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AN EXAMINATION OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY'S LIMITED ROLE IN LOCAL LAND-USE DEVELOPMENT DECISIONS

(114–53)

HEARING

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 21, 2016

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Committee on Transportation and Infrastructure
U.S. House of Representatives

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Chairman

Washington, DC 20515

Peter A. DeFazio
Ranking Member

Christopher P. Bertram, Staff Director

Katherine W. Dedrick, Democratic Staff Director

September 16, 2016

SUMMARY OF SUBJECT MATTER

TO:	Members, Committee on Transportation and Infrastructure
FROM:	Staff, Committee on Transportation and Infrastructure
RE:	Full Committee Hearing on "An Examination of FEMA's Limited Role in Local Land Use Development Decisions"

PURPOSE

The Committee on Transportation and Infrastructure will meet on Wednesday, September 21, 2016, at 10:00 a.m. in 2167 Rayburn House Office Building for a hearing titled "An Examination of FEMA's Limited Role in Local Land Use Development Decisions." The purpose of the hearing is to examine the Federal Emergency Management Agency's (FEMA) role and authorities under the National Flood Insurance Program (NFIP), their impact on local land-use development decisions, and the national implications of FEMA's implementation of the NFIP. The Committee will receive testimony from FEMA, the State of Oregon, and other public and private stakeholders.

BACKGROUND

The National Flood Insurance Program

The NFIP[1] was first authorized in 1968 after Congress found that it was uneconomical for the private insurance industry alone to make flood insurance reasonably available to those who need it. The intent of the program was to provide protection for property owners against potential losses through an insurance mechanism that requires property owners to pay a premium. At the same time, the program encourages state and local governments to make appropriate land-use decisions in an effort to reduce future flood damage to structures. The NFIP was most recently

[1] 42 U.S.C. §4001 et seq.

reauthorized by the Biggert-Waters Flood Insurance Reform Act of 2012[2] and amended by the Homeowner Flood Insurance Affordability Act of 2014[3]. The program expires September 30, 2017.

Community participation in the NFIP is considered voluntary. In order for the community to participate in the NFIP, it must adopt a floodplain map developed by FEMA with community input that identifies their flood prone areas. They must also meet or exceed FEMA's minimum floodplain standards and regulations to reduce property damage due to floods in floodplain areas. In return, the federal government agrees to provide primary flood insurance to individuals and businesses within the community.

In order for an individual homeowner to participate in the NFIP, his or her community must have opted into the NFIP. Although anyone can purchase flood insurance, individuals with a federally backed mortgage who reside in a Special Flood Hazard Area (SFHA) are required to purchase and carry flood insurance during the life of the mortgage. SFHAs are areas identified by FEMA that have a one percent chance of flooding each year; commonly referred to as the "100-year floodplain."

FEMA and the Endangered Species Act

The Endangered Species Act (ESA)[4] provides for the conservation of endangered and threatened species and the ecosystems upon which they depend. Implementation and enforcement of the ESA is jointly administered and conducted by the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) – depending on the species. Once a species is declared endangered or threated, federal agencies are required under section 7 of the ESA to ensure, through consultation with NMFS or FWS, that any action that is authorized, funded or carried out by that agency will not cause jeopardy to the endangered or threatened species or result in the destruction or adverse modification of an endangered or threatened species' critical habitat.

Through consultation, the action agency, in this instance FEMA, will ascertain whether an endangered or threatened species is located in the affected area involved. If the species is located in the area, the action agency must prepare a Biological Assessment to determine whether a proposed action may cause jeopardy to the species or its critical habitat. If the Biological Assessment determines that there may be an impact to the species or its critical habitat, NMFS or FWS will prepare a Biological Opinion (BiOp). The BiOp describes how the proposed agency action impacts an endangered or threatened species and its critical habitat as well as how the proposed agency action causes "incidental taking"[5] of the species. If an incidental taking is found, NMFS or FWS will provide "reasonable and prudent alternatives" (RPAs) suggesting actions that the action agency may take to ensure that its action does not cause jeopardy to endangered or threatened species or their critical habitat. If the federal agency

[2] Title II of P.L. 112-141.
[3] P.L. 113-89.
[4] 16 U.S.C. §§1531-1544.
[5] An incidental taking "refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant." 50 C.F.R. §402.02.

does not adopt the RPAs, the federal agency opens itself to lawsuits that the agency is causing jeopardy to endangered or threatened species and/or their critical habitat. If a court agrees, the court could compel the action agency to comply with the RPAs as provided.

FEMA is Required to Manage Land Use

Washington. In 2003, a lawsuit was filed against FEMA alleging the agency had violated the ESA by not consulting with NMFS on the impacts of the NFIP in the Puget Sound region of the State of Washington.[6] The Court determined that FEMA's implementation of the NFIP in the Puget Sound area could affect an endangered or threatened species or its critical habitat and ordered FEMA to consult with NMFS under the ESA.[7] After consultation between the agencies, NMFS issued a BiOp in 2008, finding that FEMA's implementation of the NFIP in the Puget Sound area jeopardized several endangered or threatened species and would destroy or adversely modify their critical habitat.[8] NMFS provided FEMA with RPAs recommending FEMA make several changes to its NFIP implementation, including to its minimum floodplain management criteria.[9]

