



FLOODPLAINS, FEMA, AND FISH

BIOLOGICAL OPINION ON THE IMPACTS OF THE NATIONAL FLOOD INSURANCE PROGRAM IN OREGON

Updated: April 15, 2016



Photo of Columbia River courtesy of Joe Parks / Creative Commons.

Since its initiation in 1968, the National Flood Insurance Program (NFIP) has aimed to reduce the impact of flooding on communities and individuals by providing affordable insurance for property owners and by encouraging and incentivizing communities to adopt and enforce floodplain management regulations. While the NFIP has helped many communities recover from flood damage and has encouraged safer building standards within floodplains, it has also effectively subsidized the costs of development in floodplains. As a result of this subsidy and the ever-increasing cost of flood damage, the NFIP is estimated to be about \$24 billion in debt.

The link between NFIP implementation and increased development in floodplains has put it on a collision course with another, very different federal policy. Since 1973, the federal Endangered Species Act (ESA) has aimed to protect critically imperiled species from extinction. The ESA prohibits the take of listed species and requires federal agencies to ensure none of their actions or programs are likely to cause the extinction of species (“jeopardy”) or to adversely impact critical habitat for listed species.

The conflict between these two policies first came into focus in 1994, when environmental groups sued the Federal Emergency Management Agency (FEMA), arguing that the agency was legally required to consult with the US Fish and Wildlife Service over the impact their provision of low-cost flood insurance had on development in floodplains, and therefore on the endangered Florida Key deer. Similar cases followed in several other states, including Oregon.



Salmon (pictured) and steelhead are fish addressed in the biological opinion. Photo courtesy of USFWS.

WHAT’S HAPPENING IN OREGON?

Litigation in Oregon (filed in 2009) required FEMA to consult with the National Marine Fisheries Service (NMFS) over the impact of the NFIP on listed fish species, including salmon and steelhead, and southern resident killer whales. In 2013, NMFS drafted a Biological Opinion stating that the program creates jeopardy of extinction for many of the species involved in the consultation. With release of its final Biological Opinion today, NMFS has also provided a “Reasonable and Prudent Alternative” that describes how FEMA could change implementation of the NFIP in order to come into compliance with the ESA.

IMPLEMENTATION TIMELINE

Phase 1: FEMA provides notice to communities and develops outreach strategy by Sept. 15, 2016

Phase 2: Implementation of interim measures, some mapping changes, and data collection and reporting are in place by March 15, 2018

Phase 3: Changes to floodplain management criteria that can be completed without federal rulemaking are implemented by Jan. 1, 2019

Phase 4: Mapping changes to include additional hazard areas and residual risk are completed, and enforcement has begun, by Sept. 15, 2019

Phase 5: Any needed changes to FEMA's regulations are completed by January 1, 2021

THE NATIONAL FLOOD INSURANCE PROGRAM

- The NFIP was established in 1968 to incentivize communities to improve public safety and floodplain management by providing federally-subsidized flood insurance.
- More than half of Oregon's floodplains have been developed.
- Intact and functional floodplains provide rivers and streams with better water quality, lower and more fish-friendly water temperatures, greater biological diversity, and slower moving water that support fish reproduction, limits erosion, and is less dangerous to people.

HOW MIGHT THE BIOLOGICAL OPINION CHANGE FLOODPLAIN MANAGEMENT IN OREGON?

The Reasonable and Prudent Alternative outlined in NMFS's final Biological Opinion includes several key features that could significantly affect the way local governments in Oregon regulate and manage floodplains. These changes present opportunities and challenges for many communities and individual landowners.

The changes NMFS is recommending FEMA make to the program include:

- 1 Notice to communities:** FEMA is expected to inform NFIP communities in Oregon about the Biological Opinion and develop an education and outreach strategy to assist Oregon communities and the Department of Land Conservation and Development in implementing the recommended measures.
- 2 Interim measures:** In the 2-5 years allowed for FEMA to fully comply with the Biological Opinion, FEMA and local communities are expected to follow some immediate steps to prevent unmitigated development in the floodplain. Communities would need to implement these measures within two years to qualify for ESA coverage under the Incidental Take Statement included in the Biological Opinion (that is, in order to receive NMFS' assurance that the impacts of their floodplain management decisions are below a threshold considered acceptable under the Endangered Species Act).
- 3 Mapping special hazard areas:** FEMA would provide communities with more accurate floodplain mapping that uses updated methods and includes identification of additional flood-related hazard areas.
- 4 Floodplain management criteria:** FEMA is expected to require communities that participate in the program to take steps to steer development impacts away from high-hazard areas and minimize and mitigate impacts to floodplain function, including water quality, fish habitat, and flood storage capacity. Communities that can demonstrate that this approach is impracticable due to exceptional circumstances (such as geomorphic constraints or most or all of a community being located in a flood hazard area) can propose an alternative approach.
- 5 Data collection and reporting:** FEMA is expected to require NFIP communities to report on development in special hazard areas and would provide NMFS with an annual report on local permitting of development in floodplains.
- 6 Compliance and enforcement:** Communities that take early action to comply with the Biological Opinion would be provided extra credit under the Community Rating System, while those that do not comply with new criteria would be placed on probation or suspended from the program.

