



September 21, 2016

Examination of FEMA's Limited Role in Local Land Use Development Decisions

Committee on Transportation and Infrastructure, United States House of
Representatives, One Hundred Fourteenth Congress, Second Session

HEARING CONTENTS:

Witnesses

Michael Grimm
Assistant Administrator for Mitigation
Federal Emergency Management Agency
[\[View Testimony\]](#)

Chris Shirley
Natural Hazards and Floodplain Specialist
Department of Land Conservation and Development, State of Oregon
[\[View Testimony\]](#)

Denny Doyle
Mayor
City of Beaverton, OR
[\[View Testimony\]](#)

Heather Carruthers
Commissioner, Board of County Commissioners, Monroe County, FL
National Association of Counties
[\[View Testimony\]](#)

Jon Chandler
CEO, Oregon Home Builders Association
National Association of Home Builders
[\[View Testimony\]](#)

** Please Note: External links included in this compilation were functional at the time of its creation but are not maintained thereafter.*

*This hearing compilation was prepared by the Homeland Security Digital Library,
Naval Postgraduate School, Center for Homeland Defense and Security.*



Available Webcast(s)*:

[\[Watch Full Hearing\]](#)

Compiled From*:

<https://transportation.house.gov/calendar/eventsingle.aspx?EventID=400684>

** Please Note: External links included in this compilation were functional at the time of its creation but are not maintained thereafter.*

*This hearing compilation was prepared by the Homeland Security Digital Library,
Naval Postgraduate School, Center for Homeland Defense and Security.*

STATEMENT OF

MICHAEL GRIMM

ASSISTANT ADMINISTRATOR FOR MITIGATION
FEDERAL INSURANCE AND MITIGATION ADMINISTRATION
FEDERAL EMERGENCY MANAGEMENT AGENCY

U.S. DEPARTMENT OF HOMELAND SECURITY

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

“EXAMINATION OF FEMA’S LIMITED ROLE IN LOCAL LAND-USE
DEVELOPMENT SYSTEMS”

Submitted By

Federal Emergency Management Agency
500 C Street SW
Washington, D.C. 20472

September 21, 2016

Introduction

Good morning Chairman Shuster, Ranking Member DeFazio, and Members of the Committee. My name is Michael Grimm and I am the Assistant Administrator for Mitigation for the Federal Emergency Management Agency (FEMA). Thank you for the opportunity to testify about FEMA's efforts to strengthen our National Flood Insurance Program (NFIP) compliance with the Endangered Species Act (ESA) of 1973 (Pub. L. No. 93-205, codified at 16 U.S.C. § 1531 et seq.) in Oregon, as well as associated implications for the program nationwide.

Under section 7 "Interagency cooperation" of the ESA, (16 U.S.C. 1536) all Federal agencies are required to consult with the Department of Commerce's National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) or the Department of Interior's U.S. Fish & Wildlife Service (FWS) (collectively, the Services) to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of the critical habitat of such species, unless such agency has been granted an exemption. FEMA agreed to initiate formal consultation with NMFS on the implementation of the NFIP in Oregon based on litigation brought by the Audubon Society of Portland. As required in consultation, FEMA submitted a Programmatic Biological Assessment (PBA) to NMFS in 2011 to assess the effects, if any, that the implementation of the NFIP in Oregon had on 16 endangered or threatened salmon and steelhead species, as well as eulachon and Southern Residence killer whales and their habitats. FEMA's PBA determined that the implementation of the NFIP was "Not Likely to Adversely Affect" these ESA-listed species or their habitats.

After many years of inter-agency discussions and coordination, on April 14, 2016, NMFS issued a Biological Opinion that determined the implementation of the NFIP in Oregon was likely to jeopardize the continued existence of endangered or threatened species and result in the adverse modification of the critical habitats of such species. When a jeopardy opinion is issued, NMFS must also provide Reasonable and Prudent Alternatives (RPA), if any, to the proposed action. In this case, the RPA is a recommended set of program changes that will ensure the NFIP is implemented in a manner that will not jeopardize the continued existence of endangered or threatened species or result in the adverse modification of the critical habitats of such species.

National Flood Insurance Program

Before discussing how the ESA interacts with the NFIP and FEMA's relationship to local land-use systems, it is important to explain some of the basic elements of the NFIP.

Flooding continues to be the single greatest source of damage from natural hazards in the United States, causing about \$8 billion in property damage annually. Congress established the NFIP as a voluntary Federal program through which property owners in participating communities can purchase Federal flood insurance as a protection against flood losses. In exchange, participating communities must enact local floodplain management regulations that meet or exceed FEMA's program requirements for floodplain development, which are intended to reduce flood risk and flood-related damages. In addition, FEMA identifies and maps the nation's floodplains so that areas of risk are discernible by planners, developers, and the public. Maps depicting flood hazard information are used by FEMA to promote broad-based awareness of flood hazards, provide data

for rating flood insurance policies, and determine the appropriate minimum floodplain management criteria for flood hazard areas.

Today, more than 22,000 communities participate in the NFIP, with more than 5.1 million flood insurance policies in effect, providing over \$1.2 trillion in flood insurance coverage. The NFIP serves as the foundation for national efforts to reduce the loss of life and property from flood disaster, and FEMA estimates that the program saves the nation \$1.9 billion annually in avoided flood losses.

Floodplain Management

The power to regulate floodplain development, including requiring and approving permits, inspecting property, and citing violations, requires land-use authority. This falls under a state's Police Powers, which the Constitution reserves to the states, and the states delegate this power to their respective political subdivisions.

Congress found that a unified national program for floodplain management was an essential element of an effective NFIP. Therefore, Congress authorized FEMA to “develop comprehensive criteria designed to encourage, where necessary, the adoption of adequate state and local measures which, to the maximum extent feasible, will constrict the development of land which is exposed to flood damage where appropriate, guide the development of proposed construction away from locations which are threatened by flood hazards, assist in reducing damage caused by floods, and otherwise improve the long-range land management and use of flood-prone areas.”

FEMA's floodplain management role under the NFIP is limited to enrolling communities in the NFIP when a community has adopted adequate floodplain management regulations consistent with Federal criteria, establishing minimum floodplain management criteria, providing programmatic monitoring and oversight, offering technical assistance to ensure that communities are complying with the NFIP program requirements, and enforcing the program requirements when there are issues of programmatic non-compliance by a participating community.

Mapping

Through its national flood mapping program, FEMA identifies flood hazards, assesses flood risks, and collaborates with states and communities to provide accurate flood hazard and risk data to guide them to mitigation actions. The National Flood Insurance Act (NFIA) requires that FEMA identify flood-prone areas and subdivide them into flood risk zones to provide the data necessary for FEMA to determine the appropriate minimum floodplain management criteria and to rate flood insurance policies. While a variety of flood zones are mapped on Flood Insurance Rate Maps (FIRMS), the NFIP's regulatory authority is the 100-year flood zone. Mapping of flood hazards promotes public awareness of the degree of hazard within such areas and provides for the expeditious identification and dissemination of flood hazard information. FEMA maintains and updates data through flood insurance studies and resultant FIRMs and Flood Insurance Study (FIS) Reports.

FEMA is required by statute to revise and update flood hazard maps to carry out its responsibility to ensure that the flood risk information presented is scientifically and technically correct: (a) upon

a determination that such revision or updates are necessary; or, (b) upon request from any state or community if accompanied by technical data sufficient to justify the requested change. To assess flood hazards in a community, FEMA conducts FISs and publishes FIS reports that describe the flood hazards for the community. FEMA uses the information developed in the FIS to prepare FIRMs. FEMA publishes the FIRM for distribution to a wide range of users including private citizens, community officials, insurance agents and brokers, lending institutions, and other Federal agencies. The FIRM is the basis for the floodplain management, insurance, and mapping activities of the NFIP.

Community Rating System

Through its Community Rating System (CRS), FEMA recognizes and rewards community floodplain management activities that exceed the minimum NFIP standards. The CRS uses a class rating system to determine flood insurance premium reductions for residents. As a community engages in additional mitigation activities, community residents become eligible for a higher class, and thus additional discounts on NFIP policy premiums. The CRS recognizes 90 creditable activity elements, organized into four categories: Public Information, Mapping and Regulations, Flood Damage Reduction, and Flood Preparedness. Currently, there are a total of 1,391 NFIP communities that participate in the CRS and receive discounts for higher standards that protect their community against future flooding; 27 of these communities are in Oregon.

FEMA's CRS credit system primarily rewards flood loss reduction activities. FEMA also has authority to provide credit for activities that preserve natural floodplain functions and resources, as these activities also reduce flood-related losses. The CRS program illustrates that sound floodplain management for risk reduction often goes hand-in-hand with responsible environmental stewardship.

ESA Consultations

Under section 7 of the ESA, all Federal agencies are required to consult with the Services to ensure that any action that is authorized, funded, or carried out by that agency is not likely to jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of the critical habitat of such species.

In response to lawsuits brought under the ESA, FEMA has been required, either by the courts or through settlement agreements with the plaintiffs, to undertake consultations under the ESA on the implementation of the NFIP in particular communities or regions. In consultations undertaken in Monroe County, Florida, the Puget Sound region of Washington State, and Oregon, the Services have found that the implementation of the NFIP in those areas was likely to jeopardize the continued existence of threatened and endangered species and adversely modify designated critical habitat.