In 2009, another lawsuit was filed alleging FEMA did not properly implement the Puget Sound RPAs.[10] The Puget Sound RPAs required FEMA to modify the minimum floodplain management criteria for NFIP communities in the Puget Sound area such that either no development would occur or that local permitting authorities would demonstrate any proposed development would cause no adverse impacts.[11] Since FEMA contends it does not have authority over privately funded development on private lands, FEMA developed a process for local communities to demonstrate that development would not cause adverse impacts. In 2014, the Court upheld FEMA's implementation of the Puget Sound RPAs. In doing so, the Court referenced FEMA's position that it is not a land-use authority.[12]

FEMA's position that it is not a land-use regulatory agency is consistent with the NFIP. The NFIP has several purposes, including to encourage (not prohibit) state and local governments to limit the development of land at risk of flooding, to minimize flood damage, and, where practicable, to guide future development away from flood hazards.[13]

O*regon:* In 2009, another lawsuit was filed against FEMA alleging FEMA failed to consult with NMFS on NFIP implementation in Oregon.[14] The parties reached a settlement agreement requiring certain floodplain map changes, to avoid or prevent adverse critical habitat

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[6] *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, C11-2044-RSM (W.D. Wash. 2004).
[7] *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2nd 1151 (W.D. Wash. 2004).
[8] Endangered Species Act – Section 7 Consultation Final Biological Opinion And Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation (Sept. 22, 2008).
[9] Id.
[10] NWF v. FEMA, 3:09-cv-00729-HA (June 29, 2009).
[11] Order denying Plaintiff's Motion for Summary Judgment and Granting FEMA's Motion for Summary Judgment, *NWF v. FEMA*, Civ. C11-2044-RSM (W.D. Wash. Oct. 2014).
[12] Id. at 30 (*stating* "But as FEMA notes, it is not a land-use authority and it can only provide guidance, technical assistance, require reporting, and institute enforcement actions, which it is required of it under the RPAs).
[13] 42 U.S.C. §4001(e).
[14] *Audobon Society of Portland, et al. v. Fed'l Emergency Mgmt. Agency*, Case 3:09-cv-00729-HA (June 29, 2009).

impacts. Following consultation between FEMA and NMFS on FEMA's implementation of the NFIP in Oregon, NMFS issued a BiOp with RPAs in April 2016 finding jeopardy to certain endangered or threatened species and adverse modification to the species' critical habitat.[15]

The RPAs subject 251 out of 271 NFIP participating communities in Oregon to more restrictive floodplain development standards and require them to be remapped to higher standards.[16] Under the RPAs, participating NFIP communities in Oregon must revise or adopt restrictive land use standards and criteria that will prohibit most development or redevelopment on lands in a floodplain. FEMA must suspend any community that fails to comply with the Oregon RPAs from participating in the NFIP, meaning flood insurance would no longer be available to those located in the floodplain. Under the RPAs, many individuals and businesses in Oregon will be subjected to new and expanded NFIP requirements and prohibitions and those with mortgaged property located in the expanded SFHA will be required to purchase flood insurance.[17]

National Implications of FEMA Land-Use Management

FEMA is currently implementing consultation outcomes (RPAs and other agreements) in the states of Washington, Oregon, New Mexico, and Monroe County, Florida. FEMA is also undergoing consultation under the ESA for NFIP implementation in the states of California, Arizona, and Florida. Further, FEMA has received notice of intent to file suit under the ESA from various environmental groups in the states of Missouri and Alabama, although no litigation has been filed.

When the respective BiOps and RPAs are eventually issued and implemented in each of these states, there could be two outcomes. One, FEMA could end up implementing the NFIP differently in each state thereby undermining one of the stated purposes of the NFIP for a nationwide flood insurance program;[18] or two, NMFS (or the FWS depending on the species) could insist on using the Oregon RPAs as a model, resulting in an expanded definition of the SFHA, development prohibitions and other stringent provisions being used in these states or even nationwide.[19]

Regardless of whether or not NMFS uses the Oregon RPAs as a model, the Oregon RPAs will have nationwide effect. To the extent that FEMA has to amend its regulations, guidance or the Community Rating Service program to meet requirements in the State of Oregon, these changes will apply nationwide.

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[15] Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) "Not Likely to Adversely Affect" Determination for the Implementation of the National Flood Insurance Program in the State of Oregon, p. 288 (April 14, 2016) (Oregon BiOp).

[16] FEMA's NFIP ESA Consultation in Oregon:
http://www.oregon.gov/LCD/docs/FEMAs_NFIP_ESA_Consultation_OR.pdf

[17] The Oregon RPAs require flood maps to include areas in the SFHA, areas in a newly defined high hazard area, and areas of future conditions flood hazard. Oregon BiOp at 282.

[18] 42 U.S.C. 4001(d).

[19] Id.

WITNESS LIST

Mr. Michael Grimm
Assistant Administrator for Mitigation
Federal Emergency Management Agency

Ms. Chris Shirley
Natural Hazards and Floodplain Specialist
Department of Land Conservation and Development
State of Oregon

The Honorable Denny Doyle, Mayor
City of Beaverton, OR

The Honorable Heather Carruthers, Commissioner
Board of County Commissioners, Monroe County, Florida
on behalf of the
National Association of Counties

Mr. Jon Chandler
Chief Executive Officer
Oregon Home Builders Association
on behalf of the
National Association of Home Builders

AN EXAMINATION OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY'S LIMITED ROLE IN LOCAL LAND-USE DEVELOPMENT DECISIONS

WEDNESDAY, SEPTEMBER 21, 2016

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
WASHINGTON, DC.

