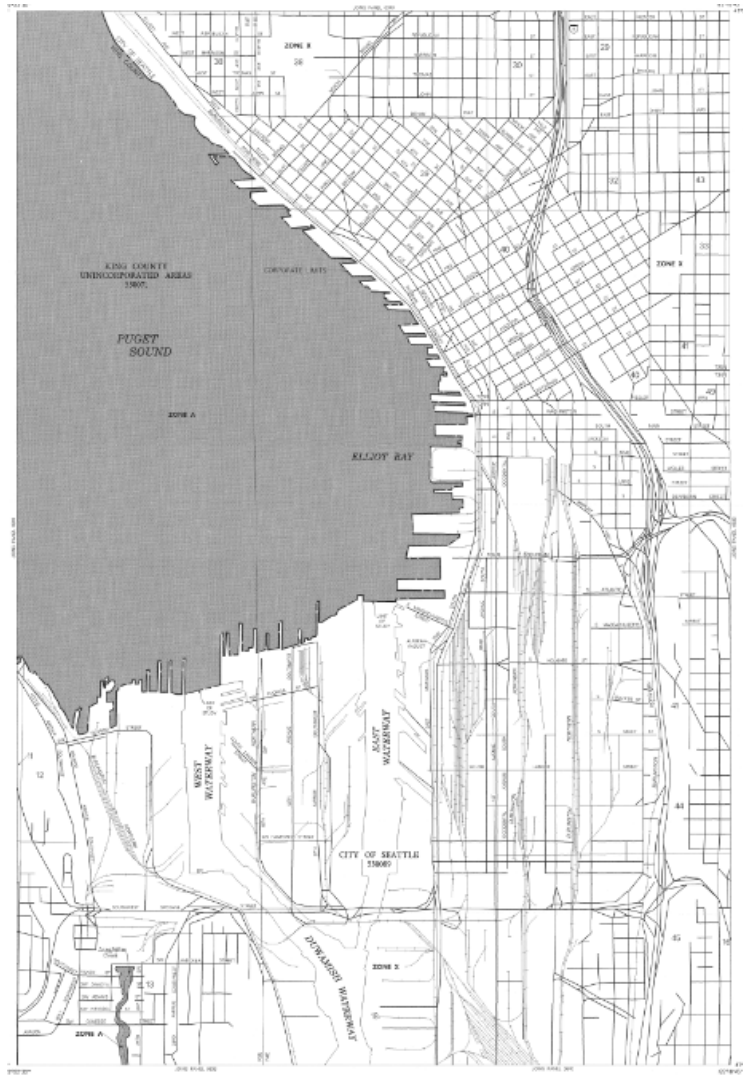
---

- FEMA has not conducted the notice and comment rulemaking required before it can impose these new documentation requirements on participating jurisdictions and applicants
- In Washington and Oregon, FEMA has not yet completed environmental review of any proposed changes to the NFIP
- Watch out: FEMA's pattern is to try to pressure jurisdictions into compliance without the required statutory or regulatory authority
- You can push back *successfully*

