



**DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION**

May 5, 2023

**FEDERAL EMERGENCY MANAGEMENT AGENCY  
DOCKET ID FEMA-2023-0007  
NATIONAL FLOOD INSURANCE PROGRAM– ENDANGERED SPECIES ACT  
INTEGRATION IN OREGON**

**STATE OF OREGON,  
BY AND THROUGH ITS DEPARTMENTS OF  
LAND CONSERVATION AND DEVELOPMENT, FISH AND WILDLIFE, STATE  
LANDS, AND FORESTRY, THE OREGON WATERSHED ENHANCEMENT BOARD,  
AND THE OREGON STATE MARINE BOARD**

**SCOPING COMMENTS AND REQUEST FOR EXTENSION OF TIME**

The Federal Emergency Management Agency (FEMA) administers the National Flood Insurance Program (NFIP). FEMA initiated consultation under the Endangered Species Act with the National Marine Fisheries Service (NMFS) in response to a lawsuit challenging FEMA's implementation of the NFIP in Oregon. NMFS issued a biological opinion (BiOp) concluding that FEMA's NFIP implementation in Oregon is "likely to jeopardize the continued existence of 16 ESA-listed anadromous fish species and Southern Resident killer whales. As required by the ESA, NMFS included several reasonable and prudent alternatives (RPAs) in the BiOp.

FEMA proposes to comply with the RPAs through execution of the Oregon Implementation Plan for NFIP-ESA Integration. This plan constitutes a "major federal action" within the meaning of the National Environmental Policy Act (NEPA). FEMA has concluded that the action requires preparation of an Environmental Impact Statement (EIS). Pursuant to 40 CFR 1501.9, FEMA is soliciting scoping comments "regarding the range of issues, information, and analyses relevant to the proposed action, including potential environmental impacts and reasonable alternatives to address in the EIS." The deadline for submission of scoping comments is May 5, 2023.

The State of Oregon ("State"), by and through the agencies listed above, requests an extension of time to provide scoping comments. The State also provides its initial scoping comments as follows.

**REQUEST FOR EXTENSION OF TIME**

The State requests a 60-day extension of the deadline to provide scoping comments. The State has significant concerns with FEMA's proposed preferred alternative, including the burden placed on local governments to implement the options listed in the preferred alternative, duplication of existing efforts in federal, state, and local law to address issues pertaining to

specified floodplain resources, and potential conflicts with state law governing these resources. While the State has identified some of these issues at a high level in the comments below, an extension would allow the State an opportunity to provide FEMA with more detailed – and therefore more useful – scoping comments.

## SCOPING COMMENTS

The State provides the following scoping comments by agency. The State also requests that FEMA consider adding a fifth option to its preferred alternative: the State’s adoption of a package of regulatory measures that would apply to local governments and would result in the achievement of the “no net loss” component of the RPA. Certain state agencies have extensive experience and expertise formulating and administering programs intended to address water quality, riparian vegetation, and floodplain storage. A statewide program would reduce the compliance burden on local governments and provide assurance to local governments that the program is consistent with other state-law requirements. It would also provide the opportunity for the state to work with local governments to accomplish the goals of FEMA in a structure more tailored to our state’s interests than those alternatives currently proposed. A statewide program would also better address potential complexities associated with multi-jurisdictional projects.

### DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

DLCD supports FEMA’s efforts to reduce negative impacts to floodplain functions and salmon habitat caused by development. A no-net-loss policy can guide avoidance and mitigation of impacts stemming from floodplain development authorized by local permits.

**Oregon’s Land-Use Planning System.** Oregon has a unique land-use planning system that protects farm and forest lands—along with their floodplain functions—while also allowing and encouraging development inside Urban Growth Boundaries. Agriculture and forestry are key economic sectors in this state, and regulations that impact or limit farming and forest activities in flood hazard areas could impact these sectors. The state’s land use program already balances the economic benefits of farm and forest activities in flood hazard areas with the need to preserve environmental attributes and minimize hazards – a change in that current balance would impact and potentially weaken these important economic sectors.