The committee met, pursuant to notice, at 10:02 a.m. in room 2167, Rayburn House Office Building, Hon. Bill Shuster (Chairman of the committee) presiding.

Mr. SHUSTER. The committee will come to order. Welcome to today's hearing.

I want to thank Ranking Member DeFazio for bringing this important issue to our attention. And today's hearing will focus on two important issues, particularly. The first is the extent of FEMA's authority to implement the National Flood Insurance Program, and the second is the national implications of FEMA's implementation of the National Flood Insurance Program.

The committee has worked this Congress to understand what is driving the rise in disaster costs and losses, including particular policies that may not make much sense or may be rewarding bad behavior.

As we have seen recently with flooding in Louisiana and right in my home district in Connellsville and Bullskin Township, the National Flood Insurance Program is an important part of preparing communities for flood risks they face. We know that smart mitigation practices save the taxpayer at least $4 for every $1 invested.

It is important that local land-use and development decisions ultimately reside with local officials who understand the risks and challenges of a particular area. Additionally, it is critical that Federal agencies understand the limitations of their authorities and work within their authorities.

I look forward to hearing from our witnesses today.

And now I yield to the ranking member for an opening statement.

Mr. DEFAZIO. Thank you, Mr. Chairman. Thanks for holding this oversight hearing of the Federal Emergency Management Agency. And thanks to the witnesses who are here today.

As you stated earlier, the National Flood Insurance Program is critical in many areas. It's pretty simple. It says that, you know, the FEMA should develop minimum flood plain standards, and then it's up to local communities to enact laws that meet or exceed

those in order to participate in the National Flood Insurance Program.

Now, in the particular case of Oregon, which, under this, is now being sort of nominated to be the poster child and the template for all the United States of America by certain agencies and groups, we have strict land-use planning. So the question becomes how are you going to overlay these new rules on top of our already strict land-use planning, which is designed to have compact urban growth?

But it also says you have to accommodate future needs. And therefore, you have to have enough buildable property. In all probability, we would have to blow up our law, do away with the idea of compact growth, and say, no, we are going to have sprawling growth like so many other places because the downtown core of many of our cities, which was intended to be redeveloped with higher densities, including the riverfront through Portland, where Oregon Health Sciences is building major new projects. Parts of downtown Eugene, an area called Glenwood between Eugene and Springfield, these areas would be pretty well precluded from redevelopment. Therefore, it appears that we would then begin to model ourselves after the rest of the country.

And somehow this is going to help the endangered species, according to the National Marine Fisheries Service. I give a—you know, we have a map that shows how many communities in Oregon would be affected, which they are going to put up. And you can see it is over 221 communities in Oregon would be affected—232.

It would—in the case of Coos Bay—if I could have the Coos Bay map—Coos Bay is a community, it has been struggling with a depressed economy for many years. There are some glimmers of hope and activity there. But this is what has been designated and which FEMA would restrict or prohibit development or redevelopment in that entire area.

That happens to be all of the downtown core—you can leave it up for a second, whoever took it down—that—that area, it does include the local newspaper building, which is critical salmon habitat. It does include Highway 101, critical salmon habitat. It does include some buildings that are well over 100 years old and need substantial renovation or actually would be replaced. But no, this area would be denied flood insurance unless they dramatically restrict or prohibit any redevelopment in that area, at least in an interim period, while FEMA develops rules to accommodate the so-called RPA.

So, we are going to have a number of witnesses here today to talk about this. You know, when I first came to Congress, there was—one of the early black helicopter conspiracy theories was about the Rockefeller Commission. And I said, "Well, what is that?"

And they said, "I have a plan to institute national land use—the Federal Government is going to usurp the police powers of the States under the Constitution, and is going to mandate national land-use planning." And I would always tell those people they were nuts. Well, maybe they weren't. That is why we are here today.

Thank you, Mr. Chairman.

Mr. SHUSTER. Thank you, Mr. DeFazio. And with that, I recognize the subcommittee chair, Mr. Barletta, for a statement.

Mr. BARLETTA. Thank you, Mr. Chairman.

Since the beginning of the 114th Congress, we have been exploring the rising costs of disasters in terms of both the loss of property and human life. At our first hearing in the 114th Congress, I stated that my top emergency management priority was pursuing disaster legislation that will save lives, lower costs, and launch a comprehensive review of Federal disaster policies and the rising costs of disasters.

Early last year, Ranking Member Carson and I introduced the FEMA Disaster Assistance Reform Act to call for the first comprehensive assessment of disaster costs and losses in over 20 years.

One of the most important pieces of our country's disaster assistance policy is linked to the National Flood Insurance Program, or the NFIP. So, today's hearing focusing on FEMA's authorities to implement the NFIP, and the extent that those authorities can impact local land-use and development decisions, is a critical element of that discussion.

I thank Ranking Member DeFazio for bringing this issue to the forefront so that we could bring the right people together to help us understand how some of the challenges being faced in Oregon will impact the entire Nation. I look forward to hearing from FEMA, the State and local officials, and our representatives from the National Association of Home Builders, about their current challenges and concerns regarding these issues. Thank you.

Mr. SHUSTER. Thank you. And now I would like to recognize Mr. Curbelo to introduce one of his constituents, who is a witness today.