WHAT'S NEXT?

While some communities and individuals have significant concerns about how the Biological Opinion will be implemented in Oregon, the release of a final version today also creates some important new opportunities. The Opinion, and the implementation planning process that follows it, provide some long-awaited clarity to communities about what level of floodplain development is permissible under the Endangered Species Act.



Floodplains as open space can act as a buffer against the powerful forces of flood flows to prevent flood damages to development. Photo of McMurry Natural Area courtesy of the City of Fort Collins.

It also provides significant guidance on how communities can steer development away from the most hazardous areas of floodplains, where the risk of flood damage to human lives and property is high and development is most likely to harm listed fish.

The implementation planning process, which is likely to be led by Oregon’s Department of Land Conservation and Development in coordination with FEMA, will also provide the first opportunity for many communities, individuals, and interest groups to provide input on how the NFIP should work moving forward. The Reasonable and Prudent Alternative within the Opinion provides one potential path to bringing the program into compliance with the Endangered Species Act, but other alternatives may also exist. The agencies are planning a robust stakeholder process to determine exactly how that will happen. This process will dive into details of potential conflicts with existing policies, including Oregon’s land use planning system, and will work to address concerns about how the Opinion will be implemented within existing authorities and in the context of communities’ economic development needs and other planning goals.

In addition to a clear route to ESA compliance and an expanded opportunity for stakeholder engagement, the Biological Opinion presents opportunities for communities to benefit from improved mapping of flood-related hazards, reduced risks and costs from flooding, and a path to building more resilient floodplain ecosystems.

However, the Opinion may also present significant challenges. If FEMA is unable to develop updated hazard maps in a timely fashion, communities or the state may need to step in and fill the gap, and many planning departments, particularly in small towns, lack capacity and resources to do the modeling and mapping that will likely be required in the final Biological Opinion. The intersection between new land use restrictions recommended in the Biological Opinion and Oregon’s existing land use system and laws, as well as public concerns related to takings and private property rights, may also create challenges for communities trying to implement interim measures or meet updated NFIP criteria.

Careful planning and effective mitigation can help Oregon’s communities continue to grow without undermining public safety and the important natural functions of healthy floodplains. However, both policy changes and significant support from the state and federal levels will be needed to help communities achieve a smarter and safer approach to floodplain management. State and federal policymakers can help support local communities by ensuring that sufficient funding and technical support are available to help communities and individuals understand the risks of developing in flood-prone areas and to plan for and implement changes that are needed both before and after flood disasters strike. ■

WHAT IS A BIOLOGICAL OPINION (BIOP)?

Biological opinions are prepared when a federal agency consults with National Marine Fisheries Service (NMFS) or the US Fish & Wildlife Service (FWS) to determine whether a proposed action might “jeopardize” the survival of threatened or endangered species or adversely modify its designated critical habitat.

A finding of “significant impacts” results in a jeopardy opinion and means that some aspect of the federal program threatens to jeopardize an endangered species or adversely modify its critical habitat.

A jeopardy opinion includes a “Reasonable and Prudent Alternative” (RPA) that describes an alternate route to implementation of the federal program that would allow the consulting agency to avoid jeopardizing the species and come into compliance with the Endangered Species Act (ESA).

Implementation of the Biological Opinion: Opportunities and Challenges	
Opportunities	Challenges
Improved hazard mapping	Disagreement over FEMA authorities
Reduced flood risk, costs	Community capacity
More resilient floodplain ecosystems	Intersection with land use policies
Clear route to ESA compliance	Conflict with other community goals

FOR MORE INFORMATION

Sara O’Brien, Director of Strategy
 503.946.8350 | obrien@willamettepartnership.org
<http://willamettepartnership.org/floodplains/>