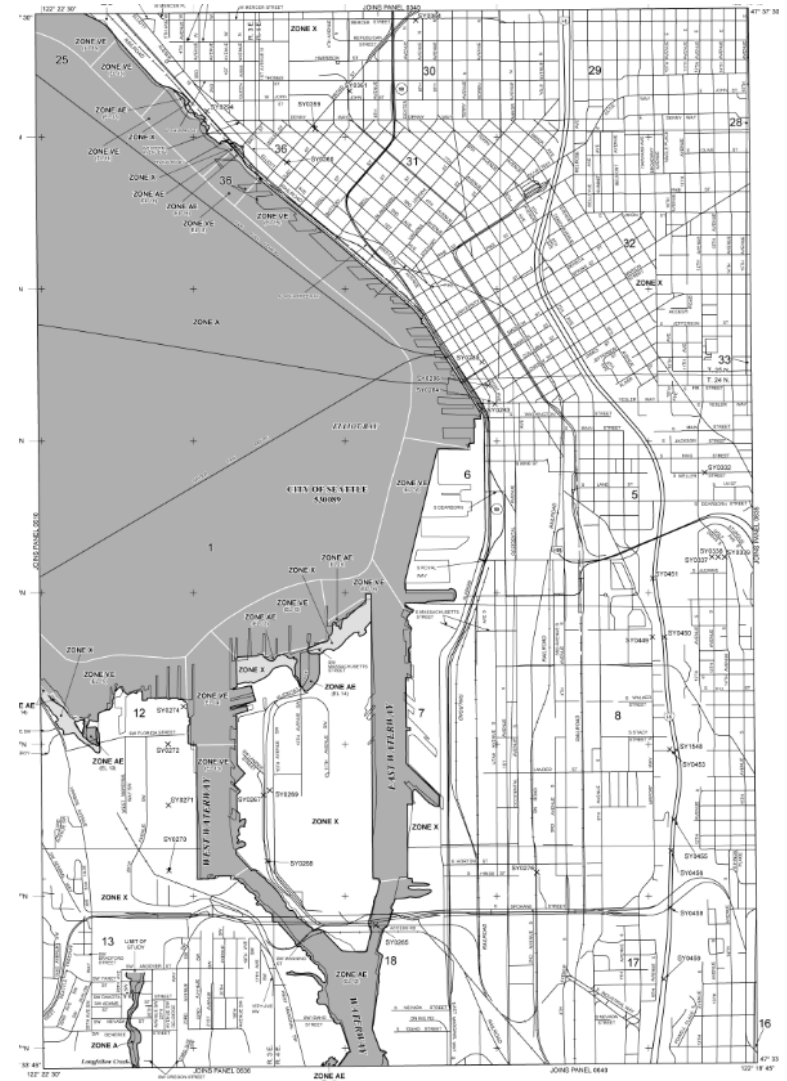


## **Part 4: Coastal High Hazard Zones, V/VE**

# SFHA Maps: Seattle, WA



1995 FIRM



2020 FIRM

# Implications of V/VE Zones

---

Standards set forth in 44 CFR 60.3(e)

- Siting limitations
  - No “new construction” waterward of the MHT
  - No “new construction” or “substantial improvements” waterward of the shoreline setback
- Elevation Requirements
  - New construction and substantial improvements required to meet elevation requirements
  - Elevation in VE zone measured from **the lowest structural member of the lowest floor**

*Not intended to keep ports from using existing piers – but is intended to trigger future upgrades*

# Implications of V/VE Zones

---

- Numerous VE zones pending
- VE zones primarily in open water = may apply to piers and other over water structures
- Infrastructure bill: \$3,000,000,000 for floodplain mapping
- **PAY ATTENTION; GET INVOLVED**





# **Part 5: Miscellaneous Other Issues**

# Grab Bag of Other Issues

---

- Substantial additional mitigation funding available through BRIC and HMPG - see BRIC NOFO
  - [https://www.fema.gov/sites/default/files/documents/fema\\_nof-fiscal-year-2021-building-resilient-infrastructure.pdf](https://www.fema.gov/sites/default/files/documents/fema_nof-fiscal-year-2021-building-resilient-infrastructure.pdf)
- ASFPM and National Resources Defense Council petition to FEMA for regulatory reform
  - <https://www.floods.org/whats-new/as-flooding-from-climate-change-worsens-groups-seek-to-change-outdated-federal-rules-for-building-homes-and-infrastructure/>
- FEMA getting more serious about enforcing NFIP against state agencies/structures

# Publications

---

- VNF Alert, *FEMA Adopts Significant Changes to the National Flood Insurance Program ("NFIP") Under the Rubric of a "Clarification"*, June 8, 2018. <http://www.vnf.com/fema-adopts-significant-changes-to-the-national-flood-insurance-program>
- Clark, A. P., & Lawrence, M. A. (2017). Floodplains and Flood Risk : A Brief Overview of Changing Management Responsibilities. *The Water Report*, (165), 1-5.
- Lawrence, M. A., & Mandell-Rice, J. (2016). National Flood Insurance Program: Oregon Communities & Developers Face Significantly Heightened Standards Following ESA Consultation - National Impacts Probable. *The Water Report*, (152), 1-1.
- Lawrence, M. A. (2015). National Flood Insurance Program: The Changing Landscape of Floodplain Insurance & Regulation. *The Water Report*, (131), 1-12.

For more information:

**MOLLY LAWRENCE**

206-623-9372 office

206-954-5011 cell

[mol@vnf.com](mailto:mol@vnf.com)