During the Puget Sound consultation in Washington State, FEMA worked closely with NMFS, the state, communities, and stakeholders to implement the RPA that resulted from the Biological Opinion in that region. NMFS's Puget Sound RPA was written in a manner that would accommodate performance-based standards, which provided communities flexibility to implement an approach to preserve ESA-listed species and their designated critical habitat in a manner that is

consistent with local decisions on land use. Some Puget Sound communities have expressed concerns with the implementation of the Puget Sound RPA.

FEMA appreciates the dialogue it engaged in with NMFS as we coordinated efforts to reach an optimal outcome in the Oregon consultation. During consultation, FEMA recommended that the Oregon RPA follow the Puget Sound performance-based standard approach, giving FEMA and communities flexibility for determining how species and habitat can be protected. Ultimately, based on its experience in Washington, NMFS issued an RPA that differs from the Puget Sound performance-based standard approach, following a clearer, more prescriptive approach instead. If implemented as written, the RPA would result in an expansion of the areas mapped within the SFHA to include areas likely to flood based on data reflecting the anticipated impacts of climate change, and will require enhanced regulatory floodplain management criteria, going beyond the minimum standards currently required as a condition of NFIP eligibility. The agencies continue to work through methodologies to implement the RPA in a manner that is consistent with FEMA's operation of the NFIP, and which will reduce impacts to natural and beneficial functions of floodplains, such as safely storing and conveying floodwater, recharging streams through the hyporheic zone, and forming habitat areas for listed species.

Path Forward in Oregon

Under the ESA, Federal agencies must utilize their legal authorities for the benefit of endangered species. As such, FEMA is looking comprehensively at the NFIP to determine how to ensure continued compliance with the ESA. FEMA will work to implement all the RPA requirements that it has the legal authority to implement. To the extent we determine that particular RPA requirements are outside the scope of FEMA's authority to implement, we will explore and implement alternatives to accomplish the purposes of those RPA provisions.

FEMA believes that implementation of a number of the RPA requirements and conservation recommendations will further the goals of both the NFIP and the ESA. FEMA is and will continue to be committed to working with our stakeholders, including the NMFS, the Oregon Department of Land Conservation and Development (DLCD), NFIP-participating communities, tribal nations, and others, to implement an ESA-compliant NFIP in the State of Oregon within our legal authorities.

Please be assured that no enforcement actions will be taken against any participating Oregon communities for failure to comply with the Oregon RPA interim requirements until after FEMA issues guidance next year on how communities can comply.

Path Forward Nationally

FEMA is concerned about our ability to maintain uniform implementation of the NFIP nationwide amid multiple RPAs in different areas of the country. The combination of the five concluded consultations (Monroe County, New Mexico, Puget Sound, Oregon, and Arizona) with the two consultations in process (San Joaquin/Sacramento Delta, California, and Florida) means that there is inconsistent national implementation of the NFIP across the nation instead of a unified and consistent national program. The outcome of each consultation brings changes to the implementation of the NFIP.

FEMA will do everything within our authorities granted by Congress to administer the NFIP to reduce flood risks, first and foremost, while supporting the complementary responsibility of environmental stewardship. To that end, FEMA has undertaken a national assessment of the NFIP to consider its potential environmental impacts as modified by recent legislation and other proposed program modifications. The purpose for the proposed modifications to the NFIP is to implement legislative requirements of the Biggert-Waters Flood Insurance Act of 2012, and the Homeowner Flood Insurance Affordability Act of 2014, and to demonstrate compliance with the ESA.

FEMA and the Services have different primary missions and priorities, but we share the common obligation of species conservation under the ESA. Healthy floodplains reduce risk of loss of life and property, and benefit threatened and endangered species. Decisions and actions that are beneficial for wildlife habitat and floodplains can also be good for hazard reduction and community resilience.

Again, thank you for the opportunity to testify today, and I look forward to any questions that the committee may have.



Oregon

Kate Brown, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

Fax: (503) 378-5518

www.oregon.gov/LCD



TESTIMONY OF CHRISTINE SHIRLEY

NATIONAL FLOOD INSURANCE PROGRAM COORDINATOR, STATE OF OREGON

BEFORE THE
HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
SEPTEMBER 21, 2016

Chairman Shuster, Ranking Member DeFazio, and Members of the Committee:

I am pleased to be here today to discuss the State of Oregon's perspective on the National Flood Insurance Program in light of Endangered Species Act (ESA) consultations and the resulting changes to the program. My name is Christine Shirley and I am the National Flood Insurance Program Coordinator for the State of Oregon. I work directly with communities in Oregon, providing assistance in floodplain management and implementation of the National Flood Insurance Program.

Pioneers in Land Use Planning

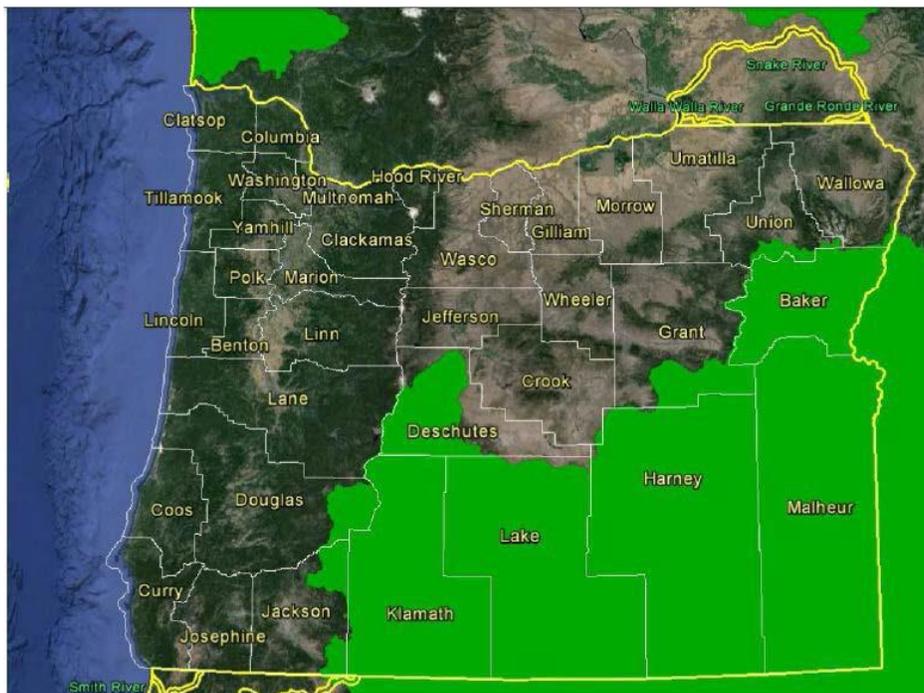
Oregon is a pioneer in land use planning. In 1973, Oregon passed legislation to implement a land use planning program that preserves local control and responsibility for land use decisions while establishing an overarching set of statewide land use planning goals. At its core, it directs new development into towns and cities, protects rural areas for fishing, farming and forest uses, and evaluates environmental impacts at the planning level (not at the permit level through a simplified process akin to the National Environmental Policy Act or NEPA process as in other states). Our state land use planning program has succeeded in protecting farm and forest lands from rural sprawl, while encouraging urban growth in appropriate areas, thus protecting the environment. Research shows that far fewer acres are developed in Oregon for each new resident than in other states.

New Federal Directive on State's Land Use System

Today, Oregon finds itself at the forefront of a federal directive to incorporate an *additional* layer of land use management on our state's floodplains. In 2009, environmental organizations filed a lawsuit contending that the Federal Emergency Management Agency (FEMA) failed to consult with the National Marine Fisheries Service (NMFS) – a division of NOAA Fisheries – on how floodplain development allowed under the National Flood Insurance Program (NFIP) might affect fish listed under the Endangered Species Act (ESA). The ensuing consultation resulted in a "jeopardy biological opinion" and a set of recommendations to FEMA from NMFS known as the "Reasonable and Prudent Alternative," or RPA, which was published in April of this year.

In its recommendations, NMFS stated it wants “FEMA [to] improve floodplain mapping so hazards are clear, limit development in the areas of highest flood hazard and require developers to mitigate floodplain losses by restoring floodplain elsewhere.” NMFS also asserts “[t]hese recommendations will help Oregon communities make informed decisions about development in flood plains, recognizing the implications for both public safety and the environment.”¹

The outcome of this consultation and ensuing recommendations means that (1) 232 of the 260 communities in Oregon will have to be remapped once FEMA adopts new standards based on the RPA, and (2) that all communities will be required to revise and adopt local regulations to comply with FEMA’s new development standards in order to continue to secure flood insurance under the NFIP. The consequences of a community not participating in the NFIP are significant. Home and business owners would not have access to federally backed flood insurance and may have difficulty obtaining mortgages.



Note: The unshaded areas are the affected areas.

Source: FEMA https://www.oregon.gov/LCD/docs/FEMAs_NFIP_ESA_Consultation_OR.pdf

I want to stress that Oregon supports the principle of sound floodplain management because it protects people, property, habitat function, and other values. As a result, the State has endeavored to be good partners with FEMA and NMFS during this multi-year consultation and its aftermath. We intend to remain good partners in the years ahead. Even so, we have significant concerns about the current process to date and the lack of a workable approach for Oregon

¹ Source:

http://www.westcoast.fisheries.noaa.gov/publications/habitat/fact_sheets/oregon_fema_biop_factsheet_2016.pdf

communities. We have identified a number of issues and lessons learned that may be of interest to the Committee.

Early Consultation

Primary among those lessons is the importance of early consultation that informs the RPA. In the Oregon experience, the State was only allowed limited interaction with the agencies during the consultation period. As a result the Oregon RPA does not fit well with Oregon's land use planning program. The State is now faced with the more difficult task of trying to mesh the RPA with Oregon's system. The bottom line is that we will need additional assistance from our federal partners if that process is to be successful.