Mr. CURBELO. Chairman Shuster, Ranking Member DeFazio, thank you for yielding me time and, more importantly, thank you for holding a hearing on such an important topic as FEMA's role in the National Flood Insurance Program.

My south Florida district is almost completely surrounded by water, so this hearing is of particular importance to my constituents, which is why I am so proud to have with us today Mayor Heather Carruthers from Monroe County, Florida, on behalf of the National Association of Counties.

As the mayor of all of the Florida Keys, Ms. Carruthers brings to this hearing a unique insight on how flood insurance rates affect those who work and live in our coastal communities, not just those who come for vacation.

As a member of the Key West Chamber of Commerce, and as an instrumental founder of the Fair Insurance Rates in Monroe County, or FIRM, Mayor Carruthers has been an invaluable source of information to me and my staff, as we work together on addressing flood insurance rates and disaster mitigation. She is a steadfast leader in our community for working on behalf of her constituents and those residents who call the Keys home.

And fun fact: She has been a featured soloist with the Key West Pops and Island Opera Theatre. Also, recently, a charades partner with me—a very successful partnership, by the way, at a charity event—and, more importantly, Mayor Carruthers and her family

recently welcomed a little boy to the world, Colin. So congratulations, and thank you so much for joining us today.

Ms. CARRUTHERS. Thank you very much, Representative. It is a pleasure working with you.

Mr. SHUSTER. Thank you, and welcome. He said a soloist. Does that mean an instrument or a singer?

Ms. CARRUTHERS. Mezzo soprano.

Mr. SHUSTER. OK. The high voice. Is that the low voice? I don't know anything about music.

[Laughter.]

Mr. SHUSTER. And with that, I will recognize Mr. Carson, the ranking member of the subcommittee, for a statement.

Mr. CARSON. Thank you, Chairman Shuster, Ranking Member DeFazio, Chairman Barletta.

You know, today's topic explores how the Endangered Species Act affects the Federal Emergency Management Agency's work in implementing the National Flood Insurance Act. Both of these laws are very essential, yet the interplay between these two laws raised several questions that we need to examine.

Congress directed FEMA to carry out the National Flood Insurance Program. But this morning we will have a conversation about the extent the National Marine Fisheries Service should be allowed to direct FEMA, if at all, on how FEMA carries out the NFIP. FEMA currently does not authorize, fund, or license private development on private lands. Yet the Fisheries Service is directing FEMA to either take or prohibit certain actions. That will result in FEMA being responsible for determining whether privately funded activities on private lands may occur.

So, the committee must examine whether FEMA should have this land-use authority, or regulatory authority. Now, the Fisheries Service is proposing that FEMA exercise its authority to prohibit most, if not all, private development in Oregon flood plains. If FEMA exercises its authority, we need to know whether it could be used nationwide.

On the surface, these issues seem to only apply in Oregon. But what I want to learn more about is whether these authorities and directives could be expanded elsewhere. We have several endangered species in Indiana that deserve protection, but we also have flood plains, and property owners who have resided in these flood plains for a long time, and who need flood insurance.

I look forward to learning more about the laws and processes involved here, as well as other issues, concerns, and suggestions for addressing these issues.

Thank you, Mr. Chairman. I yield back.

Mr. SHUSTER. Thank you, Mr. Carson. And, with that, we will start our panel.

First, welcome to all of you for being here. We really appreciate you taking the time to testify with us today and help educate us.

Our first witness is Mr. Michael Grimm, the Assistant Administrator for Mitigation at FEMA. Mr. Grimm, you are recognized for your statement.

TESTIMONY OF MICHAEL GRIMM, ASSISTANT ADMINISTRATOR FOR MITIGATION, FEDERAL EMERGENCY MANAGEMENT AGENCY; CHRISTINE SHIRLEY, NATIONAL FLOOD INSURANCE PROGRAM COORDINATOR, DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, STATE OF OREGON; HON. DENNY DOYLE, MAYOR, CITY OF BEAVERTON, OREGON; HON. HEATHER CARRUTHERS, COMMISSIONER, MONROE COUNTY, FLORIDA, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES; AND JON CHANDLER, CHIEF EXECUTIVE OFFICER, OREGON HOME BUILDERS ASSOCIATION, ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. GRIMM. Thank you. Good morning, Chairman Shuster and Ranking Member DeFazio and members of the committee. My name is Michael Grimm, and I am the Assistant Administrator for Mitigation for the Federal Emergency Management Agency. Thank you for the opportunity to testify about FEMA's efforts to strengthen our National Flood Insurance Program compliance with the Endangered Species Act in Oregon, as well as the associated implications, nationwide.

In response to lawsuits brought under ESA, FEMA has been required, either by the courts or through settlement agreements with plaintiffs, to undertake consultations under the ESA on implementation of the NFIP in particular communities and regions. In consultations undertaken in Monroe County, Florida, the Puget Sound region of Washington, and in Oregon, the Services—in some cases the National Marine Fisheries Service, or NMFS, and in other cases the U.S. Fish and Wildlife Service—have found that the implementation of the NFIP in those areas was likely to jeopardize the continued existence of threatened and endangered species, and adversely modify designated critical habitat. When a jeopardy opinion is issued, the Services must also provide reasonable and prudent alternatives, if any, to a proposed action.

The RPA is a recommended set of program changes that will ensure a proposed action is implemented in a manner that will not jeopardize species, as well as the adverse modification of critical habitats.

