



American Rivers
Rivers Connect Us



NATURAL RESOURCES DEFENSE COUNCIL



June 6, 2017

Regulatory Affairs Legal Division
Office of Chief Counsel
Federal Emergency Management Agency
500 C Street SW, Room 8NE
Washington, DC 20472-3100

**Re: National Flood Insurance Program Draft Nationwide Programmatic
Environmental Impact Statement**

Dear Federal Emergency Management Agency (FEMA):

Thank you for this opportunity to comment on the draft Nationwide Programmatic Environmental Impact Statement (NPEIS) for the National Flood Insurance Program (NFIP).

American Rivers protects wild rivers, restores damaged rivers, and conserves clean water for people and nature. Since 1973, American Rivers has protected and restored more than 150,000 miles of rivers through advocacy efforts, on-the-ground projects, and an annual America's Most Endangered Rivers® Campaign. Headquartered in Washington, DC, American Rivers has offices across the country and more than 250,000 members, supporters, and volunteers.

The Natural Resources Defense Council (NRDC) is an international nonprofit environmental organization with more than 2 million members and online activists. Our organization works to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends. Our organizational goals include curbing global warming, safeguarding human health, and ensuring safe and sufficient water for people and the environment.

Defenders of Wildlife (“Defenders”) is a major national conservation organization focused solely on wildlife and habitat conservation and the safeguarding of biodiversity. We believe in the inherent value of wildlife and the natural world, and this singular focus defines our important

niche in the environmental and conservation community and serves as the anchor for our organizational values. Defenders works on the ground, in the courts, and on Capitol Hill to protect and restore imperiled wildlife across North America and around the world.

The NFIP is a far reaching federal program that has implications for land use development, endangered species protections, and preparing for the impacts of climate change. American Rivers, NRDC, and Defenders have significant concerns regarding the quality of analysis in FEMA's draft NPEIS and the conclusions FEMA reached based on that analysis. Thus, we respectfully submit the following observations and recommendations:

I. FEMA Should Delay Finalizing the Draft NPEIS Until After Congress Reauthorizes the NFIP.

The NFIP expires on September 30th, 2017.¹ Since the NFIP's last reauthorization in 2012, significant discussion has occurred as to the future structure and operation of the program.² Recently, several draft bills to reauthorize the NFIP have been proposed in both the House and the Senate, and which include proposals that could potentially present significant new circumstances for the operation of the NFIP.³

FEMA should delay finalizing the draft NPEIS until after Congress reauthorizes the NFIP to account for and analyze any legislative changes to the program that present "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."⁴ Failure to account for these potentially significant new circumstances before issuing a Final NPEIS may require FEMA to prepare a Supplemental Environmental Impact Statement.⁵ "NEPA's approach to environmental protection and its manifest concern with

¹ 42 U.S.C. § 4026.

² See Andrew G. Simpson, *Here's What the House Has in Mind for Revamping Flood Insurance Program*, Insurance Journal (May 26, 2017), <http://www.insurancejournal.com/news/national/2017/05/26/452260.htm>; see also U.S. Gov't Accountability Office, GAO-17-425, *Flood Insurance: Comprehensive Reform Could Improve Solvency and Enhance Resilience* (2017); Rachel Cleetus, *The National Flood Insurance Program Must Be Improved: 5 Ways to Promote Climate Resilience*, Union of Concerned Scientists Blog (Aug. 10, 2016, 9:52 AM), <http://blog.ucsusa.org/rachel-cleetus/national-flood-insurance-program-must-be-improved-to-promote-climate-resilience>; U.S. Gov't Accountability Office, GAO-13-858T, *National Flood Insurance Program: Continued Attention Needed to Address Challenges* (2013).

³ See e.g., Press Release, Congressman Sean Duffy, Congressman Sean Duffy's Statement on NFIP Discussion Draft (May 25, 2017) available at <https://duffy.house.gov/press-release/congressman-sean-duffy-s-statement-on-nfip-discussion-draft>; Press Release, Senator Bill Cassidy, Cassidy, Gillibrand Release National Flood Insurance Extension Draft Legislation for Comment (April 26, 2017) available at <https://www.cassidy.senate.gov/newsroom/press-releases/cassidy-gillibrand-release-national-flood-insurance-extension-draft-legislation-for-comment>; see also Flood Insurance Market Parity and Modernization Act, S. 563, 115th Cong., (2017).

⁴ 40 C.F.R. § 1502.9(c)(1)(ii).

⁵ *Id.*; see also *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 873 (9th Cir. 2004) (stating a supplemental environmental impact statement is required if a new proposal "will have a significant impact on the environment in a manner not previously evaluated and considered).

preventing uninformed action” makes clear that significant new changes or information to a proposed action should be considered and evaluated.⁶

FEMA’s justification for preparing the current draft NPEIS is to evaluate “proposed modifications to the [NFIP.]”⁷ FEMA is modifying the NFIP to implement the legislative requirements of the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12) and the Homeowner Flood Insurance Affordability Act of 2014 (HFIAA).⁸ As of June 2017, several draft bills to reauthorize the NFIP have been introduced in the both the House and Senate. Many of these bills propose significant changes to the current operation of the program. For example, the draft discussion bill titled, “Flood Risk Mitigation Act of 2017,” contains a provision directing the Administrator of FEMA to promulgate regulations to require NFIP participating communities to mitigate flood risks if the community has a high number of repeatedly flooded properties.⁹ Community-proposed mitigation actions, which must be reviewed and authorized by FEMA per the draft bill, could have a significant impact on floodplain environments. As FEMA must promulgate the rules to create such a program, which may influence the types of mitigation actions employed by these flood-prone communities, FEMA would be wise to delay finalization of the draft NPEIS until after Congress has passed a final NFIP reauthorization bill.

Therefore, delaying finalization of the draft NPEIS would allow for potentially significant new changes to the NFIP to be considered and evaluated. Such reasonable precaution would minimize the likelihood that FEMA would later be required to supplement its NPEIS.

II. The Draft NPEIS’ Assessment of the NFIP’s Effect on Floodplain Development Is Inadequate and Relies on Inconclusive and/or Contrary Sources.

Congress established the NFIP to “encourag[e] sound land use by minimizing exposure of property to flood losses.”¹⁰ Congress found the “availability of Federal ... insurance... [is] often [a] determining factor in the utilization of land and the location and construction of public and of private industrial, commercial, and residential facilities.”¹¹ Congress intended the NFIP to influence floodplain development in a manner that would reduce the nation’s flood exposure.¹² Hence, an expectation has existed since the inception of the program that the NFIP would affect floodplain development.

⁶ *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 371 (1989).

⁷ FEMA, National Flood Insurance Program Draft NPEIS (2017) at ES-1.

⁸ *Id.*

⁹ See Press Release, Congressman Sean Duffy, Congressman Sean Duffy’s Statement on NFIP Discussion Draft (May 25, 2017) (Draft discussion bill FSC04- Enhance the NFIP’s Mitigation Process proposing a new program for communities with high numbers of repeatedly flooded properties).

¹⁰ 42 U.S.C. § 4001(c)(1).

¹¹ 42 U.S.C. § 4002(a)(2).

¹² 42 U.S.C. § 4001(e) (stating a purpose of the NFIP is encourage the constriction of development in floodplain areas and to direct new development away from locations susceptible to flooding).