Be Transparent & Cooperative

It is imperative that FEMA develop an implementation strategy and provide guidance to local governments using a transparent and cooperative process. Local governments, developers, conservation groups, and others must be engaged in conversation with FEMA as materials are drafted, rather than being asked to respond after FEMA begins producing new procedures and materials. To that end, the state is committed to facilitating topical work groups to provide a forum for such engagement. I will say more about these work groups later.

To their credit, after April 2016 release of the Biological Opinion, both FEMA and NMFS did emphasize local outreach. Both federal agencies partnered with the State holding three webinars for local government and State agencies to answer immediate questions. Then, in July - again with participation from FEMA and NMFS - the State hosted ten in-person workshops across Oregon that attracted over 230 local government planners and other stakeholders and provided a valuable opportunity for affected communities across Oregon to voice their concerns and to get information directly from the federal agencies. The workshops will be followed up with a set of work groups, which will continue to advise FEMA.

Give Local Government Time & Understand Their Resources

It is also imperative that FEMA and NMFS recognize and address local government concern that any necessary changes will take time and resources to implement. Most of Oregon's local governments have yet to carve out time or budget in their annual work plans to respond to new FEMA directives. This is not because they were unaware of the ESA consultation, but because the outcome and implementation timeframes have been highly uncertain. Local government cannot be expected to respond quickly when they have been largely left in the dark about what might be expected of them. As it turned out, the RPA in Oregon is significantly different than previous RPA's (e.g., Puget Sound of Washington State), so it was prudent for local governments to wait before taking any action based on assumptions.

Establish Realistic Timelines

A considerable amount of effort will be required to sort out what FEMA will require of local government to implement the Oregon RPA. After this is worked out, FEMA must allow enough time for local governments to adopt and implement any required changes.

The State has been told by FEMA that they intend to develop guidance to implement Interim Measures by April 2017 and then have local governments adopt changes to their permitting programs within a year of releasing the guidance. This proposed schedule is simply not workable. Based on past experiences with the FEMA Map Modernization program, a minimum of four to five years will be needed to develop new guidance, and for affected local governments to adopt and for the State to review local code changes. The State will also need substantial additional staffing to help provide the necessary technical assistance to local governments. These tight timelines are dependent on the responsiveness of FEMA. State and local governments cannot hit their targets if the federal agencies are lax on theirs.

The mapping and regulatory changes for development in floodplains suggested by RPA Elements 3 and 4 (described in the addendum) will pose significant challenges to state resources as new maps and NFIP regulations are rolled out over the next decade. This is because FEMA relies on the State to provide technical support to local communities during the map review and adoption process. There will be a significant public education need as new maps are produced. And, the State will need to review new flood hazard codes to verify their compliance with any new NFIP regulations and statewide land use planning goals for over 230 communities. Keep in mind that these new maps are anticipated by the RPA to be delivered shortly after maps produced by FEMA's RiskMAP program are to be adopted by local government. Many local governments will barely have enough time to catch their breath before a new round of Flood Insurance Rate Maps are introduced.

Timely Response Needed From Federal Agencies

Another key challenge has been timely responsiveness from FEMA and NMFS. Several commitments to supply specific clarifications were made by federal agency staff during the July workshops that have yet to be fulfilled. For example, FEMA agreed to provide information about the kinds of data FEMA expects local government to collect beginning in January 2017 when issuing floodplain development permits. But these instructions have yet to be delivered. During these same July workshops, NMFS agreed to prepare an errata to the RPA to clarify certain ambiguities identified by participants. But the State and local governments as of today do not have this errata.

Use Feedback from Communities Gathered During Workshops

It is critical that FEMA use the information brought forward by stakeholders to create ESA implementation strategies, guidelines, and processes that meet local needs, respects our existing regulatory systems, and contributes to species recovery. That is the current hope in Oregon. We believe that if local regulatory programs are ignored, it will cause further problems for all involved. For instance, if FEMA places too much of the implementation burden onto local governments by forcing every project in the special flood hazard area to undertake a professional biological assessment as a condition of permitting new development may well come to a standstill, at least for smaller projects or projects in smaller communities. This is because most local governments lack both the necessary expertise and financial resources, and because such individualized assessments may be too costly for smaller projects.

The State instead favors a strategy that streamlines the permitting review process for most projects by developing non-discretionary checklists that can be completed by landowners and others with little scientific knowledge about the threatened species in question. Development of such checklists are possible if FEMA will put forth the upfront effort and work with states and local governments.

In addition to the big picture conclusions and recommendations above, many specific issues were raised at the above mentioned workshops that will require further deliberation.

Credit for Using Current State Land Use System

We heard the desire to get credit for and leverage Oregon's existing land use and planning programs, that encourages high density development within pre-defined urban growth boundaries thus lessening environmental impacts outside of these boundaries. We heard that some state laws and regulatory issues will need to be resolved before guidance can be prepared by for local implementation. Many saw a critical need to establish a riparian mitigation banking program. Workshop attendees wanted specific technical resources such as model code, checklists, and maps to be developed. These will not be fast or easy to produce.

Consider Species Recovery Work Outside the Floodplain

Another concern is how resulting federal guidance focused on the NFIP special flood hazard area might fit within existing state and local land use programs. Because the goal is species recovery – and in Oregon the focus is on salmon recovery – flood plain management cannot be disconnected from river basin or watershed management. The RPA in the Biological Opinion is part of but not *the* solution for species recovery. Thus the federal focus on floodplains must work within the larger ecosystem context. In Oregon, comprehensive state and local land use plans provide critical context and they must be respected.

Climate of Uncertainty Creates Development Concerns

Uncertainty caused by changing rules and maps and unclear implementation timelines continue to be raised as an issue. Many local governments have – consistent with Oregon's land use planning program – created and received public approval for plans to redevelop lands near rivers within their existing city limits rather than expand onto greenfields and rural areas. Cities and special districts such as Springfield, Beaverton, and Enterprise, and the Port of Coos Bay have expressed significant concern that their existing redevelopment plans could be undermined if there is a new requirement to set aside large areas of urban-zoned land adjacent to rivers as riparian buffer zones; plans that, incidentally, encourage density within urban growth boundaries, improve existing riparian function, and discourage sprawl outside of urban growth boundaries. We also heard and appreciate concerns of developers, homebuilders, and cities that poorly thought out implementation and perhaps onerous standards set forth in the RPA could undermine our system of containing most new development within urban growth boundaries. Many locals are fearful that investors will not undertake development in this climate of uncertainty.

New Mapping Must Support Species Recovery

The recommended changes to floodplain mapping in Element 3 of the RPA could significantly increase the size of special flood hazard area in some places, increasing the area subject to new development restrictions. Consequently, there are concerns that newly added flood hazard areas could be so far away from salmon habitat that applying the more stringent regulatory standards would not contribute much to salmon recovery, but could have significant, negative economic impacts. We need to evaluate these claims to better understand the consequences of these RPA recommendations.

Conclusion & Next Steps

While these issues pose real challenges, we do not believe they are insurmountable provided FEMA, NMFS and our Oregon stakeholders work together in good faith. But this sort of cooperation and negotiation takes time – as was demonstrated by recent sage grouse negotiations that involved federal partners in Oregon. It is vital that enough time and resources be allocated to produce a workable program that advances species recovery without undermining our State's land use planning program and economic health.

The changes brought about by FEMA/NMFS consultations must not be simply overlaid on top of existing regulatory programs. They must be woven into the fabric of existing state and local programs and regulations. Such integration will require dedicated staff at the Federal level to work in cooperation with the State and local floodplain managers.

In conclusion, I hope this outline of Oregon's experience to date helps the Committee understand the challenges faced by local governments and is instructive for other states. Interweaving Oregon's long established and successful regulatory regimes with the RPA will take a process of close cooperation with the State and its cities and counties. It is our hope that we can work with our federal counterparts to ensure a clear communication of federal interests and how they intend to work with communities to get there.

ADDENDUM - RPA SUMMARY

Summary of 2016 NOAA-F Biological Opinion, Reasonable and Prudent Alternatives affecting FEMA administration of the NFIP

Six Elements comprise the Biological Opinion, Reasonable and Prudent Alternatives (RPA):

Element 1. Notice, Education, and Outreach. NOAA Fisheries recommends that FEMA develop an education and outreach strategy for RPA implementation and provide notice to all affected NFIP participating communities in Oregon (232 cities and counties) regarding the substance of the RPA. DLCD, the designated state coordinating agency for the NFIP in Oregon, will work with FEMA to get input from local governments as FEMA develops an implementation plan.

Element 2. Interim Measures. Most RPA elements will take years to fully implement, however Element 2 includes measures for more immediate implementation. These interim measures are intended to slow the rate at which development currently permissible under NFIP rules degrades habitat necessary for species survival and recovery. NMFS states that these interim measure alone are inadequate to avoid continued decline of threatened fish populations and loss of habitat. NOAA-F intends Element 2 to apply the portion of the SFHA near adjacent to salmon bearing surfacewaters and recommends mitigation for the impacts of new development. The RPA directs FEMA to require local governments to adopt new standards to implement the protective measures in Element 2 as soon as possible but not later than April 2018. Interim measures will remain in place until FEMA makes changes to mapping protocols and implements additional development permit review standards as described in Elements 3 and 4.