Up until the consultation conducted with NMFS in Oregon, all of the RPAs from consultations had been able to be implemented, consistent with the NFIP and what we at FEMA call performance-based standards. FEMA uses performance-based standards to implement the NFIP throughout our 22,000 participating communities. FEMA recognizes that there are any number of ways in which a committee can meet the minimum flood plain management criteria established by FEMA for a community to participate in the NFIP.

Performance-based standards provide flexibility for communities to meet the requirements of the ESA in a way that makes sense to them. In like manner, the RPAs FEMA implemented prior to the Oregon consultation operated within this framework, allowing FEMA to work collaboratively with communities to ensure compliance with the requirements of the Endangered Species Act in a way that made sense to each individual community.

For example, FEMA's implementation of the RPA resulting from the Puget Sound Washington area consultation with NMFS pro-

vided communities flexibility to implement an approach to preserve ESA-listed species and their designated critical habitat in a manner that is consistent with local decisions and land use. While some communities chose to adopt a model ordinance to ensure compliance with the requirements of ESA, others have the flexibility to demonstrate through existing codes and standards that they are already meeting these important standards.

Still others chose a third option, demonstrating compliance on a permit-by-permit basis. The RPA resulting from the Oregon consultation with NMFS, however, is different. In Oregon, NMFS issued an RPA that differs from the Puget Sound performance-based standard approach, following a prescriptive approach, instead.

If implemented as written, the RPA in Oregon will result in expansion of areas mapped within the special flood hazard area to include areas likely to flood based on data reflecting the anticipated impacts of climate change, and will require enhanced regulatory flood plain management criteria going beyond the minimum standards currently required as a condition of participation in the National Flood Insurance Program.

Changing FEMA's regulations to accommodate these requirements of the RPA in Oregon will not only impact how FEMA administers the NFIP in Oregon, but across the Nation in all 22,000 communities that participate in the NFIP.

Environmental stewardship is an important responsibility, and FEMA is committed to doing everything within our authority to ensure that the NFIP is compliant with the ESA. At FEMA we believe in the whole-community approach in accomplishing our mission. As such, we will continue a close working relationship with NMFS and the U.S. Fish and Wildlife Service, as well as working with our State, local, and tribal partners to make sure we accomplish our goals.

Thank you for the opportunity to testify, and I look forward to answering any questions the committee may have.

Mr. SHUSTER. Thank you, Mr. Grimm. Now our next witness today is Ms. Chris Shirley, the National Flood Insurance Program coordinator for the Oregon Department of Land Conservation and Development.

Thank you for being here today.

Ms. SHIRLEY. Good morning, Chairman Shuster, Ranking Member DeFazio, and members of the committee. I am pleased to be here today to talk about this—to discuss Oregon's perspective on the reasonable and prudent alternatives. My name is Christine Shirley, and I work with communities directly on implementation of the National Flood Insurance Program in Oregon, as the State NFIP coordinator.

I am going to present an abbreviated version of some written testimony that I have submitted.

So, as Mr. DeFazio mentioned, Oregon has been a pioneer in implementing a statewide land-use program. This was implemented 40 years ago. And it preserves local control and responsibility for land-use decisions while establishing an overarching set of goals known as our 19 land-use planning goals, which, at its core, direct new development into towns and cities, protect rural areas for farm

and forest use, and evaluate environmental impacts at the planning level, rather than at the permit-by-permit level that is the case in some States, many States.

So, now Oregon is at the forefront of a Federal directive through these reasonable and prudent alternatives to incorporate an additional layer of land-use management in the special flood hazard areas.

So I want to emphasize that the State of Oregon supports the principle of sound flood plain management, because we believe it protects people, property, habitat function, and economic vitality. And, as a result, the State has strenuously endeavored to be a good partner with our Federal counterparts at FEMA and the National Marine Fisheries Service during the multiyear consultation that resulted in the reasonable and prudent alternative, and will continue to participate vigorously in the years ahead.

And since the RPA was released in April, we have learned a few things, recognized a few challenges. And primary among the lessons is the importance of early involvement of the States and local governments in the crafting of any future reasonable and prudent alternatives.

The State was only allowed limited interaction with the Federal agencies during the consultation period, and we are now faced with a really difficult task of having to fit a consultation that didn't really involve us and doesn't really fit with the Oregon land-use planning system; we have to fit that RPA into our existing land-use program. It would have been easier if we had had the opportunity to do that fitting earlier on.

In the same vein, it is important now that FEMA involve local governments in the development of implementation strategies for the RPA, and that FEMA understand local government timelines and resources in setting their implementation targets for the RPA.

The State has been told by FEMA, for example, that they intend to develop guidance to implement interim measures set forth in the RPA by April of 2017, which is only 9 months away, and then have local governments adopt changes into their permitting programs to reflect that guidance. And that schedule of less than 2 years is not possible to be implemented for 232 communities in Oregon.

And likewise, the schedule for adopting revised flood insurance rate maps that are called for in the RPA over the next decade, it must pay attention to State and local processes and budgets and resources. And realistically, the State can't manage an aggressive map adoption process as called for in the RPA. And just by way of example, the FEMA map modernization program took over 10 years to implement in a much smaller number of communities.

To their credit, both FEMA and NMFS have emphasized outreach after the RPA was released, and scheduled immediately with us some webinars that local government and the State were involved in. And then we hosted 10 regional meetings throughout the State with FEMA and NMFS, where we talked about the RPA and heard from local governments what their concerns were.