Whether the NFIP “constricts” floodplain development or, conversely, actually encourages floodplain development to occur has been a central question concerning the program’s success.¹³ Research indicates the NFIP can have direct and indirect impacts on floodplain development, including encouraging development in floodplains by removing potential barriers to that development.¹⁴

In contrast, FEMA strongly asserts throughout the draft NPEIS that the NFIP does not encourage floodplain development.¹⁵ FEMA relies on this questionable assertion to determine that floodplain development is “neither a direct or **indirect effect** of the implementation of the NFIP” [**emphasis added**].¹⁶ Based on this determination, FEMA’s draft NPEIS concludes the NFIP’s implementation has almost no environmental impacts.¹⁷

However, FEMA’s effects analysis is insufficient to conclude implementation of the NFIP does not influence floodplain development, including encouraging it to occur. Additionally, studies to which FEMA cites to support this conclusion, either contradict, in some instances, such a finding or are, at best, inconclusive. As such, FEMA failed to adequately evaluate the indirect effects the NFIP may have on floodplain development and the related environmental impacts as required by NEPA. FEMA should further analyze the influence the NFIP has on floodplain development, including indirectly encouraging development, before finalizing the draft NPEIS.

A. FEMA’s Indirect Effects Analysis Fails to Satisfy NEPA Requirements.

FEMA violates NEPA by failing to adequately evaluate the indirect effects of the NFIP on floodplain development. Federal agencies must consider “indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”¹⁸ These effects “may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”¹⁹ Indirect impacts need only to be reasonably foreseeable, which is defined as “sufficiently likely to occur that person of ordinary prudence would take it into account in reaching decision,” to require an assessment of the environmental impact.²⁰

¹³ See, Walter A. Rosenbaum & Gary Boulware, American Institutes for Research, *The Developmental and Environmental Impact of the National Flood Insurance Program: A Summary Research Report* vii (2006)

¹⁴ See, *Id.* at 65.

¹⁵ See generally, FEMA, National Flood Insurance Program Draft NPEIS (2017) (stating multiple times that “Floodplain development is not an action under the NFIP. Floodplain development is not authorized, funded, or carried out by FEMA pursuant to the NFIP, nor does the NFIP encourage such floodplain development to occur”).

¹⁶ *Id.* at 4-4.

¹⁷ *Id.* at ES-8.

¹⁸ 40 C.F.R. § 1508.8(b)

¹⁹ *Id.*

²⁰ *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003). *But see, Mooreforce, Inc. v. U.S. Dep’t of Transp.*, 243 F. Supp. 2d 425, 431 (M.D.N.C. 2003) (finding Federal agencies must consider indirect

The NFIP's potential inducement of floodplain development is a reasonably foreseeable indirect effect. Academic research,²¹ case history,²² National Marine Fisheries Service and U.S. Fish and Wildlife Service issued Biological Opinions,²³ and FEMA commissioned research studies²⁴ have all found that the implementation of the NFIP influences floodplain development, and may actually encourage such development to occur.

For example, the National Marine Fisheries Service's (NMFS) extensive Biological Opinion for the NFIP in the State of Oregon concluded that the NFIP both facilitates floodplain development and establishes the land-use and construction standards pursuant to which such development may occur.²⁵ This conclusion affirmed a previous NMFS' Biological Opinion for the NFIP in the State of Washington. NMFS held that the inducement of floodplain development due to NFIP implementation affects endangered species. A biological opinion assesses whether the federal action, such as FEMA's implementation of the NFIP, is likely to negatively impact endangered species. Its indirect effects analysis is similar to the NEPA process.²⁶ As such, NMFS' conclusion that the implementation of the NFIP indirectly impacts endangered species is sufficiently analogous to reasonably foresee floodplain development would be an indirect effect of NFIP implementation under NEPA.

In addition, a FEMA commissioned study found the provision of federally-subsidized flood insurance creates an incentive for development in floodplains by reducing barriers to such development.²⁷ Further, the study found the availability of flood insurance is one of the two most significant factors driving decisions to develop, buy, or build in flood risk areas. For example, the study found "[a]lmost eighty percent of the respondents with potential investments in community property development stated that they would not finance or develop floodplain

effects of a proposed action on environment that are "reasonably foreseeable," but not "highly speculative or indefinite" potential effects).

²¹ See e.g., Jennifer Wriggins, *Flood Money: The Challenge of U.S. Flood Insurance Reform in a Warming World*, 119 Penn St. L. Rev. 361, 393 (2014); French Wetmore et al., American Institutes For Research, *An Evaluation of The National Flood Insurance Program: Final Report* x, 9, 12-14 (2006) available at http://www.fema.gov/media-library-data/20130726-1602-20490-1463/nfip_eval_final_report.pdf. Beth Davidson, *How Quickly We Forget: The National Flood Insurance Program and Floodplain Development in Missouri*, 19 Wash. U. J.L. & Pol'y 365 (2005).

²² See generally, *Coal. for Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 812 F.Supp.2d 1089 (E.D. Cal. 2011); *Florida Key Deer v Paulison*, 522 F.3d 1133 (11th Cir., 2008); *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F.Supp.2d 1151 (W.D. Wash. 2004).

²³ National Marine Fisheries Service, "Endangered Species Act Section 7(a)(2) Jeopardy and Adverse Modification of Critical Habitat Biological Opinion, ESA Section 7(a)(2) "Not Likely to Adversely Affect" Determination, and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response for the Implementation of the National Flood Insurance Program in the State of Oregon." (April, 14 2016) (hereinafter "NMFS Oregon Biological Opinion"); U.S. Fish and Wildlife Service. 2003. Biological Opinion. Amendment to the June 16, 1997, biological opinion on the effects of the FEMA's continued administration of the NFIP in Monroe County, Florida. Atlanta, Georgia.

²⁴ See generally, Rosenbaum, *supra* note 13.

²⁵ NMFS Oregon Biological Opinion, *supra* note 23 at 138.

²⁶ See 50 C.F.R. 402.2 ("Effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur").

²⁷ See Rosenbaum, *supra* note 13 at 65.

property if federal flood insurance were unavailable.²⁸ Strong evidence exists for one to conclude that the implementation of the NFIP potentially encourages floodplain development and other related land use changes, and is therefore a reasonably foreseeable indirect effect.

However, FEMA summarily dismisses the notion that the NFIP's implementation has the indirect effect of encouraging floodplain development. Per the draft NPEIS, FEMA repeatedly and specifically asserts the NFIP does not encourage floodplain development, ignoring existing evidence to the contrary. FEMA discounts such evidence by claiming only "some perceive, based on anecdotal evidence, that the NFIP reduces the financial risk to property owners and communities from potential flood disasters through relatively low-cost property insurance."²⁹ FEMA's dismissal of the above-referenced sources as "anecdotal evidence" lacks merit.

While the position that implementation of the NFIP encourages floodplain development remains controversial, FEMA's position that the NFIP does not significantly impact floodplain development, and strong rejection that the NFIP's implementation may indirectly encourage such development is an improper conclusion made in the draft NPEIS. Considerable evidence exists for a "person of ordinary prudence" to determine that the NFIP's indirect effects on floodplain development, and related environmental impacts, merit further evaluation. FEMA should postpone finalization of the draft NPEIS until the agency has conducted an earnest and proper review of how the NFIP affects floodplain development, including whether an indirect effect of implementation is the inducement of development, and what are the corresponding environmental impacts of such development.

B. FEMA Relies on Inadequate or Contrary Sources to Support its Conclusion that the NFIP Does Not Induce Development in Floodplains.