Element 3. Mapping Flood and Flood-Related Hazard Areas. NOAA Fisheries recommends that FEMA implement new standards using up-to-date scientific understanding to identify and map flood hazard and flood related erosion hazard areas. Key requirements of new standards include: use of more complex flood models; mapping of 90th percentile value of 100-year flow as the Base Flood Elevation (50th percentile is currently used); and more conservative floodway calculations (likely to result in wider floodways). Also, they ask for flood and erosion hazards based on future conditions to be depicted on FIRMs. Oregon NFIP communities will be required to adopt new maps, when published, and regulate development in flood hazard areas shown on new maps. This RPA element also calls for channel migration zones to be modeled and mapped over time.

Element 4. Floodplain Management Criteria. NOAA Fisheries recommends that FEMA develop new, and revise existing, regulatory floodplain management criteria for NFIP participating communities. Local code revisions requested in Element 4 include: limits on development and some uses in high hazard areas (frequently flooded or subject to flood related erosion); restriction on lot divisions that create buildable parcels entirely within the SFHA; limits on the creation of new impervious surfaces in the SFHA; and mitigation standards for adverse impacts associated with allowed floodplain development and removal of riparian vegetation within the SFHA.

Element 5. Data Collection and Reporting. NOAA-F recommends that FEMA collect, and annually report, floodplain development information to NOAA-F. Local government would supply this information to FEMA using a standardized reporting form or system.

Element 6. Compliance and Enforcement. Recommends that FEMA use the existing CAV auditing and technical assistance process to ensure participating communities comply with any new FEMA guidance or standards developed in response to RPA Element 2, and eventually Element 4, within a reasonable amount of time.

TESTIMONY of

Denny Doyle

Mayor

City of Beaverton, Oregon

before

The House of Representatives

Committee on Transportation and Infrastructure

“An Examination of FEMA's Limited Role in Local Land Use Development Decisions”

September 21, 2016

Good morning Chairman Shuster and Ranking Member DeFazio. I am Denny Doyle, Mayor of the City of Beaverton, incoming president of the Oregon League of Cities, and a Board Member of the National League of Cities. Beaverton is located just two short hours north of the majestic tall firs in Congressman DeFazio's Lane County. Thank you for the opportunity to appear before you today to discuss the Federal Emergency Management Agency's (FEMA) role in implementing the National Flood Insurance Program (NFIP) in Oregon and throughout the United States.

As we all know, in 2009 FEMA was sued by environmental groups in Oregon for failing to ensure that the implementation of the NFIP complies with the Endangered Species Act (ESA). In response to the ruling, FEMA consulted with the National Marine Fisheries Service (NMFS), resulting in the recent Reasonable and Prudent Alternatives (RPA) that aims to minimize impacts to ESA-listed species. The final draft of the RPA calls for a drastic expansion of an area to be protected beyond FEMA's current jurisdiction under the NFIP. If the new protected area is imposed on communities, it will have an unprecedented negative impact on economic growth, job creation and new development, including affordable housing throughout Oregon. These NFIP lawsuits are occurring in a piecemeal fashion around the country. I encourage Members of

Congress to be aware that if the impacts you hear about today have yet to affect your Congressional district, they almost surely will in the future.

I have had the opportunity to meet with representatives from both FEMA and NMFS over the past several years in both Washington, DC and Oregon to discuss this situation; and I remain dismayed at the end result of the ESA consultation. During development of the RPA, FEMA repeatedly stated their concerns with the “major legal and practical issues concerning the RPA” and that the “RPA provides little flexibility in how to achieve ‘no adverse effect.’” Therefore, FEMA concluded that they were unsure how the RPA could be made “fully implementable within FEMA's legal authorities.” Yet, here we are with an RPA that FEMA and our Oregon local governments must implement.

We all agree that protection of threatened and endangered species is a high priority. However, Beaverton is an urban community, one with very little undeveloped land. In, or next door to our community, are major corporations such as Nike, Intel, and Columbia Sportswear, to name a few. Given the preponderance of many small streams that may contain threatened or endangered species, such stringent control of development in an arbitrarily-enlarged flood area as proposed by the RPA could deter development for much of our community. Without development or redevelopment by our business community, we cannot create new jobs or continue to improve our community.

For example, a restaurant in Beaverton with a long history of shallow-flood damage has recently been demolished and reconstructed. This pre-Flood Insurance Rate Map building has been rebuilt with a finished floor two-feet higher than the base flood elevation. This is smart, flood-resistant redevelopment. However, such beneficial projects could effectively be precluded in some way by the new RPA.

In another example, a previously developed area located within the RPA-expanded flood zone could not be redeveloped into affordable housing. Significant employers and exporters will also likely be adversely impacted. In general, any development plans within the affected areas

would require costly and time-consuming consultations with NMFS and FEMA, if they were allowed at all.

Finally, I am working hard to create an Arts and Culture Center in downtown Beaverton, adjacent to Beaverton Creek. Even though at this time, ESA-listed species do not exist in the Creek, the RPA will likely force us to implement significant RPA measures when developing and constructing the Arts Center. All of this comes at a cost – a significant one when just raising the funding to develop the Arts Center itself is challenging on its own.

It should also be mentioned that we remain frustrated about the lack of opportunity to provide comments on the RPA. The Congress should know that the iterations of the RPA for Oregon were developed in an apparent vacuum – one that does not respect nor serve the local communities that must ultimately comply with its mandates.

Simply put, the RPA developed by NMFS is unworkable for Oregon and FEMA. It demands action that is unreasonable and potentially unenforceable by FEMA, all at little identifiable value to the species they aim to protect.

Thank you again for the opportunity to testify before you today. I am happy to answer any questions you may have.



Written Statement for the Record

**The Honorable Heather Carruthers
County Mayor, Monroe County, Florida**

on behalf of the National Association of Counties

for the hearing

“An Examination of FEMA’s Limited Role in Local Land Use Development Decisions”

before the

**House Committee on Transportation and Infrastructure
United States House of Representatives**

**September 21, 2016
Washington, D.C.**

Thank you, Chairman Shuster, Ranking Member DeFazio and distinguished members of the Committee for this opportunity to testify on FEMA's role in local land use development decisions.

My name is Heather Carruthers and I am an elected county commissioner in Monroe County, Florida, where I currently serve as the County Mayor. Today, I am representing the National Association of Counties (NACo).

About NACo

NACo is the only national organization that represents county governments in the United States, including Alaska's boroughs and Louisiana's parishes. Founded in 1935, NACo assists America's 3,069 counties in pursuing excellence in public service to produce healthy, vibrant, safe and resilient communities.

About America's Counties

Counties are highly diverse, not only in my state of Florida, but across the nation, and vary immensely in natural resources, social and political systems, cultural, economic and structural circumstances, and public health and environmental responsibilities.

Many of our responsibilities are mandated by the federal government and by state governments. Although county responsibilities differ widely between states, most states give their counties significant authorities. These authorities include construction and maintenance of roads, bridges and other infrastructure, assessment of property taxes, record keeping, running elections, overseeing jails and court systems and public hospitals. Counties are also responsible for child welfare, consumer protection, economic development, employment/training, land use planning and zoning and water quality. We enact zoning and other land use ordinances to safeguard valuable natural resources and protect our local communities depending on state law and local responsibility.

About Monroe County, Florida

Monroe County lies on the southernmost tip of Florida and encompasses more than 3,737 square miles. The county is home to the Florida Keys, Florida Keys National Marine Sanctuary, Everglades National Park and part of the Big Cypress National Preserve. Although we are the largest county in Florida by land mass, the majority of the county—73 percent — is under water, and the majority of our 77,136 residents live in the Florida Keys. All of Monroe County is considered a coastal floodplain and is subject to the Federal Emergency Management Administration's (FEMA) National Flood Insurance Program (NFIP) requirements. In fact, in our county alone, we have more than 27,000 NFIP policies for residences and businesses.

In my county – which has been designated by the State of Florida as an Area of Critical State Concern – we have limited land, a sensitive environment and more than 30 endangered species. Combined, these

factors have required us to regulate development through a Rate of Growth Ordinance (ROGO), which limits the number of building permits we can issue over the next decade to approximately 3,500. As a result, there are roughly 11,000 undeveloped parcels in Monroe County.

There are 28 threatened and endangered animal species in Monroe County, with another four species proposed for listing by the U.S. Fish and Wildlife Service (USFW). The listed species include shorebirds, butterflies, rodents, the iconic Florida Key deer and five species of sea turtle. The Keys are also home to four listed plants.

The primary industry in Monroe County is tourism, and nearly four million tourists visit the Keys each year to enjoy our unparalleled natural environment, rich culture and history. Other major economic drivers include commercial fishing, local government, the school system and the Naval Air Station Key West, which is one of the military's premiere aviation training facilities. These industries – particularly our service industry – do not produce many high-paying jobs. Given our distance from the mainland and our limited land and strict growth regulations, the cost of living in Monroe County is well above the national average. Indeed, the United Way has estimated that the basic survival budget for a family of four in Monroe County is nearly three times higher than the national poverty level.

The Local Perspective on Endangered Species Regulation and the National Flood Insurance Program

The topic of this hearing is of great importance to my county and many other counties across the United States. The NFIP is indispensable to our homeowners and businesses, and changes to the program and its requirements for participating communities directly affect our residents and our local economy. We are also entrusted by our constituents to establish local land use policies that protect our county's environment and its many species and their habitats, while also allowing for development that benefits our community and local economy. We have worked hard to identify solutions that help us achieve these key goals.

