

NFIP-ESA Interface and NFIP Reform

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NFIP Background

- Congress adopted the National Flood Insurance Act in 1968
- Intended to defray federal expenditures on flood recovery and to reduce future flood damages
- *Goal: Reduce hazards to humans and structures from flooding events. No mention of protecting floodplain habitat or species.*

NFIP Regulation of Development

- To participate in the NFIP, local governments are required to adopt flood hazard regulations for development at least as stringent as FEMA minimum standards, 44 C.F.R. §60.3
- Applies to all “development,” which is defined as:
“any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials.”

NFIP Evolution due to ESA Challenges

- Started with a series of suits around the country challenging FEMA's ESA compliance
- Monroe County, Florida (1990s-2008) re: Key Deer
- Washington State (2004), Oregon (2009), and California (2010, 2019) re: T&E salmon/steelhead, delta smelt, Orca whales
 - *FEMA 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 states – including Arizona, New Mexico

Effect of ESA Challenges

- Puget Sound BiOp (2008) –
 - RPA Element 3 establishes “no adverse effect” standard and attempts to dictate local floodplain regulations
 - Implementation left to State and local jurisdictions with FEMA guidance
- Oregon BiOp (2016) –
 - Establishes “no net loss of natural floodplain functions” standard
 - Attempts to dictate changes to flood mapping and minimum standards *nationwide*
 - FEMA issued a Draft Implementation Plan in October 2021
 - Now in NEPA review

Key Complaints!

- Consultation between FEMA and NMFS – but resulting requirements imposed on state and local governments
- Entirely new and undefined regulatory metrics – not defined by NFIP or ESA:
 - “No adverse effect” standard in Washington
 - “No net loss” and “beneficial gain” standards in Oregon
- *FEMA skipped any form of rulemaking; enforcing new standards directly against NFIP participating jurisdictions and permit applicants*

2023 Update: LOMRs & CLOMRs Suspended in California

- FEMA challenged for failing to implement the ESA in California in 2010 and again in 2019
- Since 2016, FEMA has required documentation of ESA-compliance for LOMR-Fs and CLOMR-Fs.
 - Hidden in the Community Acknowledgement Form
- In settlement of 2019 lawsuit, FEMA agreed to suspend processing all LOMR-Fs and CLOMR-Fs until consultation complete. Effective July 1, 2023.

Latest Suit: Center for Biological Diversity Sued FEMA in Oregon

- On Sept 14, 2023, CBD filed suit against FEMA in Oregon
- Alleging violation of ESA because FEMA has not implemented Oregon RPA
- RPA Elements 3 and 4 have nationwide implications
 - Change mapping protocols, including mapping High Hazard Areas, Erosion Zones, and “residual risks behind levees”
 - Increase restrictions on floodplain development, including adding an ESA “performance standard” to 44 CFR part 60

FEMA's First Attempt to Integrate ESA Nationwide (2012-2018)

- As part of settlement of some of state-specific suits, FEMA initiated ***nationwide*** programmatic NEPA review (NOI May 16, 2012)
- Also attempted to initiate nationwide programmatic ESA consultation (Nationwide BE November 2016)
- Final Nationwide Programmatic EIS issued November 3, 2017
- Record of Decision issued May 24, 2018 – *requires communities to maintain “documentation of compliance” with the ESA*
- *Have not seen significant implementation*

Changes Coming to NFIP Minimum Floodplain Development Standards

- 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 Request for Information - **Regulations.gov, Docket ID: FEMA-2021-0024**
 - Comments due 1/27/22; 370 comments received
- Next steps – changes in the works

Potential Concerns

- Integrating requirements from the Endangered Species Act (ESA)
- Limitations on fill
- Increased elevation requirements
- Expansion of the regulatory floodplain
- Expansion of the floodway (zero rise floodway)
- More restrictive floodway standards
- Compensatory storage requirements
- Treatment of mitigation or benefit projects

QUESTIONS?

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