FEMA states there is no clear causal link between the availability of flood insurance and resulting impacts on development or the environment.³⁰ FEMA asserts because the "NFIP does not cause development to occur, and does not play a significant role in facilitating or encouraging floodplain development"³¹ that such development is neither "a direct nor an indirect effect of the implementation of the NFIP."³²

However, the evidence to which FEMA points to support the conclusion that the NFIP does not encourage floodplain development, and thus there are no related environmental impacts, is challengeable. FEMA's minimal and inadequate analysis relies on sources that are either inconclusive at best, or actually found that the NFIP can induce floodplain development.

²⁸ *Id.* at 18.

²⁹ FEMA, National Flood Insurance Program Draft NPEIS (2017) at 4-4.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

Per section 4.1.1.1 - Availability of NFIP Flood Insurance and in FEMA’s Biological Evaluation,³³ FEMA heavily relies on the following reports and studies to support its conclusion: (1) 2006 American Institutes for Research (AIR), The Developmental and Environmental Impact of the National Flood Insurance Program: A Summary Research Report,³⁴ (2) 1982 Government Accountability Office (GAO), National Flood Insurance: Marginal Impact on Floodplain Development,³⁵ and (3) 2013 Congressional Research Service Report (CRS), The National Flood Insurance Program: Status and Remaining Issues for Congress.³⁶

1. 2006 AIR Report (Coastal Barrier Resources Act Areas Comparison)

FEMA commissioned AIR to study the NFIP’s developmental and environmental impacts. While the report acknowledged that the NFIP’s influence is “nuanced,” the report states that the NFIP has “direct and indirect impacts on the amount of development that occurs in floodplains.”³⁷ AIR found the NFIP has both the effect of discouraging development in floodplains and encouraging floodplain development by “act[ing] to remove barriers to that development.”³⁸ For example the report found that federally-backed flood insurance, in addition to property characteristics, is one of the two most significant factors driving floodplain development.³⁹ Further, report authors conducted a nationwide survey of property developers, insurers, lenders, realtors, and floodplain administrators, which found:

- *Flood insurance was identified among the most important factors affecting decisions to either purchase or develop property in the community;*
- *More than three-quarters of the respondents identified flood insurance as “very important” to decisions regarding where they would develop or purchase property in their community;*
- *Almost eighty percent of the respondents with potential investments in community property development stated that they **would not finance or develop floodplain property if federal flood insurance were unavailable [emphasis added]**.*⁴⁰

The AIR report supports finding that floodplain development is a reasonably foreseeable indirect effect of the NFIP, meriting additional evaluation. However, FEMA appears to ignore this evidence, and instead uses the report’s analysis of development in Coastal Barrier Resources System (CBRS) areas to confirm FEMA’s belief that the NFIP does not encourage development.⁴¹ While the report found that some CBRS areas still developed despite the prohibition of NFIP flood insurance, the report stated “inferences about the NFIP’s

³³ *Id.* at 4-5, C-59.

³⁴ See Rosenbaum, *supra* note 13.

³⁵ U.S. Gov’t Accountability Office, GAO-82-105, *National Flood Insurance: Marginal Impact on Flood Plain Development* (1982) (hereinafter “1982 GAO”)

³⁶ Rawle O. King, Cong. Research Serv., R42850, *The National Flood Insurance Program: Status and Remaining Issues For Congress* (2013) (hereinafter “2013 CRS”).

³⁷ Rosenbaum, *supra* note 13 at 65.

³⁸ *Id.* at 18.

³⁹ *Id.* at 67.

⁴⁰ *Id.* at 18.

⁴¹ FEMA, National Flood Insurance Program Draft NPEIS (2017) at 4-7.

developmental impact drawn from current information about the status of CBRS properties are problematic.”⁴² The reports holds:

*The CBRS may not presently be an appropriate basis for such generalizations for several reasons. First, discussions with USFWS staff indicate that maps of CBRS land and related developments are frequently outdated, sometimes unrevised since the early 1980s, and conclusions about the rate of development on CBRS lands and its causes are often anecdotal. Second, the motivation for purchase and development of property on CBRS land, and the extent to which this is analogous to property development on non-CBRS lands is not well established. These may constitute different marketplaces with different clientele.*⁴³

The 2006 AIR report not only contradicts FEMA’s strong denial of the NFIP’s potential to encourage development in floodplains, but the report also explicitly states that the evidence concerning CBRA areas upon which FEMA relies to support its stance is “problematic” and should not be used to generalize about the influence of the NFIP on development. Thus, FEMA inappropriately concludes that the NFIP does not encourage development in floodplains; FEMA must go back and conduct an in-depth review of how the NFIP affects floodplain development to satisfy NEPA requirements.

2. 1982 GAO Report (Pre- and Post- NFIP Floodplain Development)

Likewise, FEMA’s heavy reliance on the 1982 GAO report also results in FEMA drawing conclusions that are not definitively supported by the report’s findings. First, the report is nearly 35 years old. The NFIP has expanded substantially since the issuance of this report. At the time of the report’s publication, only 1.9 million NFIP policies were in existence.⁴⁴ Today, more than 5 million policies have been issued.⁴⁵ Additionally, the number of participating communities has increased substantially.⁴⁶ Further, a decade after the publication of the GAO report, Congress passed the National Flood Insurance Reform Act of 1994, which prohibited Federally-regulated lenders from making, extending, or renewing any loan on applicable property unless flood insurance is purchased and maintained.⁴⁷ The effect of this requirement must be accounted for in any analysis of the NFIP’s influence on floodplain development as such a requirement directly impacts the availability of financing for such development. As stated above, the AIR report found “[a]lmost eighty percent of the respondents with potential investments in community property development stated that they would not finance or develop floodplain property if federal flood insurance were unavailable.”⁴⁸ The requirements of the 1994 Act may be an influencing

⁴² Rosenbaum, *supra* note 13 at 72.

⁴³ *Id.* at 63.

⁴⁴ 1982 GAO, *supra* not 35 at 2.

⁴⁵ FEMA, Total Policies in Force by Calendar Year *available at* <https://www.fema.gov/total-policies-force-calendar-year>

⁴⁶ When the 1982 GAO report was published only 17,000 communities participated in the program. There are now over 22,000 communities in the program.

⁴⁷ National Flood Insurance Reform Act of 1994, Pub. L. No. 103-325 (1994).

⁴⁸ *See* Rosenbaum, *supra* not 13 at 18.

factor concerning this figure, which were not in place when the 1982 study was conducted. As such, the data included in the 1982 GAO report may not be an accurate indicator of the current influence the NFIP has on development in floodplains.

Second, the report only analyzed development patterns in 6 coastal and barrier island communities.⁴⁹ The report compared the rate of population growth in a 10-year period before communities entered the program with the rate of population growth in a 10-year period after the communities joined the program. While the 1982 GAO report found that development was occurring in these communities both before and after the creation of the NFIP, the data cannot be offered as definitive proof that the NFIP does not influence, including potentially encouraging, floodplain development. One, the GAO was only able to obtain these data from 1977 to 1980 for three of the six communities. This is a significant information gap that impacts half of the study. Second, the GAO recognizes the study cannot be used to generalize about the NFIP on a national level as the report solely focused on barrier islands and coastal communities with characteristics like those barrier islands.⁵⁰ As the more recent AIR report states, comparing development in barrier islands to non-barrier islands is not a reliable indicator of the NFIP's influence on development.