Mr. Chairman, I will focus my remarks today on the following points:

- **First, local governments work daily to craft land use policies that protect our endangered species, mitigate against disasters and facilitate economic development. We carry out this difficult balancing act in compliance with existing state and federal species protection regulations.**
- **Second, NFIP is of vital importance to the economic health of flood-prone communities, and imposing additional species protection regulations through the program will force local governments to significantly alter the land use policies that they have carefully crafted.**
- **Third, species protection regulations carried out through NFIP have typically been one-size-fits-all solutions that consider neither the variance in local communities nor their existing species protection efforts. Because of this, their implementation results in land use policies**

that are often damaging to local economies and less effective at protecting endangered species.

For these reasons, which are elaborated upon below, we believe that advancing species protection efforts through NFIP is problematic and ultimately counterproductive at the local level. The careful balancing of a community's unique needs and circumstances, carried out by its elected officials, should not be upended by one-size-fits-all federal regulations that are imposed without consideration of such factors.

First, local governments work daily to craft land use policies that protect our endangered species, mitigate against disasters and facilitate economic development. We carry out this difficult balancing act in compliance with existing state and federal species protection regulations.

In most states, land use planning and regulation is carried out primarily at the local level. Through this land use authority, we carry out the important and ongoing work of shaping the local communities within our jurisdiction. Our task is to create an environment that is livable for our residents, conducive to economic growth, protective of our natural environment and threatened and endangered species, and resilient against natural and man-made disasters. Local plans, ordinances and regulations enable us to balance these considerations in a manner that best suits the unique needs and circumstances of our local communities, and we expend significant time and resources to achieve these goals.

After our county was determined by the State of Florida to be an Area of Critical State Concern because of our sensitive and special environmental resources, we updated our Comprehensive Plan to include strict development restrictions. After five years of challenges and discussion, the plan was adopted in 1991.

In 1992, the county adopted our Rate-of-Growth-Ordinance in compliance with that Comprehensive Plan that sets forth a point system whereby we allocate a limited number of building permits the State allows us to issue each year. Both positive and negative points are awarded based on certain criteria such as infrastructure availability, flood elevation, hurricane wind resistance, affordable housing, water conservation, energy conservation, habitat protection, and protection of historic and archaeological resources. The number of building permits the State allows is tied to hurricane evacuation. The Rate-of-Growth-Ordinance creates a competitive development arena and encourages compliance with the allocation scoring criteria; thereby directing the award of permits to developments that are, for example, designed in areas outside of sensitive habitat and away from the coastal high hazard areas.

As we set and carry out our land use policies, we must comply with a series of state and federal regulations that aim to protect threatened and endangered species, including the Endangered Species Act (ESA). In 2006, we partnered with state agencies and voluntarily submitted a Habitat Conservation Plan and Incidental Take Permit application to the USFWS to protect the Key Deer and other protected

species on Big Pine Key and No Name Key, two islands located in the lower Florida Keys. On June 9, 2006, USFWS issued a permit that limits development on those islands.

In sum, land use policies at the local level are the product of much coordination and partnership with state and federal partners, and are tailored to the specific needs and circumstances of each community.

Second, NFIP is of vital importance to the economic health of flood-prone communities, and imposing additional species protection regulations through the program will force local governments to significantly alter the careful balancing of their land use policymaking considerations.

NFIP was enacted in 1968 to offer residents and businesses federal flood insurance. Although the program is voluntary, communities are heavily incentivized to participate in NFIP, because if a community does not participate, its property owners cannot purchase flood insurance policies. Since flood insurance policies are often required by mortgage lenders when a property is in a floodplain, a community that does not participate in NFIP severely limits the ability of its residents to sell and purchase homes and commercial buildings.

In 2012, the Government Accountability Office (GAO) estimated that 2,930 of the nation's 3,096 had NFIP policies in their jurisdictions. NFIP is important to local economies, and especially vital in Monroe County because all of our parcels lie within a coastal floodplain.

While there are approximately 77,000 full-time residents in the Keys, our functional population is twice that number. More than half of all residences in the Keys are second homes and vacation homes, limiting the supply of housing for working families. In fact, the median price of a home in the Keys today is \$480,000. That's why the NFIP is so important to our workforce and residents. Without it, buyers cannot secure federally-backed mortgages. That goes for buyers of primary homes, rental residences and businesses as well.

The importance of NFIP was highlighted after a federal court halted issuance of new NFIP policies for nearly 50,000 parcels in Monroe County following a lawsuit filed by conservation groups. For seven years, the injunction (known as the "FEMA injunction") remained in place, and the owners of the parcels were unable to obtain institutional loans and/or build. In fact, there was a moratorium on all building within the county, even for those individuals who had obtained one of the county's allotted building permits.

During the FEMA injunction, costs for construction skyrocketed and the permitting process dragged. The county documented homeowners paying over \$1,000 more in permit fees and waited six months to a year for USFWS approval to build. The only homeowners and businesses that were able to build, were those property owners who did not need flood insurance and had the deepest pockets. This injunction hurt our working families and small businesses and further slowed economic growth and drove up business and housing costs even further in the county.

The additional injunction requirements also directly impacted county functions because we had to allot staff time for coordination across geographic information system (GIS) platforms at the local level. This created a bureaucratic and financial burden for our local governments and for our residents.

Although participation in NFIP is technically voluntary, local governments have little choice but to comply with NFIP's participation requirements. In this way, NFIP's participation requirements effectively serve as federal regulations that force local governments to adjust their policies in order to maintain eligibility for the program.

Since local governments are not consulted regarding NFIP participation requirement changes, they have no opportunity to provide input on the potential impact of these changes at the local level, and must implement additional requirements regardless of how they affect carefully crafted policies. It is generally true in Monroe County that if you cannot get federal flood insurance, you cannot build.

Third, species protection regulations carried out through NFIP have typically been one-size-fits-all solutions that consider neither the variance in local communities nor their existing species protection efforts. Because of this, their implementation results in land use policies that are often damaging to local economies and less effective at protecting endangered species.

In contrast to the careful balancing and consideration of a community's unique circumstances that take place when local governments set their land use plans and policies, federal species regulations imposed through NFIP participation requirements are one-size-fits-all solutions. **Furthermore, these regulations fail to take into consideration the often extensive efforts that have been carried out at the local level to protect threatened and endangered species.** This leads to scenarios in which, in order to maintain eligibility for NFIP, local governments must put aside the decisions and judgments they have made regarding the best means of achieving various land use policy goals, and instead adopt ill-fitting regulations that may ultimately do less to protect endangered species in their jurisdiction.

In the past, owners of properties within Endangered Species habitat areas were required to seek approval for development from USFWS before they could be granted a building permit by the County. In 1997 as a result of a lawsuit brought by environmentalists, the USFWS completed a Biological Opinion (BO) for the effects of the NFIP on Federally protected species in the Florida Keys. The 1997 BO found the NFIP jeopardized nine species in the Keys. In 2003 the Service re-initiated consultation and amended the 1997 BO and concluded that the effect of the NFIP would result in jeopardy on eight of ten species evaluated in the BO.

The BO contains Reasonable and Prudent Alternatives (RPA's) that required Monroe County and other participating communities in the Florida Keys to revise their Flood Damage Prevention Ordinance(s) to implement a Permit Referral Process whereby the participating communities are required to evaluate building permit applications for potential impacts to the covered species and to report to the FWS and

FEMA on issued permits. **In other words, the responsibilities of the Service and FEMA were shifted to the local governments as unfunded mandates.**

These Ordinance recommendations were developed by FEMA to meet the requirements of the RPA's and require the County to make permit determinations based on Species Assessment Guides (SAGs) developed by the Service. The SAG's contain limits to the amount of habitat that can be impacted and in the event the impact limits are exceeded, the County may ultimately be required to deny a building permit. In other words, the burden for assuring development complied with the ESA restrictions shifted from the property owner (who previously was required to get sign-off from USFWS before receiving a permit from the County) to FEMA, who now must coordinate with USFWS and then back to the County. Additionally, FEMA informed the County that if it did not comply with the RPA process, it would be placed on probation, with the ultimate threat that non-compliance would trigger removal from NFIP for all County residents.

The entire process of developing the BO and the RPAs was based on calculations provided by the County. In essence, because USFWS is not really accustomed to land regulations, and because that responsibility generally resides with local governments, the level of regulation provided by the BO and RPAs simply repackaged existing County regulations.

Further, as FEMA has little expertise in the biological and endangered species arena, their annual oversight and review of County compliance with the policy consists of making sure all the fields on the FEMA forms have been filled out. **In short, the entire FEMA review process adds no real value to the species protective measures the County had already developed and enforced. It simply adds bureaucratic redundancy and cost.**

Closing

Thank you again Chairman Schuster, Ranking Member DeFazio and members of the Committee for this opportunity to provide the local perspective on this important discussion about the impact of species protection regulations carried out through NFIP. We look forward to continued dialogue with the Committee on our shared goal of protecting threatened and endangered species while enabling the livability and economic vitality of our communities.



Testimony of Jon Chandler
CEO, Oregon Home Builders Association
On Behalf of the
National Association of Home Builders

Before the
House Transportation and Infrastructure Committee

Hearing on
“An Examination of FEMA’s Limited Role in Local Land Use Development
Decisions”

September 21, 2016

Introduction

Chairman Shuster, Ranking Member DeFazio and Members of the Committee, thank you for the opportunity to testify today. My name is Jon Chandler, and I am the CEO of the Oregon Home Builders Association, a state association of the National Association of Home Builders (NAHB).

NAHB represents more than 140,000 members who are involved in building single-family and multifamily housing, remodeling, and other aspects of residential and light commercial construction. Collectively, NAHB's members employ more than 1.26 million people and construct approximately 80 percent of new housing in America each year.