Further, DLCD has concerns that elements of the Oregon Implementation Plan could unnecessarily limit development within established Urban Growth Boundaries (UGB), which are a critical component of Oregon’s statewide land-use planning system. DLCD requests that the EIS include separate analysis of impacts inside and outside UGB’s. This should include a careful evaluation of the potential for unintentional consequences from limiting development within UGB’s that could undermine the farmland and environmental protections that are currently provided by focusing development within UGBs.

**Local Capacity.** Finally, DLCD has concerns about the timeline and resources available to Oregon communities for implementing any of the four options described in the Draft Oregon Implementation Plan. Many cities and counties do not have the budget, technical expertise, or capacity on their staff to evaluate if measures proposed to achieve a no-net-loss standard are

adequate. DLCDC requests that the EIS evaluate the costs to local governments for each of the options identified in the Implementation Plan to achieve the no net loss standard and identify sources of funding to offset these costs. DLCDC further requests that the EIS evaluate likely time periods for implementation of each of the options and tailor the plan to allow for a reasonable implementation period.

## **DEPARTMENT OF FISH AND WILDLIFE**

### Co-benefits of addressing natural hazards and habitat protections

The NFIP implementation plan may provide an opportunity to acknowledge and integrate the co-benefits of protecting and restoring riparian, floodplain, and wetland habitats as a climate adaptation strategy in addition to addressing the natural hazards and avoiding impacts to listed fish populations. It is also timely since the state of Oregon is engaged in developing and implementing the Oregon Climate Adaptation Framework, and ODFW recently adopted a [Climate and Ocean Change Policy](#). As many local governments are recognizing the need to plan for climate resiliency, there is opportunity in the implementation of the plan to recognize how work to maintain or improve fish and wildlife habitat, such as protection of riparian buffers and floodplains, serves as a climate adaptation strategy to address natural hazards, such as flooding. Integrating nature-based solutions/natural climate solutions through planning (e.g., incentives, ordinances), design, and engineering practices can reduce future risk, loss of life, and damage to infrastructure from natural hazards (e.g., erosion, landslide risk, wildfire risk, flood storage, water quality), protect and enhance fish and wildlife habitat, and enhance community resilience.

### NFIP challenges for implementation of habitat restoration

ODFW and local partners implement habitat restoration, fish screening and passage, and riparian improvements that often require federal, state, and local permitting and review within a regulated floodplain. ODFW is concerned that the combination of the proposed FEMA changes and 2020 rescission of a FEMA memo pertaining to habitat restoration would delay the pace and scale of restoration and mitigation (that may be required under this program) to address legacy impacts to aquatic and riparian habitat. Indeed, we have already seen on the ground impacts to the cost and scale of restoration as a result of the changes in 2020. This is at odds with the overarching goal of the BiOp of improving conditions for listed fish species.

**ODFW recommends FEMA include programmatic coverage under the four proposed pathways for certain restoration/mitigation activities, projects, or areas to address one of the key permitting bottlenecks that is currently hindering implementation of habitat restoration.** These actions have also been previously assessed in federal programmatic documents including the Aquatic Restoration Biological Opinion and Essential Fish Habitat consultation (ARBO II), associated with understanding the effects of funding and carrying out aquatic restoration activities in Oregon, issued by the National Marine Fisheries Service (NMFS 2012) and U.S. Fish and Wildlife Service (USFWS 2013). Regional offices have also prepared environmental assessments to analyze potential effects on aquatic restoration activities across similar project areas (USFS R6 Aquatic Restoration EA, 2019). This Environmental Assessment includes coverage for 19 aquatic restoration categories, all of which are additionally covered under ARBO II.

As cities and counties respond to the updated guidance with new development regulations, it is critical that common habitat restoration and/or mitigation practices not require extensive permitting or expensive engineering certification. Added cost and additional regulatory layers (e.g., “no net rise” certification) for many habitat restoration projects will delay the rate of progress and the amount of work that can be completed to benefit fish. For example, projects that place large woody debris in streams do not add a new structural component, but instead replace a structural component that has been lost over time. This material restores substrate upstream but scours substrate downstream. Another example includes fish screens, which are a response to a development action, not a new stand-alone development action.