Third, the 1982 GAO report acknowledged that the NFIP was a factor in encouraging floodplain development. The report found that while the NFIP was not the “principal factor” in encouraging floodplain development on barrier islands, it was a factor in the sense that it “offers a marginal added incentive to development in coastal and barrier island communities because it offers financial security against the risk of loss.”⁵¹ This is supported by the more recent AIR report, which found the availability of NFIP insurance reduces barriers to entry for floodplain development.

3. 2013 CRS Report (Low Flood Insurance Penetration Rates)

FEMA inappropriately references less than tenable sources to justify its conclusions in the draft NPEIS. FEMA states that low-participation rates demonstrate that the availability of flood insurance is an irrelevant factor in encouraging floodplain development, indicating that other factors are more likely the driving force behind development in the floodplain.⁵² FEMA states only 18 percent of Americans in flood zone areas have flood insurance.⁵³ FEMA references this figure repeatedly throughout the draft NPEIS as proof that the NFIP does not encourage floodplain development.⁵⁴

⁴⁹ 1982 GAO, *supra* note 35 at 4-5.

⁵⁰ *Id.* at 6. (stating “[t]he information we obtained as to whether the flood insurance program was encouraging development in coastal and barrier island communities is limited to those types of communities and cannot be extended to flood-prone riverine and lake communities”).

⁵¹ *Id.* at 13.

⁵² FEMA, National Flood Insurance Program Draft NPEIS (2017) at 4-5.

⁵³ *See Id.*

⁵⁴ *See Id.* at 4-5, 4-72, c-vi, c-66, and c-216.

The 18 percent figure on which FEMA relies is mentioned only briefly in the 2013 CRS report and the source for this figure is a one-line quote from an insurance industry representative in a New York Times article.⁵⁵ In contrast, there are other more credible sources which estimate the participation rate to be much higher. For example, the same CRS report contains significant discussion of participation rates in a section titled “Factors Affecting Financial Soundness of the NFIP: Low NFIP Program Participation,” which finds NFIP participation rates to be closer to 50 percent.⁵⁶ This figure is based on an extensive 2006 FEMA-commissioned Rand Corporation study, which specifically focused on the NFIP’s market penetration rate.⁵⁷ Further, the Rand report found that in coastal areas, participation rates are closer to 63 percent.⁵⁸ FEMA’s strong reliance on the 18 percent figure, which is a quote from a news article, rather than more credible and rigorously researched sources is inappropriate. FEMA’s use of such a figure reduces the agency’s credibility in strongly asserting the NFIP does not encourage floodplain development. At a minimum, further analysis is needed to determine whether low market penetration rates do indicate the availability of flood insurance is an irrelevant factor in driving floodplain development.

In sum, FEMA’s analysis of the NFIP’s effect on floodplain development is inadequate, and fails to satisfy NEPA requirements. Floodplain development is influenced, including potentially encouraging such development to occur, due to the implementation of the NFIP and therefore is a reasonably foreseeable indirect effect. Congress clearly intended for the NFIP to influence development, significant evidence exists to support a finding that the NFIP may encourage floodplain development, and the sources on which FEMA relies are not conclusive enough for FEMA to state that the NFIP does not encourage floodplain development. FEMA must not finalize the draft NPEIS without consideration of more credible sources and should consider conducting a more in-depth and meaningful review of the NFIP’s impact on floodplain development and the corresponding environmental outcomes.

III. Direct Land-Use Authority is not required for FEMA to Establish Federal Land-Use Standards to Mitigate the NFIP’s Indirect Effect of Inducing Floodplain Development.

FEMA also improperly concludes the agency lacks land use authority to direct the type of development which may occur in the floodplain. FEMA implies that this lack of land use authority prevents the agency from regulating floodplain development to mitigate the negative impacts to the environment, including impacts to endangered species, from such development. While FEMA may lack direct land use authority (i.e. the ability to issue and deny individual

⁵⁵ See 2013 CRS, *supra* note at 3 (The corresponding footnote references a New York Times article, “Reconsidering Flood Insurance” as the source of information for this figure).

⁵⁶ *Id.* at 21.

⁵⁷ See generally, Lloyd Dixon et. al., *The National Flood Insurance Program’s Market Penetration Rate: Estimates and Policy Implications* (2006) (analyzing the market penetration rate of the NFIP, including reasons for lower than expected participation).

⁵⁸ *Id.* at xviii.

permits), FEMA retains the authority to establish minimum land use standards, which States and local governments must adopt to participate in the NFIP.⁵⁹ FEMA is also responsible for publishing Flood Insurance Rate Maps (FIRMS) that depict areas at a high risk of flooding. Communities must adopt these maps to participate in the NFIP; the maps determine where the minimum land use standards apply. Through these minimum standards and publication of flood maps, FEMA can influence floodplain development.

A. FEMA’s Characterization of the Agency’s Ability to Regulate Floodplain Development Is Inappropriately Narrow and Ignores the Agency’s Existing Statutory and Regulatory Authority.

FEMA’s characterization of land use authority is misleading. While FEMA is correct that land use authority, in the narrowest sense of the term, is a power typically exercised by the States and localities, FEMA is incorrect to imply the agency lacks the authority to establish land use standards to guard against the NFIP inducing floodplain development. FEMA’s interpretation of land use authority is inappropriately narrow. FEMA’s statutory and regulatory authority permit the agency to act to influence, including proscribe, such development.⁶⁰

In contrast, FEMA repeatedly asserts it has no land use authority. Specifically, FEMA states:

*The power to regulate development in the floodplain, including requiring and approving permits and citing violations requires land use authority. The regulation of land use falls under each State's police powers, which the Constitution reserves to the States; the States delegate this power down to their respective political subdivisions. Therefore, floodplain development is regulated at the community level through the community's floodplain management regulations and permitting process for development in the floodplain. As such, FEMA has no role in the issuance, denial, or enforcement of individual permits, nor does it have the land use authority necessary to prescribe the types of development that may take place in the floodplain.*⁶¹

First, Congress fully intended for the NFIP to restrict risky floodplain development. Congress declared a central purpose of the NFIP was to (1) encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and (2) to guide the development of proposed future construction, where practicable, away from locations threatened by flood hazards.⁶² Additionally, Congress held flood damages were increasing nationwide due to accelerated floodplain development and “the purpose of [the NFIP] is therefore to **require** States or local communities, as a condition of future

⁵⁹ 42 USC § 4022 (flood insurance in exchange for adopting land use controls).

⁶⁰ See e.g., *Florida Key Deer v Paulison*, 522 F.3d 1133, 1144 (11th Cir., 2008) (stating “FEMA has the authority in its administration of the NFIP ... to prevent the indirect effects of its issuance of flood insurance by, for example, tailoring the eligibility criteria that it develops...”).

⁶¹ FEMA, National Flood Insurance Program Draft NPEIS (2017) at 4-9.

⁶² 42 U.S.C. § 4001(e).

Federal financial assistance to participate in the flood insurance program and *to adopt adequate flood plain ordinances with effective enforcement provisions* ...to reduce or avoid future flood losses.”⁶³ [emphasis added]. Further, Congress stipulated States and local governments must adopt “*adequate land use and control measures*” (with effective enforcement provisions) to participate in the program, which would make flood insurance available to their residents.⁶⁴ To achieve these goals, Congress authorized FEMA to develop land use criteria designed to encourage the adoption of 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.⁶⁵

As noted above, States and local governments are required to adopt land-use regulations and ordinances that satisfy the land-use criteria developed by FEMA to participate in the program. Congress clearly envisioned a program that would restrict floodplain development by providing a federal agency the authority to promulgate specific land use criteria. Thus, FEMA has significant influence over floodplain development; FEMA has clear authority to establish the minimum land use standards by which all States and local government must abide to participate in the NFIP. FEMA wrongly implies that without direct land use authority it lacks the ability to act.