And we learned many important things, such as the need to get credit and leverage Oregon's existing land-use planning program, to contextualize the RPA within the watershed management program, and not just focus directly on flood plains, develop a mitiga-

tion banking program, and to limit uncertainty around changing rules, maps, and timelines that can dampen development investment.

The State is concerned that the recommended changes to the flood plain mapping protocols as set forth in element 3 of the RPA would dramatically increase the footprint of the special flood hazard areas and regulation therein called for in the RPA, and——

Mr. SHUSTER. Ms. Shirley, if I could get you to wrap up——

Ms. SHIRLEY. Yes. And those could have a significant negative economic impact.

So, in conclusion, the changes brought about by this consultation must not be overlaid on top of our existing system, but be woven into it, and that is going to take some time and resources and dedicated staff at the Federal level.

Thank you very much, and I would be happy to answer any questions.

Mr. SHUSTER. Thank you, Ms. Shirley. And with that, our next witness is the Honorable Denny Doyle, the mayor of the city of Beaverton, Oregon.

Thank you for being here today and proceed, Mr. Doyle.

Mr. DOYLE. Thank you. Good morning, Chairman Shuster and Ranking Member DeFazio. I am Denny Doyle, mayor of the city of Beaverton. I am also the incoming president of the Oregon League of Cities, as well as a board member of the National League of Cities. Beaverton is located just 2 short hours north of the majestic tall firs in Congressman DeFazio's Lane County. Thank you for the opportunity to appear before you today to discuss the FEMA role in implementing the National Flood Insurance Program in Oregon and throughout the United States.

As we all know, in 2009 FEMA was sued by environmental groups in Oregon for failing to ensure that the implementation of the NFIP complies with the Endangered Species Act. In response to the ruling, FEMA consulted with the National Marine Fisheries Service, resulting in the reasonable and prudent alternatives that aims to minimize impacts to ESA-listed species.

The final draft of the RPA calls for drastic expansion of an area to be protected beyond FEMA's current jurisdiction under the NFIP. If the new protected area is imposed on communities, it will have an unprecedented negative impact on economic growth, job creation, and new development as well as redevelopment, including affordable housing throughout Oregon.

These lawsuits are occurring in a piecemeal fashion around the country. I encourage Members of Congress to be aware that if the impacts you hear about today have not yet affected your congressional district, they almost surely will in the future. I have had the opportunity to meet with representatives from both FEMA and NMFS over the past several years in both Washington, DC, and Oregon to discuss this situation, and I truly remain dismayed at the end results of ESA consultation.

During development of the RPA, FEMA repeatedly stated their concerns with the "major legal and practical issues concerning the RPA," and that the "RPA provides little flexibility in how to achieve 'no adverse effect.'" Therefore, FEMA concluded that they were unsure how the RPA could be made "fully implementable

within FEMA's legal authorities." Yet here we are, with an RPA that FEMA and our local governments must implement.

We all agree that the protection of threatened and endangered species is a high priority. However, Beaverton is an urban community, one with very little undeveloped land left. In or next door to our community are major corporations such as Nike's world headquarters, Intel, Columbia Sportswear, to name just a few. Given the preponderance of many small streams that may contain threatened or endangered species, such stringent control of development in an arbitrarily enlarged flood area as proposed by the RPA could deter development for much of our community.

Without development or redevelopment by our business community, we cannot create new jobs or continue to improve our little part of the world. For example, a restaurant in Beaverton with a long history of shallow-flood damage—i.e., water in a parking lot—has recently been demolished and reconstructed. This pre-flood insurance rate map building has been rebuilt with a finished floor 2 feet higher than the base flood elevation. In other words, they lifted the ground 10 feet. This is smart, flood-resistant development. However, such a beneficial project could effectively be precluded in some way by the new RPA.

In another example, a previously developed area located within the RPA-expanded flood zone could not be redeveloped into affordable housing because of the additional costs. Significant employers and exporters will also likely be adversely impacted. In general, any development plans within the affected areas would require costly and time-consuming consultations with NMFS and FEMA, if they were allowed at all, and if they were affordable at all.

Finally, on a personal note, I am working hard to create an arts and culture center in downtown Beaverton, adjacent to Beaverton Creek. Twenty-plus years. Even though at this time ESA-listed species do not exist in the creek, the RPA will likely force us to implement significant RPA measures when developing and constructing the arts center. This is going to be built at no cost to the local taxpayers; it is a $45 million project. All of this comes at a cost, a significant one when just raising the funding to develop the arts center itself is a challenge on its own terms.

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

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

Thank you again for the opportunity to testify before you today. I am happy to answer questions later. And good luck to all of us that appropriate in November.

Mr. SHUSTER. Thank you, Mayor Doyle. Our next witness today was introduced, the Honorable Heather Carruthers, the county commissioner from Monroe County, Florida. And she is testifying on behalf of the National Association of Counties.

Again, thank you for being here, and please proceed with your statement.

Ms. CARRUTHERS. Thank you, Chairman Shuster, Ranking Member DeFazio, and distinguished members of the committee for this opportunity to testify on FEMA's role in local land-use decisions. My name is Heather Carruthers, and I am an elected county commissioner from Monroe County, Florida, home of the Florida Keys. And today I am representing the National Association of Counties.