#### Recommend strategic mitigation to achieve co-benefits

ODFW is supportive of efforts to address habitat restoration in a more strategic landscape and watershed scale. There are opportunities to integrate other local, state or federal restoration and mitigation efforts, including the opportunity for joint mitigation banking or establishment of credits. FEMA’s approach to meeting the intent of RPA 4 includes providing guidance to communities on multiple routes to achieving a no net loss of three key natural floodplain functions (flood storage, water quality, and riparian habitat) for new development actions within the SFHA. The Oregon Implementation Plan discusses the opportunity for local governments to initiate more of a watershed approach, and there are a number of existing resources and tools that should be considered, such as the [Oregon Conservation Strategy](#) and other ODFW efforts to develop habitat priorities across the state. The integration of these efforts would support the multi-benefit mapping as referenced in RPA Element 3 and acknowledge the other functions and values that support the identified three key natural floodplain functions (flood storage, water quality and riparian habitat). Seddon et al. (2021) found a wide range of connected landscapes and prioritizing habitat through nature-based solutions will optimize societal and ecological benefits by reducing exposure to climate hazards, reducing sensitivity to adverse effects, and building adaptive capacity of local communities.

ODFW supports requiring the mitigation principles, which includes the no net loss standard, applying the mitigation hierarchy and a landscape approach, ensuring durability of mitigation projects, and using transparent reporting, monitoring and metrics to ensure successful implementation. We recommend identifying additional opportunities for local governments to align with other habitat restoration and mitigation priorities, including development of wetland and/or stream mitigation banks.

Appropriate siting of restoration and mitigation projects is essential to ensure no net loss of habitat functions and values, which includes minimizing the allowance for conversion of one habitat type for another. For example, in some instances, restoration actions such as mitigation wetlands are being constructed in riparian areas within mapped floodways and floodplains. These restoration sites may be appropriately sited but, in some instance, riparian habitat is adversely impacted. In addition, for proposals that may entrain or trap fish or wildlife species during a high flow event, coordination with ODFW is essential to comply with state fish passage requirements.

ODFW recommends that new development or substantial improvements permitted in the floodplain that cause adverse effects must mitigate those adverse effects through compensatory mitigation that results in flood storage within the same watershed. RPA Element 5 discusses data

collection and tracking, which is an essential requirement of successful implementation. The Implementation Plan states that FEMA will develop a reporting tool and annual reports to local governments. It is not clear how the individual projects will be tracked to ensure the mitigation standards are being met and the actions are durable and successful through a changing landscape. Mitigation actions should be reported to ensure the no net loss standard is achieved not only on a project-by-project basis, but also in the landscape/watershed scale to support climate resiliency for local communities.

#### Role and Expectation of ODFW

ODFW provides technical assistance regarding land and water development actions consistent with the ODFW [Fish and Wildlife Habitat Mitigation Policy](#). This policy also has a no net loss standard and specific mitigation goals for ensuring that standard is achieved when impacts to fish and wildlife habitat are proposed. ODFW also provides technical assistance regarding habitat restoration, for both required compensatory mitigation projects and voluntary restoration. It is not clear what the role and expectation of ODFW would be in evaluating local land use reviews, including mitigation criteria triggering NFIP compliance. RPA 4 would require all NFIP communities through a model ordinance and checklist, Community Compliance Plan or Habitat Conservation Plan to address the risk to listed species at the programmatic level through land use permitting, which would help to integrate a streamlined approach. Due to the uncertainty of what implementation may look like for each local community ODFW recommends additional documentation of ESA compliance, or that adverse effects will be mitigated appropriately with all development and ordinance regulations that involve floodplains.