Second, FEMA’s regulations reflect the agency’s authority to link flood insurance controls on floodplain development. Per 44 CFR § 59.2(b), FEMA requires state and local governments to adopt and enforce floodplain management regulations that satisfy, at minimum, FEMA-established criteria for land use management qualify for the sale of federally-subsidized flood insurance. FEMA has direct authority to establish such criteria.⁶⁶ In addition, FEMA has asserted that the regulations adopted by NFIP participating communities must take precedence over any less restrictive or conflicting local laws, ordinances or codes for floodplain management.⁶⁷ Hence, while States and local governments may have direct land use authority, such as the authority to issue or deny individual permits, they must, nevertheless, abide by the minimum land use management criteria established by FEMA. These regulations thus obviously can influence floodplain development. And FEMA already prohibits certain types of development under its regulations. For example, FEMA prohibits any development in a regulated floodway that potentially could elevate flood levels in a NFIP participating community during

⁶³ 42 U.S.C. § 4002(a)(1)

⁶⁴ 42 U.S.C. § 4022.

⁶⁵ 42 U.S.C. § 4102(c).

⁶⁶ 44 C.F.R. § 60.1(a).

⁶⁷ 44 C.F.R. § 60.1(b).

the occurrence of the 100-year flood.⁶⁸ Thus, FEMA is not without recourse to impose floodplain development restrictions as the draft NPEIS implies.

Third, FEMA has enforcement authority to penalize NFIP communities for failing to properly implement and enforce the minimum land use criteria promulgated by the agency. If floodplain development restrictions are being violated, FEMA has the authority to place a community on probation and ultimately suspend the community from the program for violating local regulations implementing FEMA's land use management criteria.⁶⁹ Per 44 CFR § 59.24(g), a suspended community loses its right to obtain federally-subsidized flood insurance and becomes ineligible for federal development and disaster assistance.⁷⁰ FEMA has exercised this authority: Formal threats of probation in the form of probation letters have been issued 104 times; probation has been imposed 49 times; 10 communities have been suspended.⁷¹

In addition, FEMA also has the authority to penalize individual NFIP policyholders. Per 44 CFR Part 73, FEMA has the authority to deny flood insurance coverage on individual structures for NFIP violations. If a policyholder is violating laws or regulations intended to discourage or otherwise restrict land development or occupancy in the flood-prone area., the community may issue a notice of violation. If subsequent efforts to remedy the violation to the maximum extent possible are not sufficient to prompt action by the policyholder, the community may request FEMA deny flood insurance coverage.⁷² FEMA will exercise its authority to deny flood insurance coverage if the requesting community demonstrates that it has attempted to remedy a violation to the maximum extent possible and the policyholder is in fact in violation of a regulation restricting floodplain development.⁷³ The ultimate decision to deny flood insurance coverage rests with FEMA. While FEMA must receive a request by the State or community to deny flood insurance under Section 1316, denial of flood insurance is still considered an enforcement action available to FEMA to address individual acts of noncompliance. Further, FEMA also has the authority to recommend a State or local community make such a request.⁷⁴

FEMA can influence and/or restrict floodplain development under existing statutory and regulatory authority. As intended by Congress, FEMA, through the implementation of the NFIP, has a clear role in avoiding risky land use. As such, FEMA can act to mitigate the indirect effects of floodplain development due to the implementation of the NFIP. *Florida Key Deer v. Paulison* confirms FEMA has such authority.⁷⁵ Thus, FEMA's characterization of its land use authority is

⁶⁸ 44 C.F.R. § 60.3(d)(3).

⁶⁹ See 44 C.F.R. § 59.24.

⁷⁰ FEMA, "Suspension" available at <https://www.fema.gov/suspension>

⁷¹ See Jacquelyn Monday et al., *An Evaluation of Compliance with the National Flood Insurance Program Part A: Achieving Community Compliance* 153. (Most recent publicly available data is from Oct 31, 2003).

⁷² FEMA, *National Flood Insurance Program Community Compliance Program Guidance*, FEMA P-1022, 36-37 (2014).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Florida Key Deer*, F.3d at 1143 (holding "FEMA has the authority in the administration of the NFIP to prevent the indirect effects of its issuance of flood insurance").

impermissibly narrow and leads to an incorrect conclusion about the agency's ability to influence floodplain development.

B. The NFIP is a Voluntary Federal Benefit for States and Local Communities. Congress May Condition Receipt of Federal Funds on State Compliance with Federal Standards.

FEMA does not need “land use authority,” as it narrowly defines it, to modify federal floodplain management criteria to limit floodplain development. The NFIP is a voluntary federal benefit. States and local governments are free to join the program. In exchange, States and local governments must adopt and enforce federal land use standards.

Under the “spending clause” of the U.S. Constitution, Congress may require compliance with federal standards in exchange for receipt of federal funds. The U.S. Supreme Court has explicitly held “Congress may attach conditions on the receipt of federal funds ... ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’”⁷⁶ The U.S. Supreme Court has repeatedly affirmed this constitutional interpretation. For example, in *National Federation of Independent Business v. Sebelius* the Court stated “[w]e have long recognized that Congress may use [its spending clause] power to grant federal funds to the States, and may condition such a grant upon the States' taking certain actions that Congress could not require them to take.”⁷⁷

Congress's spending power must be exercised within certain parameters. The Supreme Court has ruled that “[t]he legitimacy of Congress's exercise of the spending power ... rests on whether the State voluntarily and knowingly accepts” the conditions on the receipt of federal funds.⁷⁸ Additionally, such conditions on the receipt of federal funds are held constitutional so long as the funds are expended for the “general welfare,” the funding conditions are unambiguous enabling states to exercise their choice knowingly, cognizant of consequences of participation, and the financial inducement is not unduly coercive.⁷⁹

The NFIP plainly satisfies these requirements. The program is for the “general welfare” of the United States. As stated in 42 USC § 4001, Congress found “disasters have created personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources” and that the creation of a national flood insurance program would help ease this burden.⁸⁰ Additionally, the NFIP is a voluntary program. States and local communities are free to choose whether to participate. Further, the requirements are not unduly coercive. As FEMA notes in the draft NPEIS, private flood

⁷⁶ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (upholding a federal requirement that states enact a minimum drinking age of 21 as a condition of receiving federal highway funding).

⁷⁷ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2601 (2012)

⁷⁸ *Id.* at 2602, quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).

⁷⁹ See generally, *Dole*, 483 U.S. 203. (describing the limitations on Congress's use of the spending clause power).

⁸⁰ 42 U.S.C. § 4001(a).

insurance is already an option under the NFIP,⁸¹ and is becoming more readily available.⁸² States and local governments do not have to join the NFIP for flood insurance to be available to their residents.

Thus, FEMA has the authority to guide and even restrict certain land use practices of communities participating in the NFIP. FEMA would not be exercising direct land use authority, as the agency implies is necessary to restrict floodplain development, but instead, would be establishing certain requirements and standards States and local communities must adopt in exchange for voluntarily accepting a federal benefit. FEMA does have the authority to impose more restrictions on use of floodplains, including erosion areas, and to encourage mitigation for impacts on floodplains. As such, FEMA has the authority to act to protect harmful environmental impacts to the nation's floodplains.