The topic of this hearing is of great importance to my county and to many other counties across the United States. In fact, in Monroe County we have been dealing with this issue for more than three decades, initially through locally originated efforts, and eventually through the courts.

The National Flood Insurance Program is vital to us, and any changes to the program and its requirements directly affect our residents, businesses, and local economy. Although counties are highly diverse across the country, we share many of the same goals and responsibilities. We establish local land-use policies that protect our natural resources and environment, but also provide the tools and foundation needed for development that helps our communities. In Monroe County we have worked diligently to identify solutions that help us balance both of these goals. Today my remarks will focus on three points.

First, local governments work daily to craft land-use policies that protect endangered species, mitigate disasters, and facilitate economic development in compliance with existing State and Federal species protection regulations. In most States, land-use planning and regulation is carried out primarily at the local level. Through this land-use authority, we help to shape the local communities within our jurisdictions.

In my county we have approximately 30 endangered and threatened species. We work to protect these species and their habitats in many ways, including establishing ordinances that limit construction and development in specific areas of the county. Our local regulations cap building permits for many reasons, the most important of which is to protect environmentally sensitive land. These local land-use policies are developed through extensive coordination with our communities, as well as our State and Federal partners. We have long required coordination with the Fish and Wildlife Service before issuing any building permits.

Second, because NFIP is so important to our flood-prone communities, local governments have little choice but to comply with its participation requirements. In 2012, the Government Accountability Office estimated that about 95 percent of the Nation's counties had NFIP policies in their jurisdictions. In Monroe County, we have over 27,000 NFIP policies, and Florida, as a whole, has over 1.8 million.

The importance of the NFIP to our county was highlighted when, in 2005, a Federal court halted issuance of new NFIP policies for nearly 50,000 parcels in Monroe County, following a lawsuit filed for conservation groups, even though we had already carefully developed comprehensive land-use policies to protect our environment and native species. For 7 years, this FEMA injunction remained in place, and owners of the parcels were unable to build. Construction

costs skyrocketed, and the permitting process dragged. We documented instances of homeowners paying over $1,000 more in permit fees, and waiting almost a year for Fish and Wildlife Service approval before they could proceed.

The only homeowners and businesses that were able to move forward were those with deep pockets who could do without flood insurance. And as you can imagine, this really hurt our working families and small businesses. It further slowed economic growth and drove up business and housing costs.

Finally, species protection regulations carried out through NFIP have typically been one-size-fits-all solutions that consider neither the variance in local communities nor our existing species protection efforts. As a result of the previously mentioned lawsuit, reasonable and prudent alternatives, RPAs, required our county to revise our flood damage prevention ordinances. We were required to implement a new permit process that was essentially a repackaging of existing county regulations with multiple layers of added bureaucracy. Owners of properties within endangered species habitat areas were already required to seek Fish and Wildlife Service approval before getting county permits for development.

FEMA's review did not take into consideration the unique circumstances of our county ordinances and procedures. Ultimately, no additional habitat acreage was protected. In short, the entire process added no real value to the species protective measures we had already developed and enforced. It simply added more redtape and cost. As you can see from this permit review process flow chart, this is what is required of a homeowner—property owner before they can get a building permit. And this does not even include what happens at Fish and Wildlife or FEMA.

So thank you again, Chairman Shuster, Ranking Member DeFazio, and members of the committee, for this opportunity to provide the local perspective on how advancing species protection efforts through NFIP is problematic and ultimately counterproductive at the local level. And I am happy to answer any questions that you may have.

Mr. SHUSTER. Thank you, Commissioner Carruthers. And our final witness today is Mr. Jon Chandler, the chief executive officer of the Oregon Home Builders Association. He is testifying on behalf of the National Association of Home Builders.

Thank you for being here today, and please proceed with your statement.

Mr. CHANDLER. Thank you, Chair Shuster, Ranking Member DeFazio, members of the committee. I really appreciate the opportunity to come talk about what is happening with NFIP on behalf both of NAHB and my organization, the Oregon Home Builders. I am the CEO of the Oregon HBA. We are a State association of the National Home Builders, and this is an issue of great interest for us across the country.

I am going to address this morning, in addition to my written testimony, the land-use problems that are created by linking the Endangered Species Act with FEMA's National Flood Insurance Program. Quite simply, it is inappropriate to use the NFIP to protect endangered species. Doing it that way adds duplicative, burdensome, and costly regulatory barriers that will prevent the devel-

opment of communities in a sensible and planned fashion. It will hurt well-paying jobs, and it will increase the price of housing beyond the means of many middle-class and working families.

Courts have held recently that FEMA must consult with the National Marine Fisheries Service concerning impacts of the NFIP on endangered species. In Oregon, as you have heard, NMFS issued a biological opinion dictating the implementation of NFIP. The State of Oregon and every city and county in Oregon has invested over 40 years in comprehensive statewide land-use planning, the money that goes along with that, the infrastructure planning and development that goes along with that. But with this NMFS BiOp, those efforts will be significantly undermined, if not completely undone.

The terms of the BiOp could result in large areas of land that can no longer be developed. Under Oregon law, local governments can be held accountable for that diminution in value. What we call measure 49 holds that any Government entity that downzones or reduces by regulatory measures the value of a piece of property must provide compensation to the property owner for that diminution in value.