Most of NAHB's home builder members are small business owners who construct 10 or fewer homes annually and typically have less than 12 direct employees. They know firsthand how changes to land development strategies directly affect not only homeowners, but also small businesses and communities.

Today I will address the land use problems created by linking the Endangered Species Act (ESA) with the National Flood Insurance Program (NFIP). NAHB has a long history of supporting the NFIP and we are committed to ensuring that it remains available and affordable to its policyholders while being mindful of the cost to the taxpayer.

At the same time, NAHB remains vigilant to ensure that the NFIP is not undermined needlessly as the result of excessive regulatory burdens. NAHB is strongly opposed to the inappropriate use of the ESA to make national changes to the NFIP program. This will add duplicative, burdensome and costly regulatory barriers which will prevent the development of communities near well-paying jobs, and increase the price of housing beyond the means of many middle-class working American families.

Background

Since its creation in 1968, the Federal Emergency Management Agency (FEMA) has implemented the NFIP through three basic categories of actions.

First, FEMA designates Special Flood Hazard Areas (SFHA) which have traditionally been defined as the 100-year floodplain, or an area with a 1 percent chance of flooding annually. FEMA publishes and periodically updates and amends SFHAs through Flood Insurance Rate Maps (FIRM) based on technical geographic data concerning the proper location of the Base Flood Elevation (BFE).

Second, FEMA enrolls communities in the NFIP when they satisfy the minimum eligibility requirements. To be eligible, a community must demonstrate that it regulates land use in the SFHA by (1) requiring permits for development; (2) prohibiting development in floodways that would obstruct the discharge of floodwater and therefore raise the BFE; (3) prohibiting residential development below BFE; and (4) requiring flood proofing construction methods for nonresidential development below BFE. Also, through the Community Rating System (CRS), FEMA encourages communities to undertake floodplain management measures that go beyond the minimum land use criteria for NFIP eligibility.

Third, Congress mandates that FEMA make flood insurance available for developments in an NFIP eligible community.

Although the NFIP faces many problems, such as challenges with mapping and financial stability, not all the difficulties stem from within the program itself.

Legal Battles on ESA

Recently, environmental groups have worked to tie the ESA to the NFIP. According to Section 7 of the ESA, federal agencies, such as FEMA, are required to ensure that “any action authorized, funded, or carried out by such agency” is not likely to jeopardize or result in the destruction of critical habitat of any endangered or threatened species.¹ FEMA accomplishes this by “consulting” with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS).²

The outcome of a consultation is a written statement by the FWS and the NMFS (collectively known as the Service) explaining how the agency’s actions affects a species or its critical habitat.³ In addition, if the Service determines that the agency’s action will jeopardize a species or adversely modify its critical habitat, then the Service will suggest “reasonable and prudent alternatives which [the Service] believe will not violate [the ESA] and can be taken by the Federal agency...in implementing its action.”⁴

A number of courts have held that under Section 7, FEMA must consult with the NMFS concerning certain impacts of the NFIP on endangered species because FEMA has discretion to alter its activities to protect endangered species.

One of the earliest cases concerned the Florida Key Deer. In 1990, wildlife organizations filed suit against FEMA for failing to consult over the impacts of the NFIP on the Key Deer. In 1994, the district court ruled against FEMA, and FEMA then entered into consultation with the FWS. The outcome of the consultation was a Biological Opinion (BiOp) and reasonable and prudent alternatives (RPAs) that required Monroe County, FL to condition “the grant of building permits to landowners on the completion of FWS review.”⁵

Subsequently, not satisfied that FEMA was indeed protecting listed species, the wildlife organizations amended their original complaint. In 2005, the district court agreed that neither FEMA nor the FWS had complied with their section 7 obligations.⁶ FEMA appealed that decision to the 11th Circuit, arguing that it has no duty to consult under the ESA. The 11th Circuit held that FEMA must consult under section 7 because it has discretion (1) to set the criteria used to determine if a community has adequate land use controls in place, and (2) in its development of the CRS.⁷

In 2004, the National Wildlife Federation (NWF) challenged FEMA’s failure to consult over the impacts of the NFIP on federally protected salmon. In this case, similar to the Key Deer case in south Florida, the judge found that FEMA has discretion to set the land use control criteria when creating the factors used in the CRS program. The court also said that with respect to FEMA’s mapping function, FEMA has the discretion to not authorize placing fill material in floodplains. Compared to the Key Deer, this case went further and the judge ruled that FEMA has no discretion when issuing flood insurance, and therefore

¹ 16 U.S.C. § 1536(a)(2).

² *Id.* While the FWS is responsible for most species, NMFS has authority over certain marine species.

³ 16 U.S.C. § 1536(b)(3)(A).

⁴ 16 U.S.C. § 1536(b)(3)(A).

⁵ *Key Deer v. Paulison*, 522 F.3d 1133, 1139 (11th Cir. 2008).

⁶ *Id.* at 1140.

⁷ *Id.* at 1142-43.

held that FEMA does not have to consult with NMFS concerning the actual issuance of flood insurance.⁸ This is of particular interest because the basic purpose of the NFIP is the issuance of flood insurance, but contrasted with CRS and mapping, Congress gave FEMA no discretion on the issuance of flood insurance.

In response to these court cases and others, FEMA has consulted with the Service concerning the impact of the NFIP on specific species.

Oregon Case

In 2010, FEMA settled a lawsuit by, among other things, agreeing to consult with the NMFS over its implementation of the NFIP in Oregon (including 260 cities, towns and counties). The outcome of the consultation is a BiOp that the NMFS finalized on April 14, 2016 (hereinafter the NMFS' BiOp). The BiOp concludes that FEMA's implementation of the NFIP in Oregon "is likely to jeopardize the continued existence of 16 ESA-listed anadromous fish species and Southern Resident killer whales, and it will result in the destruction or adverse modification of designated or proposed critical habitat for the 16 anadromous fish species."⁹

Under NMFS' BiOp, FEMA and the NFIP participating communities in Oregon face two unmanageable options: (1) immediately suspend "all NFIP related activities," including halting the issuance of any new building permits for projects occurring within SFHA,¹⁰ or (2) agree to fully implement NMFS's proscribed modifications to the NFIP program (requiring FEMA to undertake a series of federal rulemakings).

State and local governments in Oregon will also need to establish new permitting and mitigation requirements to restrict future land development and construction activities in and around areas described and mapped by FEMA as "riparian buffer zones."¹¹ The BiOp will require changes to FEMA's floodplain mapping program, and the manner in which communities demonstrate full compliance with the National Flood Insurance Act (NFIA), and by implication the ESA. While requirements under NMFS's BiOp would require FEMA to amend existing NFIP regulations, FEMA has until January 1, 2021 to complete all necessary rulemakings under the NFIP.¹²

Future land development and construction activities occurring within current SFHA will need to comply with numerous requirements, including:

- Demonstrating the proposed development or construction will achieve a "no net loss of natural floodplain functions."

⁸ *National Wildlife Federation v. FEMA*, 345 F. Supp. 2d 1151, 1173-74 (W.D. Wa. 2004), see also *Coalition for a Sustainable Delta v. FEMA*, 812 F.Supp.2d 1089 (E.D. Cal. 2011).

⁹ Letter from William Stelle, Jr., Regional Administrator, NMFS West Coast Region to Mark Eberlein, U.S. Department of Homeland Security, FEMA Region X (April 14, 2016), http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

¹⁰ U.S. Department of Homeland Security, Federal Emergency Management Agency Region X. *Letter to all NFIP communities within the State of Oregon*. June 13, 2016.

¹¹ U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) "Not Likely to Adversely Affect" Determination for the Implementation of the National Flood Insurance Program in the State of Oregon*. April 14, 2016. Page 279. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

¹² *Id.* page 286.

- Requiring NFIP participating communities to establish mandatory mitigation programs for new land development or building activities within SFHA and require developers to undergo a separate pre-construction permit review process that include mitigation requirements such as:¹³
 - *2 to 1 offset requirement* for activities NMFS finds results in lost flood storage,
 - *3 to 1 offset requirement* for activities that remove trees (exceeding 6 inches in diameter), and
 - Requires developers/builders to offset any increase impervious surfaces (roads, sidewalks, roofs) by removing existing impervious surfaces within SFHAs.

- Mandating national changes in FEMA's floodplain mapping program.

The NMFS believes that the very existence of the NFIP encourages future development in and around the SFHA. Floodplains are important ecological and environmental areas for aquatic species, like salmon, that are protected by the government under ESA. However admirable it may be to conserve floodplains to protect endangered species, it is not the role of the NFIP.

However, FEMA has already issued public statements stating that it intends to fully comply with all the requirements within the NMFS's final BiOp. Failure by FEMA to comply with all mandatory requirements identified by the NMFS in the BiOp could result in FEMA being sued for violating the ESA.

Effect on Development

Given Oregon's history of progressive land management decisions, the problems raised by the imposition of the BiOp in Oregon bring into focus an additional layer of concern for the development community. State and local land management decisions, including the adoption of urban growth boundaries and requirements for long-term land supplies, have already put Oregon at the forefront of land protection efforts.

The irony of the situation is that states such as Oregon or California, and many others, have invested time and money in land use planning, infrastructure development and economic revitalization. If the BiOp is required nationwide, it could undermine those efforts. Participation in the NFIP program and the adoption of the minimum floodplain requirements does not preclude communities from also being subject to separate state laws governing policies such as zoning, planning or takings.