#### Additional information requested

The proposed implementation plan appears to address elements of RPA 4 in the BiOp. ODFW would like to understand how FEMA intends to meet other RPA's, specifically RPA's 2, 3, 5, and 6.

### **DEPARTMENT OF STATE LANDS**

The Oregon Department of State Lands regulates removal and fill in rivers and streams up to the ordinary high water line or, in tidal systems, to the highest measured tide or upper edge of wetland. A removal-fill permit or notice is typically required for any removal or fill in wetlands over 50 cubic yards, although this threshold is for any amount in essential salmon habitat or state scenic waterways. If there are unavoidable impacts to waterways or wetlands, projects are required to provide a mitigation plan, including compensatory mitigation to replace what will be lost. Some portion of the floodplain may already be included in this existing permitting process, including information collected from the riparian area as part of Oregon's Stream Function Assessment Method, which is used to determine mitigation requirements.

Applicants for removal fill permits must provide a land use compatibility (LUC) statement from their local planning office, such that DSL can determine whether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill or removal is to take place. In the event the project requires a conditional land use permit or other local development permit, DSL may issue

the removal-fill permit with a condition requiring the specified local approval be issued before starting. If the project is identified as not being consistent with the local comprehensive plan, DSL will not authorize the project until a plan amendment or zone change is secured. Additional floodplain development standard requirements for local governments may result in delays and additional costs for applicants to secure a LUC and secure permits. There is a similar challenge with the Department issuing authorizations for use of state-owned submerged and submersible lands. Those authorized uses must be consistent with local ordinances as well, so it may be more difficult to authorize new uses or to get existing uses authorized.

The new FEMA FPIP requirements present potential opportunities and incentives to do important environmental restoration work and to invest in green infrastructure i.e., remove dikes, restore floodplains, etc. That is a potential opportunity for mitigation bankers who could potentially provide “flood plain credits” in addition to wetland credits. While approval of multiple credit types for a project can be attractive for sponsors of mitigation banks for a better market return, and can result in better ecological benefits, requirements for each credit type approved must be clear and closely coordinated to be efficiently reviewed, approved, monitored for success, and tracked (releases and sales). The requirements for mitigation under FEMA rules are not clear, nor is it clear who would provide review and approval and ongoing oversight of compensatory mitigation projects to provide statewide consistency.

### **OREGON WATERSHED ENHANCEMENT BOARD**

OWEB generally agrees with ODFW and DSL that aspects of the proposed NFIP implementation plan could present opportunities for green infrastructure to create ecological uplift and provide environmental and community benefits from a climate resilience standpoint. However, the agency has questions related to feasibility of the proposed implementation plan.

In 2020, FEMA Region 10 rescinded a long-standing policy that waived the need for a conditional letter of map revision for fish habitat restoration projects prior to a local floodplain development permit being issued. FEMA determined that this policy was inconsistent with NFIP requirements. This rescission has resulted in local habitat restoration practitioners/implementers experiencing significant cost increases to complete required floodway hydraulic and hydrologic analyses for instream and floodplain restoration projects. In addition, restoration implementers are experiencing impacts to project timelines, due to the longer timeframes required for local jurisdictions (e.g., county staff) to review these analyses, which can take several months. As a non-regulatory agency that provides grants for restoration and conservation, OWEB is seeing first-hand the effects of the policy’s rescission on ecologically important fish and aquatic habitat projects.

FEMA’s proposed NFIP implementation plan relies heavily on restoration and conservation to mitigate for floodplain impacts. While restoration and conservation can provide functions such as flood storage and benefits to water quality and riparian vegetation, the proposed approach will require tremendous upscaling of the pace and geographic scale of floodplain restoration. The policy rescission described above is directly counter to this upscaling. OWEB suggests that FEMA include programmatic coverage for habitat restoration projects under the proposed implementation plan, rather than requiring local permits for these activities. Also, Appendix D of the draft implementation plan states the need for “permanent mitigation... (using) legal mechanisms such as permanent and enforceable conservation

easement.” The additional complexity and costs associated with instruments such as easements are substantial and may present serious challenges to timely and realistic implementation of the proposed plan.