IV. FEMA Improperly Determines the Implementation of the NFIP Does Not Affect Endangered Species.

The goal of the Endangered Species Act (ESA) is the conservation of endangered and threatened species and their ecosystems.⁸³ A list is maintained of all endangered and threatened species and the designation of their critical habitats that must be protected. Section 7 of the ESA requires all federal agencies to consult with the National Marine Fisheries Service (NMFS) and/or the U.S. Fish and Wildlife Service (FWS) to ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification to its critical habitat.⁸⁴ The expert agency issues a biological opinion (BiOp) at the conclusion of the consultation process containing the impact(s) of the agency's action to endangered or threatened species. A federal agency is required to initiate the consultation process under Section 7 of the ESA whenever it takes an action that "may affect" a listed species.⁸⁵ Through consultation, federal agencies ensure that the actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of an endangered or threatened species or destroy or adversely modify any critical habitat.⁸⁶

A. NFIP Actions Requiring Expert Agency Consultation

The National Flood Insurance Act gives FEMA the authority to implement the NFIP in a manner that would avoid or minimize harm to threatened or endangered species or their critical habitat. FEMA has the authority to benefit floodplains and thus threatened and endangered species and their critical habitat by mapping floodplains, implementing the Community Rating System (CRS), and promulgating minimum eligibility criteria. These are agency actions and as such

⁸¹ 42 U.S.C. § 4012a(b)(7).

⁸² FEMA, National Flood Insurance Program Draft NPEIS (2017) at 4-120.

⁸³ 16 U.S.C. § 1531(d).

⁸⁴ 16 U.S.C. s1536.

⁸⁵ 50 C.F.R. § 402.14(a).

⁸⁶ 16 U.S.C. § 1536(a)(1), (2).

require FEMA to consult with expert agencies under Section 7 of the ESA. These are actions that not only require consultation but also allow FEMA to proactively conserve endangered and threatened species by providing more detailed and up-to-date maps, enrolling more communities in the CRS, and adopting stricter minimum eligibility criteria.

1. Mapping

FEMA implements the NFIP in part through the development and implementation of maps that identify flood-prone areas, known as Flood Insurance Rate Maps (FIRMs).⁸⁷ These maps are used an estimated 30 million times annually for enforcing State and community floodplain management regulations and planning requirements, calculating flood insurance premiums, and determining whether property owners are required by law to obtain flood insurance.⁸⁸ FEMA uses its discretion to map the floodplain and to revise flood maps to account for changing circumstances.⁸⁹ The act of designating an area within the floodplain or out of the floodplain is an affirmative action which has serious impacts on the health of a floodplain. FEMA's affirmative determination that an area is not a floodplain will then signal to third-parties that they allowed to fill-in or build in that area which will severely impact the ecosystem if that area is in fact a floodplain. FEMA therefore is carrying out an agency action that is ongoing and consultation with an expert agency under Section 7 of the ESA is required.

2. Community Rating System

The CRS is a voluntary program intended to encourage communities to go above and beyond the minimum requirements of the NFIP.⁹⁰ It uses a sliding scale to rank enrolled communities and the higher the ranking the larger reduction in flood insurance rates that community receives. FEMA uses its discretion in deciding what practices go beyond their minimum requirements and thus earn a community a higher ranking and obtain lower flood insurance. Lower flood insurance rates are an incentive for communities to take measures to preserve and protect the floodplain. Providing incentives to communities to act to better preserve the floodplain is in itself an agency action and therefore requires consultation with expert agencies.

3. Minimum Eligibility Criteria

Minimum eligibility criteria guide development in the floodplain with a focus on protecting property.⁹¹ In order for a community to be eligible for flood insurance they must adopt floodplain

⁸⁷ 42 U.S.C. § 4101.

⁸⁸ FEMA, "Mapping Flood Risks: An Overview to Floodplain Management & Flood Insurance." FEMA L-257, August 2013 (<https://www.fema.gov/media-library-data/b9bb674b6b69957399bef7ac6d6fee08/FEMA+L257.pdf>) (Accessed Jun. 5, 2017).

⁸⁹ 42 U.S.C. § 4101(e) -(f)(1).

⁹⁰ Federal Emergency Management Agency, "The Community Rating System works to Protect Natural Floodplains" (2015). (<https://www.fema.gov/media-library-data/1459276443255-663d02584edc3ac6cda2f4a7f337100b/Natural-Functions-and-CRS.pdf>). (Last accessed Jun. 6, 2017).

⁹¹ 42 U.S.C § 4102(c).

management ordinances that are consistent with FEMA’s minimum eligibility criteria. FEMA has discretion to amend its regulations on minimum eligibility criteria and thus has an ongoing impact on the use of floodplains. Minimum eligibility criteria can enable development in the floodplain that can have a negative impact on threatened and endangered species and therefore the development of such criteria constitutes an agency action.

B. Implementation of the NFIP Adversely Affects Endangered Species

The NFIP should by its very nature be consistent with national laws and policies, such as the ESA, designed to prevent damage to the environment and to protect and restore the natural and beneficial functions of floodplains. A NFIP that reduces flood damages should result in less development in floodplain areas that provide multiple environmental benefits and critical habitat for endangered and threatened species. As stated above, there are multiple programs within the NFIP where FEMA has the opportunity to fully comply with the ESA. However, FEMA has failed to address the effects that their implementation of the NFIP has on threatened and endangered species and to consult with expert agencies except when compelled by lawsuits to do so. NFIP policies are encouraging development in floodplains and thus causing the destruction of wetlands and floodplains that provide a myriad benefits including flood water conveyance and habitat for threatened and endangered species.

Therefore, the NFIP can have adverse impacts on threatened and endangered species. There have been several lawsuits over the years regarding the impacts of the NFIP on threatened and endangered species and their habitat. The lawsuits allege that FEMA violated the ESA by encouraging development in floodplains that provide habitat for threatened and endangered species without proper consultation with NMFS or FWS.

- Florida Keys: Courts found that federal flood insurance encouraged development in endangered Key deer habitat in the Florida Keys and was jeopardizing the existence of the Key deer and seven other threatened plant and animal species. FEMA then implemented voluntary protection measures. However, it was determined that the voluntary protection measures did not remove the risk FEMA was placing on the Key deer and other threatened species. Thus FEMA was barred from issuing new flood insurance policies in the Florida Keys. FWS subsequently finalized a Biological Opinion (BiOp) in 2010 that outlines activities to be implemented by FEMA, FWS and the participating communities in order to protect the threatened and endangered species before new policies may be issued.⁹²
- Puget Sound: As a result of a lawsuit, NMFS issued a BiOp that determined the NFIP is jeopardizing the survival of Puget Sound Chinook, steelhead and Hood Canal summer – run chum salmon. Because Chinook salmon are the primary food source for Southern

⁹² U.S. Fish & Wildlife Service, South Florida Ecological Services Field Office. “Fish and Wildlife Conservation in the Florida Keys.” <http://www.fws.gov/verobeach/ConservationintheKeys.html>

Resident Killer whales, the NFIP is also jeopardizing that species. The BiOp requires FEMA to strengthen NFIP floodplain management standards.⁹³