For example, under Measure 49, any state or local government entity in Oregon that enacts a land use regulation that restricts certain property uses must provide compensation to the property owner for the difference in value of the property. Local governments, whose participation in the NFIP at the community level is not mandatory, may soon face a challenging dilemma when claims begin to be filed under Measure 49. The terms of the BiOp will result in large areas of land that can no longer be developed which impact the value of that land, and due to the measure, local governments are held accountable for the difference in cost. Many communities will be unable to afford that cost, and may be forced to consider dropping out of the NFIP. However, because of the mandatory requirements for a mortgage holder in the SFHAs to purchase flood insurance, dropping out of the NFIP could result in

¹³ *Id.* page 279.

many constituents defaulting on their mortgage if they cannot afford the high rates for private flood insurance or if it is not available to them. This places communities in a lose-lose situation.

Metropolitan regions covered under one of Oregon's urban growth boundary (UGB) areas must coordinate among affected local governments to account for long range urban population that is consistent with a 20-year population forecast under Oregon's statewide planning goals and guidelines. If implementation of the BiOp removes land from the UGB, given its inclusion of high hazard areas, then other land previously protected from being developed must be brought into the UGB to meet the minimum long-term land supply requirement.

The NFMS's BiOp would require local governments in Oregon to change their existing local land use policies. This means that any new housing development occurring within areas mapped as SFHA must have lower density levels to perverse floodplain functions.¹⁴ The NMFS's mandate to local governments in Oregon to reduce housing unit density within UGB areas mapped as SFHA goes completely against Oregon's UGB approach.

The NMFS's does attempt to provide some flexibility by allowing these jurisdictions to develop their own reduced density standards. However, the NMFS determines those lower density standards are equivalent to the NMFS's proposed standard under the BiOp.¹⁵ Thus, the NFMS recommends Oregon jurisdictions with UGBs require that all new development located within SFHA adopt an approach called "cluster development or open space zoning."¹⁶ The NMFS defines "cluster development or open space zoning" as;

alternative site planning technique that concentrates dwelling units in a compact area to reserve undeveloped space elsewhere on the site. In this technique, lot size, setbacks, and frontage distances are minimized to allow for open space. The basic principle of cluster development is to group new homes onto part of the development parcel, so that the remainder can be preserved as unbuilt open space.¹⁷

Some might misinterpret the NMFS's definition of "cluster development/open space zoning" as being completely compatible with the concept of future development within UGBs by concentrating future development into a small area. However, application of the NFMS's definition would create significant implementation problems for local governments, developers and builders alike. By requiring UGB communities to reduce housing density to maximize open space, even if those areas located within UGB areas slated for higher density, the result will be a reduction of future housing units.¹⁸ At the very least, communities with UGBs will need guidance from the NMFS and/or FEMA explaining how they can achieve both lower density in the floodplain to protect salmon habitat and still meet future housing demand as required by the UGB.

While these policies may seem specific to Oregon, the underlying principles of land use planning, infrastructure management and capital facilities maintenance, are not. The federal government is unable to take into account all of the numerous local and state regulations that could negatively affect

¹⁴ *Id.* pg. 289.

¹⁵ *Id.* pg. 290.

¹⁶ *Id.* pg. 290.

¹⁷ *Id.* pg. 279.

¹⁸ *Id.* pg. 279.

communities if misunderstood or attempted to circumvent. The NFIP has traditionally worked with state and local governments to prevent these types of problems, but moving forward with policy changes such as required under the NMFS' BiOp are undoing Congress's thoughtful work.

Duplicative Requirements

Regardless of whether provisions within the NFIP are subject to the ESA's Section 7 consultation, many builders' lawful land development and construction activities must already go through the Section 7 consultation process.

The ESA Section 7 consultation process is the most sweeping and powerful regulatory program under the statute. Under Section 7, the Service has the authority to prohibit land development and construction activities if it determines it could jeopardize the continued existence of an endangered species or could potentially destroy or adversely modify designated critical habitat for endangered species.¹⁹ For home builders, the Section 7 consultation process is triggered because land development projects often need a federal permit in order to proceed.

According to the Services' permitting data, they conducted nearly 90,000 informal and formal consultations from 2008-2015.²⁰ Nearly two thirds of all 90,000 Section 7 consultations conducted by the Service were for land development or construction activities that required a federal permit – typically a wetlands permit under the Clean Water Act (CWA) Section 404. This data demonstrates how the majority of private residential land development or construction activities require a federal wetlands permit and are already fully regulated by the Service to ensure the protection of endangered species, regardless of whether or not the NFIP is subject to ESA.

Because many builders already go through this process due to wetlands permitting, it is duplicative to layer on an additional ESA consultation at the program level through the NFIP.

Intent of NFIP

The NFIP's purpose is not to protect endangered species. FEMA has correctly pointed out that under the NFIA Congress did not give the Agency land use authority. FEMA further stated that if "Congress intended to prohibit development, it could have prohibited all federal assistance to federally-backed loans for the acquisition or construction in the floodplain, instead of merely requiring a structure to be covered by flood insurance."²¹ FEMA correctly emphasizes Congress's original intent under NFIA, to ensure that all structures built within a floodplain meet higher construction standards and obtain and maintain insurance coverage. The NFIP's intent is not to prohibit communities from obtaining the housing they need.

¹⁹ Statutory provisions of the ESA's Section 7 consultation program are found at 16 U.S.C. §1536(a)(1)(2) while the regulatory requirements are located at 50 C.F.R. §402.02.

²⁰ Source FWS's Section 7 consultation database called Tracking and Integrated Logging System (TAILS).

²¹ Letter from Mark Carey, Director, FEMA Mitigation Division to Kim Kratz, PhD., NMFS Ass't Regional Administrator, West Coast Region (Jan. 14, 2015); Letter from Mark Carey, Director, FEMA Mitigation Division to Kim Kratz, PhD., NMFS Ass't Regional Administrator, West Coast Region (Jun. 3, 2015).

FEMA's Floodplain Mapping Program

Congress directed FEMA to “identify and publish information with respect to all floodplain areas...within five years following August 1, 1968.”²² In addition, FEMA must review and update these maps every five years²³ and correct and update these maps, if information is provided to FEMA proving that the existing map is incorrect.²⁴

The maps are based solely on technical evaluation of the base flood elevation. If FEMA determines that an area is at or below the BFE, FEMA must designate that area as the SFHA. FEMA is fundamentally drawing a line on a map and it cannot draw that line simply to benefit endangered species.

Under the terms of the NMFS's BiOp, however, the Service will require FEMA to cease processing requests from landowners and local governments for revisions to existing floodplain maps under the NFIP's letters of map revision process (LOMR) unless the landowner or the local government can demonstrate to FEMA's satisfaction that all potential impacts to an endangered species or the floodplain function has been fully mitigated. Specifically, the Service has required FEMA to stop processing LOMR-F requests as of last week (September 13, 2016) unless the landowner can demonstrate all potential impacts to endangered species have been fully mitigated.²⁵

The purpose of this new requirement appears to expand the ESA's current Section 7 consultation obligation to include exclusively private actions by landowners by requiring them to first provide proof from the Service that they are complying with all the provisions of the ESA before submitting any floodplain map revision requests of FEMA.²⁶

The result will be to add significant time and expense for private landowners or local governments seeking revisions to an existing FIRM by requiring all landowners to first complete the complicated and expensive ESA Section 7 consultation process or Section 10 incidental take permit process (ITP). While the Service's Section 7 consultation process can take between two months to four and half months to complete, the Section 10 ITP typically takes landowners over two years to complete.

NAHB views this as an inappropriate expansion of FEMA's authority since FEMA does not authorize or approve the construction of structures or the placement of fill in or around floodplains. FEMA also does not determine what mitigation, if any, is required for the construction of building or placement of fill. FEMA's role is to ensure that the information depicted on FIRMs are accurate and scientifically sound. It is not FEMA's role under the LOMR process to determine what level of mitigation should be required to offset presumed impacts to endangered species.

Another significant change to the NFIP's floodplain mapping program is the requirement under NMFS's BiOp that FEMA delineates “Zone E” areas on FIRMs for all riverine areas nationwide. Under FEMA's

²² 42 U.S.C. § 4101(a).

²³ 42 U.S.C. § 4101(e).

²⁴ 42 U.S.C. § 4101(f).

²⁵ U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) “Not Likely to Adversely Affect” Determination for the Implementation of the National Flood Insurance Program in the State of Oregon*. April 14, 2016. Page 280. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

²⁶ *Id.* pg. 280.

existing floodplain mapping classification regulations, Zone E means areas of special flood-related erosion hazards.²⁷ Currently, FEMA determines mapping zones depending on the types of flooding which take into account hydrologic, topographic, geologic and climatologic variability. To accurately reflect this information in new and updated FIRMs requires extensive engineering research, flood studies and incorporates extensive consultation with local communities which is not currently accounted for in the BiOp.

The BiOp presupposes a mapping outcome that would otherwise be determined by FEMA, the expert agency, through an established process that includes steps mandated by both regulation and statute.²⁸ Included in this process is an extensive engineering study as well as consultation with the community and stakeholders impacted by any potential remapping of the area. This will require massive changes to the national mapping program and undermines the intent of actions taken by Congress under the Homeowner Flood Insurance Affordability Act (HFIAA) and the Biggert-Waters Flood Insurance Reform Act (BW-12).

Thus, since FEMA's maps are based solely on technical information, Congress should consider whether FEMA has the discretion to take into account endangered species concerns when undertaking its mapping duties.