### **OREGON STATE MARINE BOARD**

The Oregon State Marine Board (OSMB) is Oregon’s recreational boating agency. One of OSMB’s priorities is public recreational boating access. To assist with this priority OSMB provides grant funding to city, county, ports, park districts, state and federal agencies to improve, renovate, repair and develop recreational boating access for both motorized and nonmotorized boats. Additionally, to remove significant barriers due to the complexity of state, federal and local permitting processes, we assist grant recipients with obtaining permits and are often the engineer of record for the improvements.

The majority of the nearly 1,600 public boating access sites in Oregon are located in the SFHA. We are concerned that the no net loss standard will be unduly restrictive and could prevent the maintenance, improvement, repair or development of boating access, address ADA accessibility and safety. We are requesting an exemption to the no net loss standard for publicly accessible, water dependent uses.

We would like additional clarification on the affect to dredging and material disposal. Ports have historically maintained channels and boat basins that go through a recurring complex permitting process. Is the flood elevation based on the native submerged land elevation or the depth of the historic channel? If a Port has a delay in maintaining the historic channel depth how does this impact the flood elevation? Do the Ports have liability to maintain the historic depths?

### **DEPARTMENT OF FORESTRY**

The Oregon Department of Forestry (ODF) would like to avoid the duplication of efforts in implementing the proposed plan. The Department is currently pursuing separate incidental take permits for private and county managed lands, and state forestlands managed by the department through Habitat Conservation Plans described below.

In 2021, representatives from conservation and timber groups reached an agreement through mediated discussions culminating in a report known as the Private Forest Accord Report. Their report included recommended changes to Oregon's forest practice laws and the completion of the Private Forest Accord Aquatic Habitat Conservation Plan (HCP) to obtain an incidental take permit. The legislature adopted these recommendations in 2022 through Senate Bill 1501, which set a timeline of obtaining incidental take permits by the end of 2027. The conservation strategies that will be implemented in this HCP have already been codified in state statute and administrative rule and will be in effect for forestry operations starting January 1, 2024. The statutes and rules supporting this HCP apply to all non-federal, non-tribal forestland in the state.

The Department is also pursuing the Western Oregon State Forests Habitat Conservation plan for both aquatic and upland species, including all listed salmonids that affect lands managed by ODF. The draft HCP contains aquatic and riparian protections, road management standards, and a commitment to funding and implementing restoration projects. ODF conducts restoration

FEDERAL EMERGENCY MANAGEMENT AGENCY

May 5, 2023

Page 8

projects on state forests both on its own initiative and in collaboration with local watershed councils. Once implemented, the HCP will provide a consistent funding and planning nexus for larger watershed restoration projects that will not only benefit habitat for the covered species, but also contribute to water storage and regulation in the forest environment. The draft HCP is currently moving through the NEPA process, and a final EIS, Biological Opinions, and incidental take permits are anticipated later this year. Beginning July 1, 2023, ODF's planned operations on state forestlands will be compliant with the draft HCP conservation measures, in the anticipation of permit issuance.

The Department is seeking confirmation that the incidental take permits for covered forestry activities and their supporting conservation strategies will be recognized as complying with the implementation plan.

Sincerely,

*/s/ Jesse D. Ratcliffe*

Jesse D. Ratcliffe  
Assistant Attorney General  
Paul Garrahan  
Attorney-in-Charge  
Natural Resources Section  
[jesse.d.ratcliffe@doj.state.or.us](mailto:jesse.d.ratcliffe@doj.state.or.us)  
[paul.garrahan@doj.state.or.us](mailto:paul.garrahan@doj.state.or.us)

JDR:nog:rmk/798714429

c via email:

Tina Kotek, Governor [Governor.Kotek@oregon.gov](mailto:Governor.Kotek@oregon.gov)

Geoff Huntington, Senior Natural Resources Advisor [geoff.huntington@oregon.gov](mailto:geoff.huntington@oregon.gov)