- Sacramento- San Joaquin River Delta: the lawsuit claimed that FEMA’s implementation of floodplain management requirements encourages the placement of fill in the floodplain and that the construction of levees removes land from the floodplain, an action that destroys habitat for listed salmon, steelhead and delta smelt. In a settlement agreement FEMA agreed to consult with NMFS and FWS regarding impacts of the NFIP on multiple species within the Sacramento- San Joaquin River Delta.⁹⁴
- Oregon: NMFS issued a BiOp that concluded FEMA’s NFIP violates the ESA by subsidizing development in floodplains that jeopardize the continued existence of Southern Resident killer whales and seventeen marine and anadromous species, including salmon and steelhead species, and adversely modifies the designated critical habitat of sixteen of these species in Oregon. Reasonable and Prudent Alternatives were included in the BiOp and FEMA is to start their implementation or substitute strategies immediately.⁹⁵

FEMA should rely upon its partner federal agencies with significant experience with federal environmental laws and the management of floodplain lands and threatened or endangered species. In particular, FEMA should consult with FWS and NMFS. FEMA, FWS, and NMFS should determine the scope of impacts of the NFIP on listed species and their critical habitat throughout the nation and then implement a strategy to fulfill their obligation under the ESA to carry out meaningful conservation of listed species. The alternatives listed in the NFIP draft NPEIS did not take into account threatened and endangered species. FEMA is well aware of the impact its implementation of the NFIP has on threatened and endangered species as seen by the number of lawsuits alleging just that and the fact that FEMA has had to consult with NMFS and/or FWS pursuant to settlement agreements to develop implementation plans to comply with the ESA. FEMA, FWS, and NMFS need to work together to develop new alternatives that implement higher standards that better protect floodplains and the threatened and endangered species that live there.

V. Alternatives discussion

FEMA’s draft NPEIS considers modifications to the NFIP intended to meet two needs – (a) to implement the legislative requirements of Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12) and the Homeowner Flood Insurance Affordability Act (HFIAA) to improve the

⁹³ *Nat’l Wildlife Fed’n v. Fed. Emergency Mgmt. Agency*, 345 F.Supp.2d 1151 (W.D. Wash. 2004).

⁹⁴ *Coal. for Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 812 F.Supp.2d 1089 (E.D. Cal. 2011)

⁹⁵ Endangered Species Act Section 7(a)(2) Jeopardy and Adverse Modification of Critical Habitat Biological Opinion, ESA Section 7(a)(2) “Not Likely to Adversely Affect” Determination, and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response for the Implementation of the National Flood Insurance Program in the State of Oregon. April, 14 2016.

http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197reducedsize.pdf

financial soundness of the NFIP, and (b) to demonstrate FEMA’s compliance with the ESA in implementing the NFIP. Of the four alternatives evaluated in the draft NPEIS, only Alternative 3 would begin to address FEMA’s compliance with ESA Section 7. Other potential alternatives that could demonstrate compliance with the ESA and improve financial soundness of the NFIP (Sec. 2.4.5) were not fully considered in this draft NPEIS, and FEMA offers inadequate reasoning for its determination not to carry those alternatives forward in particular. The designation of Alternative 2 as the preferred alternative is poorly justified. Finally, we strongly urge FEMA to renew coordination efforts with the Services to reach concurrence on a more effective Alternative.

A. There is inadequate demonstration as to why other alternatives were not carried forward

FEMA provided a summary of proposed alternatives that were deemed unreasonable for consideration in the draft NPEIS. Two of those alternatives offer significant benefit to the protection of people and property, improved financial soundness of the NFIP, and reduced loss of critical habitat areas of ESA-listed species. Those alternatives include expanding the NFIP minimum standards beyond the 1% floodplain area, and considering future conditions in flood risk mapping. These alternatives should have been carried forward.

1. Revising the NFIP’s Special Flood Hazard Area (SFHA) to a standard beyond the 1% annual floodplain –

- Using a safer a SFHA standard, such as the 0.2% floodplain (500-year event), would provide flood risk reduction to communities and cost-savings to taxpayers. However, FEMA claims there is no evidence to suggest that it would also benefit ESA-listed species or their habitat. The information needed to fully determine this lies with the Services and includes their maps of threatened and endangered species’ habitat. FEMA reports to have requested these mapping data from the Services in 2014, but to never have received a response. Without these data, FEMA was unable to determine if an expanded Special Flood Hazard Area would actually include a significant number of areas in which ESA-listed species are located. This is problematic, but is nonetheless an inadequate justification to cease full consideration of this alternative, especially when the necessary maps are readily available online through the Services’ websites.⁹⁶ Documentation of the Services’ failure to cooperate with FEMA in this request should be included here.

⁹⁶ The National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) share jurisdiction of ESA listed species and their designated critical habitat areas. Generally, the USFWS manages terrestrial and freshwater species, while the NMFS manages marine species, some of which spend a portion of their life history in freshwater systems. Spatial data for the critical habitat of ESA-listed species is available online from the USFWS at: <https://ecos.fws.gov/ecp/report/table/critical-habitat.html>. Equivalent data is available from the NMFS at: <http://www.nmfs.noaa.gov/pr/species/esa/listed.htm#fish>

- We also question FEMA’s assertion that ESA-listed species will not demonstrably benefit from an expanded SFHA. In their evaluation of the impacts of alternatives on water resources (Sec. 4.3.3.4), FEMA cites various studies concluding that avoiding development in the floodplain maintains important natural functions benefitting water resources and supporting aquatic habitats.^{97 98} Yet FEMA also claims that there is no evidence that expanding minimum floodplain management standards, which are intended to minimize risky floodplain development, would benefit ESA-listed species in the floodplain. FEMA must address the obvious tension between these statements and reevaluate its decision to not fully consider this alternative.
- Consideration of a stronger flood standard is not new to FEMA. An EIS completed for modifications to the NFIP in 1976 examined the extreme alternative of prohibiting all development in the 1% SFHA, noting that such an act would be the most direct means to meeting the intent of the NFIP, protection of life and property in flood-prone areas, and would prevent disruption and endangerment of floodplain ecosystems. It was deemed unnecessary, however, because the no-rise regulatory requirements were expected to prevent almost all encroachment by development in the floodway. The no –rise regulatory mechanism has not worked to reduce new structures in the SFHA as predicted, and thus must be reevaluated.⁹⁹

2. Future condition flood risk guidance –

- FEMA reports to be considering modifications to the flood hazard mapping program to consider flood risk under future conditions. Hazard and risk information for future planning is of utmost importance to our nation’s citizens and economy, especially as many flood-prone areas continue to see large population growth. We support this effort. As FEMA describes, the Technical Mapping Advisory Council’s (TMAC) 2015 report provides detailed recommendations for assessing and incorporating future conditions risks in FEMA’s mapping and risk products. However, none of those recommendations have informed the alternatives considered here. While TMAC notes that current actionable science is not strong enough to support a nationwide climate informed standard, TMAC makes clear that impacts of future development, land use change, and erosion on flood risk can and should be evaluated in FEMA’s flood risk products.