FEMA's minimum eligibility criteria

The NFIP authorizes FEMA to conduct studies and investigations concerning the "adequacy of State and local measures in flood-prone areas as to land management and use, flood control, flood zoning, and flood damage prevention..."²⁹ Based on those studies and investigations, Congress provided FEMA with authority to develop the minimum criteria that communities must meet to be eligible to participate in the NFIP.³⁰

One of the significant changes under the NMFS's BiOp would restrict the subdivision of existing lots within the SFHA. Specifically, the NMFS provides:

FEMA should allow no division of parcels that would create lots smaller than 5 acres within special hazard areas. This restriction on the size of lots limits the total number of lots and thus prevents densification of floodplain development, thereby restricting the number of future structures likely to be exposed to flood related hazards, and maintaining land to accommodate flood functions and processes.³¹

²⁷ 44 C.F.R. 64.3(a)(1).

²⁸ 44 C.F.R. 60.3.

²⁹ 42 U.S.C. § 4102(a).

³⁰ 42 U.S.C. § 4102(c).

³¹ U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) "Not Likely to Adversely Affect" Determination for the Implementation of the National Flood Insurance Program in the State of Oregon*. April 14, 2016. Page 328. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

Restricting development to 5-acre lots will have a pronounced impact on home building. According to the Census Bureau, the average lot size in the Pacific Division³² is .15 acres.³³ Using this data, the NMFS is requiring lots in the flood plain to be 33 times larger than the average lot. Furthermore, requiring large lots, in combination with the urban growth boundary, will cause lot prices and home prices to increase—thereby significantly curbing the development of affordable housing.

Similarly, the NMFS is restricting “the footprint of new structures to 10% or less of total lot size for both residential and commercial development....”³⁴ Again, such a restriction will have an enormous impact on home building. Assume that existing lots in the area are (based on the Census Data) .15 acres, or 6,525 square feet. NFMS’s restriction limits the size of the home to 652 square feet if single-story, or 1,305 square feet for a two-story home. According to U.S. Census/HUD survey data for 2015, the average size of a single-family home in the United States is approximately 2,500 square feet.³⁵ Drastically reducing the size of homes is not only a far reach from the goals of the NFIP, but it dramatically impacts growth in communities where families want to live.

The NMFS is regulating development on both new lots, and previously platted lots. It is undisputed that “zoning laws and their provisions...are peculiarly within the province of state and local legislative authorities,” not regulated by Congress.³⁶ By developing the Oregon BiOp, the NMFS is trampling over state and local governments authorities.

Furthermore, for the homebuilding industry in Oregon, perhaps one the most significant impacts resulting from the NMFS’s required changes to the NFIP is found under element 2 of the interim measures. The NMFS seeks to have FEMA significantly change the existing minimum eligibility criteria for communities seeking to be enrolled under the NFIP.³⁷

Under this measure, FEMA would have to require all NFIP communities to establish mandatory floodplain mitigation requirements for new development located within a SFHA as well as establish so-called “riparian buffer zones” (RBZ) across all perennial or intermittent streams where there would be a complete prohibition on any future land development or new construction.³⁸ These RBZ buffers would

³² Alaska, California, Hawaii, Oregon, and Washington

³³ Siniavskaia, Natalia “Lots in 2015 are Smallest on Record” (7/11/2016) <http://eyeonhousing.org/2016/07/lots-in-2015-are-smallest-on-record/>.

³⁴ U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) “Not Likely to Adversely Affect” Determination for the Implementation of the National Flood Insurance Program in the State of Oregon*. April 14, 2016. Page 289. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

³⁵ Dietz, Robert “New Single-Family Home Size Declining” (8/16/2016) <http://eyeonhousing.org/2016/08/new-single-family-home-size-declining/>.

³⁶ *Warth v. Seldin*, 422 U.S. 490, 508, n. 18 (1975); see also *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments”); *FERC v. Mississippi*, 456 U.S. 742, 768, n. 30, 102 S.Ct. 2126, 2142, n. 30, 72 L.Ed.2d 532 (1982) (“[R]egulation of land use is perhaps the quintessential state activity”).

³⁷ 44 C.F.R. §60.

³⁸ U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) “Not Likely to Adversely Affect” Determination for the Implementation of the National Flood Insurance Program in the State of Oregon*. April 14, 2016. Page 279. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

extend 170 feet horizontally from the “ordinary high water mark” (OHWM) of any perennially or intermittent streams. Within these RBZs future development would be significantly restricted.

Residential development routinely needs to cross streams (perennial or intermittent) to access roads, utility lines, stormwater and or sewer lines, and to engage in various other forms of infrastructure needed to support residential subdivisions. The requirement to avoid all future residential development impacts within any areas defined by FEMA in these RBZs will significantly reduce housing production in Oregon.

The NMFS’s requirement under the BiOp element 2 says all NFIP participating governments in Oregon must create a mandatory floodplain mitigation. This is akin to the existing federal wetlands mitigation program where developers and builders whose otherwise lawful land development or construction activities impact a “waters of the U.S.,” must mitigate any unavoidable impacts to wetlands from federally approved wetland mitigation banks.³⁹

However, under NFMS’s mandatory floodplain mitigation proposal, developers and builders must mitigate for any removal of vegetation or increase in impervious surface (e.g., roofs, driveways, sidewalks, etc.) that result from new land development or construction activities within SFHA areas. Developers and builders would be required to achieve specific offset ratios (e.g., ranging between 2:1 to 3:1) for any increase in impervious surface (e.g., new buildings, sidewalks, roofs, etc.) or removal of existing vegetation within SFHA areas.

Furthermore, the NMFS’s floodplain mitigation requirement stipulates that developers and builders seeking to build within the SFHA areas must first remove an equal amount of existing impervious surface. Presumably developers and builders seeking to build within a SFHA in Oregon would first need to purchase and retrofit existing structures or existing infrastructure with pervious building materials. Given that most building activity in Oregon takes place within UGBs, the cost to developers and builders to purchase floodplain credits and or retrofit existing buildings or infrastructure will be cost prohibitive.

Unlike the existing federal wetlands mitigation program run by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, the NMFS’s requirement that all NFIP participating communities in Oregon create these floodplain mitigation program lacks the necessary clarity to understand how precisely developers, builders and local governments will comply. For example, will floodplain mitigation be achieved via mitigation banks or fee in lieu of programs? Or will the permittee be responsible? What happens in situations where no floodplain credits are available for developers and builders to acquire? These and many other implementation and administrative questions must be clarified by the NFMS or FEMA before any such floodplain mitigation requirement can be enacted.

As an example, we can contrast the eligibility requirements of the NFIP with Congress’s authorization for states to operate the Clean Water Act’s NPDES⁴⁰ permitting program. Under the CWA, the EPA issues NPDES permits unless the state has submitted its own program to the EPA for review and EPA has approved such program. The EPA must approve the state’s program unless it determines that the state’s program fails to satisfy nine criteria.

³⁹ 33 CFR §§ 332.1 - 332.8 & 40 CFR §§ 230.91 - 230.98.

⁴⁰ National Pollutant Discharge Elimination System (NPDES).

In *National Association of Home Builders v. Defenders of Wildlife*, Arizona sought to administer the NPDES program in the state.⁴¹ Defenders of Wildlife argued that EPA and FEMA must consult under ESA Section 7. The Supreme Court explained that “[b]y its terms, the [CWA’s] statutory language is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application.”⁴² The Court reasoned that if the EPA were to add ESA considerations into its approval, it would improperly be adding a tenth criteria to Congress’s exclusive list.⁴³ The Court approved of the FWS’s regulations, which only require consultation when an agency takes a discretionary action, and held that the EPA and the FWS did not have to consult over the EPA’s approval of Arizona’s program.⁴⁴

As proof from this example, NAHB urges Congress, during the NFIP reauthorization, to limit future applicability of the ESA’s Section 7 consultation requirement. Congress can clarify whether key statutory provisions of the existing NFIP (i.e. mapping and minimum eligibility criteria) are in fact subject to the ESA’s Section 7 consultation.

Conclusion

I would like to thank the Chairman and the Committee for the opportunity to testify today. The cost due to duplicative regulations have significant negative impacts on the housing market. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low- and moderate-income home buyers. Analysis done by NAHB illustrates that a \$1,000 increase in home prices leads to pricing out slightly more than 206,000 individuals from a home purchase.⁴⁵ Low- to mid-income buyers are more susceptible to being priced out of the market, and those who are on the verge of qualifying for a new home will not be able to afford the purchase.

The concern intensifies with the discussion of affordable flood insurance. Home buyers should not be subject to increases in cost due to a regulation that not only conflicts with state and local interests, but was not the intent of the original program.

The result of the numerous court rulings against FEMA is unsustainable. We face a situation where the underlying insurance policy is non-discretionary, but the supporting components (e.g. mapping, minimum eligibility criteria and CRS) are subject to consultation requirements. NAHB believes that if the supporting components of the NFIP were deemed non-discretionary, the courts would reconsider the ESA requirements.

NAHB urges Congress to use both its oversight authority, and take the opportunity during the upcoming reauthorization of the NFIP, to ensure the potential negative ramifications of the BiOp do not needlessly harm communities and housing affordability. It is necessary to retain the NFIP’s original intent and focus solely on the protection of homes and communities from flooding.

⁴¹ 551 U.S. 664 (2007).

⁴² *Id.* at 661.

⁴³ *Id.* at 663.

⁴⁴ *Id.* at 665-67.

⁴⁵ <http://www.nahb.org/generic.aspx?genericContentID=161065&channelID=311>.