⁹⁷ EPA. (2016, September 14). *Manage Flood Risk*. Retrieved from Green Infrastructure: <https://www.epa.gov/green-infrastructure/manage-flood-risk>

⁹⁸ The Nature Conservancy. (2014a). *A Flood of Benefits: Using Green Infrastructure to Reduce Flood Risks*. Retrieved from Habitat Protection and Restoration: <https://www.conservationgateway.org/ConservationPractices/Freshwater/HabitatProtectionandRestoration/Documents/A%20Flood%20of%20Benefits%20-%20J.Opperman%20-%20May%202014.pdf>

⁹⁹ Larson, L. and D. Plasencia. 2001. No Adverse Impact: A new direction in floodplain management policy. Association of State Floodplain Managers Whitepaper. <http://www.floods.org/PDF/NAIjournal.pdf>

- The first recommendation in TMAC’s report includes development of “policy and supporting standards on how to consider and determine erosion zones that are outside the SFHA, as they ultimately affect flooding and environmental conditions.”¹⁰⁰ Specific recommendations for evaluating and implementing erosion hazard zones were also detailed in the Association of State Floodplain Managers’ Riverine Erosion Hazards Whitepaper.¹⁰¹ FEMA has sufficient actionable science and mapping technologies to evaluate future growth and erosion related risks to communities, and TMAC estimates that such evaluations could be implemented in the near-term (2 years). Furthermore, considering the length of time required to draft this NPEIS, it is unreasonable to postpone evaluation of these critical risk mapping improvements until the next EIS process.

B. The ESA compliance criteria proposed in Alternative 2 will maintain status-quo, whereas the ESA performance standard (Alternative 3) is a more effective means to secure NFIP compliance with the ESA

We support implementation of legislatively required changes to insurance premium rates proposed in Alternatives 2, 3 and 4.¹⁰² However, the measures for addressing NFIP compliance with the ESA proposed in all the alternatives to be inadequate for instituting long-term solutions to conflicts between NFIP permitted development and ESA protections that have occurred nationally, and will continue to occur until fully addressed within the NFIP.

1. ESA compliance criteria proposed in Alternative 2 is ineffectual –

- Alternative 2 would clarify 44 C.F.R. 60.3(a)(2) to indicate that a “community must obtain and maintain documentation of compliance with the appropriate Federal or State laws, including the ESA, as a condition of issuing permits to develop in the floodplain. Such clarification would produce no changes to current levels of ESA compliance because 44 C.F.R. 60.3(a)(2) already states that NFIP participating communities ensure “all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law”. The ESA is a Federal law and thus already applies to communities permitting development through the NFIP. Any clarifying language to 44 C.F.R. 60.3(a)(2) specifically including ESA compliance would be redundant and institute no new outcomes.

¹⁰⁰ Technical Mapping Advisory Council Report, FEMA. 2015. Future Conditions Risk Assessment and Modeling. https://www.fema.gov/media-library-data/1454954261186-c348aa9b1768298c9eb66f84366f836e/TMAC_2015_Future_Conditions_Risk_Assessment_and_Modeling_Report.pdf

¹⁰¹ Riverine Erosion Hazards Whitepaper. Association of State Floodplain Managers Riverine Erosion Hazards Working Group. Feb 2016. <https://www.floods.org/ace-images/ASFPMRiverineErosionWhitePaperFeb2016.pdf>

¹⁰² Biggert Waters Flood Insurance Reform Act of 2012, and Homeowners Flood Insurance Affordability Act

2. ESA-related performance standard proposed in Alternative 3 is stronger, but will require technical guidance from FEMA and the Services –

- We support the establishment of an ESA-performance standard in the minimum floodplain management criteria. Requiring communities to not only demonstrate ESA compliance, but to also determine whether proposed development will have adverse impacts on ESA-listed species and their habitat can more effectively address the fundamental ways in which riverine-floodplain systems function. It's well documented that flood and erosion risks are a product of activities outside the SFHA (ASFPM 2016). Similarly, natural floodplain functions are a product of processes that occur upstream, downstream, and outside the immediate floodplain area. ESA-listed species that depend on natural floodplain functions are strongly impacted by development that impairs those functions, even when that development may be appropriately permitted through the ESA. As such, simply requiring appropriate ESA permits will not, and has not, worked to alleviate degradation of habitat areas critical to success of ESA-listed species. By also documenting the impacts of proposed development on designated critical habitat, and mitigating impacts to the maximum extent possible, the NFIP can begin to address ESA conflicts.
- While a new ESA-related performance standard can be effective in reducing degradation of ESA-listed species and critical habitats, meeting that standard should be a responsibility of both participating communities and NFIP administrators. While communities may demonstrate ESA compliance independently, they are likely to lack the mapping data and methodology for documenting the potential impacts of proposed development on ESA-listed species and habitats. FEMA should work with the Services to develop technical guidance to assist communities in evaluating, documenting, and mitigating these impacts.
- While implementing an ESA-related performance standard is a complex challenge, it was at the heart of the Oregon Biological Opinion released by the National Marine Fisheries Service in 2016. In that Opinion the Services outline specific recommendations for identifying, evaluating and appropriately managing the impacts of proposed development on natural floodplain functions critical to success of ESA-listed fish in Oregon. Much of that work can inform the nationwide EIS and alternatives considered here.

C. Alternative 2 is not justified as the preferred alternative

FEMA designates Alternative 2 as the preferred alternative with the reasoning that it; (1) meets the purpose and need of the draft NPEIS, (2) causes the least environmental impact, and (3) is the only alternative within FEMA's discretion. We challenge all three reasons for this designation. Further, FEMA states that Alternatives 3 and 4 did not receive concurrence from the Services and thus could not be preferred. If this is the primary factor barring preference, we strongly support renewed attempts at concurrence for a more effective preferred alternative.

1. Alternative 2 does not meet the purpose and need of the NPEIS –

- The purpose and need for an NFIP nationwide EIS is to (a) implement the legislative requirements of BW-12 and HFIAA, and (b) to demonstrate compliance with the ESA. Alternative 2 rests on existing statute to secure community compliance with the ESA, but it does not ensure FEMA’s own compliance with the ESA.¹⁰³ Through an overly narrow interpretation of land-use authority (discussed above), FEMA inappropriately excused itself from the full ESA Section 7 (Interagency Cooperation) compliance process by abdicating any federal agency responsibility (action) for development in the floodplain.
- Alternative 2 unnecessarily clarifies 44 C.F.R. 60.3(a)(2) to specifically include ESA compliance where it already applies. This would produce no direct environmental impacts because it would maintain status-quo development compliance requirements. This is a misleading interpretation of least environmental impact. As a result, current rates of ESA-listed species loss and habitat degradation would continue.
- FEMA’s draft NPEIS rests on an overly narrow interpretation of its land-use authority, and this must be reevaluated. Alternative 2 is not the only Alternative within its discretion.

2. Lack of concurrence with the Services on Alternatives 3 and 4 should be documented, and efforts for coordination should be renewed

- FEMA states that it would prefer to coordinate with the Services to undertake program changes to meet ESA responsibilities, but without concurrence it must select Alternative 2 as preferred. A lack of concurrence with the Services is weak grounds for rejection of Alternative 3 or 4 as preferred.
- We challenge the assumption that concurrence with the Services would be time prohibitive for finalizing this EIS.

VI. Conclusion

The quality of FEMA’s draft NPEIS is severely lacking. FEMA violated NEPA by impermissibly concluding floodplain development is not an indirect effect of the NFIP without adequate evaluation, especially given the ample evidence to the contrary. FEMA also improperly concludes it lacks the ability to influence land use in the floodplains by narrowly interpreting its “land use” authority. Further, FEMA’s assessment of the NFIP’s impact on endangered species is inadequate and omits extensive findings to the contrary. Finally, FEMA’s alternatives analysis requires significant improvement to account for the improper environmental impacts analysis in the draft NPEIS. FEMA should not finalize the draft NPEIS until these issues have been resolved.

¹⁰³ 44 C.F.R. 60.3(a)(2).

We appreciate this opportunity to comment on the NFIP draft NPEIS. Please do not hesitate to contact us with any questions about our observations and recommendations.

Sincerely,



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