Many communities simply will not have the resources to cover that, and may consider, as a result, dropping out of the NFIP. But due to the mandatory requirements for building for a homeowner in a flood plain, dropping out of the NFIP could result in the homeowner defaulting on their mortgage if they can't afford or access the high cost of private flood insurance.

The courts have ruled that both mapping and the NFIP's minimum eligibility requirement criteria are discretionary. And therefore, FEMA must consult with the National Marine Fisheries Service. NAHB's position is that those supporting components should be labeled nondiscretionary, and that FEMA should not be required to consult. The maps that FEMA prepares are based solely on technical evaluations of the base flood elevation. FEMA is drawing a line on a map based on science, math, and engineering. It cannot and should not be required to draw that line simply to benefit endangered species.

Under the NMFS BiOp, if a landowner or local government seeks changes or revisions to areas in existing flood plain maps, FEMA would not be able to process that request until the owner demonstrates that all potential impacts to endangered species or the flood plain have been fully mitigated.

FEMA does not authorize or approve the construction of structures or the replacement of fill in or around flood plains, and FEMA does not require what mitigation is required. FEMA's role is to ensure that the information depicted on the maps is accurate and scientifically sound.

NAHB also believes that the minimum eligibility criteria for communities to participate in NFIP should also be nondiscretionary. The BiOp requires the square footage of new structures to be 10 percent or less of the average lot size. And to give you a sense of that, in the Pacific States, according to the Census Bureau data, the average size of a lot is 6,525 square feet. Under this requirement in the BiOp, that reduces the size of a single-story home to 652 square feet.

Now, in Oregon, where the average lot sizes are 4,000 to 5,000 square feet and 2,500-square-foot lots are not uncommon, that same 10 percent coverage requirement would have houses with a first floor—or a one-story house of 250 square feet. Compared on a national basis, the average home size is 2,500 square feet. That sort of a 10-percent requirement will dramatically hinder growth in communities where families want to live, and tramples on local government zoning authorities.

These changes are occurring on a State-by-State basis, but they have national implications to the National Flood Insurance Program. Three States are currently engaged in consultation: Florida, California, and Arizona. There are billions of dollars of home value and remodeling costs at risk. For those States combined, NAHB estimates over $400 billion of home values and over $4 billion in remodeling spending is potentially at risk. Nationwide, that would be over $1 trillion. And we add in the proposal of the Atlantic sturgeon potentially to the protected species list, it is possible that States from Georgia to Maine may be next on the NMFS consultation list.

For a lot of homebuilders, we already have to go through section 7 consultation in the development process. That protects endangered species under existing law. That is currently on the books. We don't believe this adds anything.

And in conclusion, Mr. Chairman and Ranking Member, we appreciate very much the opportunity to put these concerns in front of you, and look forward to working with you, going forward. I would be glad to take any questions.

Mr. SHUSTER. Thank you, Mr. Chandler. And again, this is an important issue. Any time that the Federal Government tries to expand an agency's powers without congressional authority, and go beyond the mission of FEMA, it is troubling. And just the last words you said there, Mr. Chandler, it can be very, very damaging to development, to the economy, to job creation, which is important to all of us.

And this is happening right in Mr. DeFazio's State, in his backyard. So I am going to forgo my questions. I am going to yield Mr. DeFazio my 5 minutes so he has a full 10 minutes to really get into questioning here, because he knows the situation. And so I will leave it to him to use my 5 minutes.

So, Mr. DeFazio, I yield to you.

Mr. DEFAZIO. Thank you, Mr. Chairman. I would point out that, well, first, let me—a couple of questions of FEMA, and then I will point something out.

Mr. Grimm, does FEMA have the authority to regulate privately funded development on private lands under the NFIP?

Mr. GRIMM. [No response.]

Mr. DEFAZIO. A simple yes or no would do.

Mr. GRIMM. No.

Mr. DEFAZIO. OK, good, thank you.

[Laughter.]

Mr. DEFAZIO. Now, you are going to be required, because of the RPA in Oregon, to amend your regulations to include an ESA standard. Will that change apply only to the State of Oregon, or will it apply to all of the States of America?

Mr. GRIMM. When we change our regulation, it applies to all 22,000 communities.

Mr. DEFAZIO. OK, all 22,000 communities, which I assume are scattered among the 50 States.

Mr. GRIMM. Correct.

Mr. DEFAZIO. OK. And then, you know, that—have you consulted with—I assume you have in-house counsel, or do you use the Justice Department for legal consultations on your authority?

Mr. GRIMM. We have in-house counsel, sir.

Mr. DEFAZIO. OK. And what does in-house counsel say about you asserting regulatory authority that wasn't extended to you by the United States Congress?

Mr. GRIMM. That we can only do what is within our authorities, and there are concerns over a number of the RPAs being outside of our current authorities.

Mr. DEFAZIO. So then, arguably, perhaps your agency, in exceeding its authority to follow the directives of National Marine Fisheries and agreeing to adopt this RPA, is vulnerable to being sued.

Mr. GRIMM. I—yes. And for the RPAs that are not within our legal authorities, we would seek other alternative RPAs, working with the States and the communities to implement the intent of the RPAs as issued by Marine Fisheries.

Mr. DEFAZIO. Now, the authority granted to you by Congress is you get communities who wish to participate in the program to adopt minimum standards, yes?

Mr. GRIMM. Correct.

Mr. DEFAZIO. So in this case we—you are far exceeding the minimum standard approach.

Mr. GRIMM. That is correct, sir.

Mr. DEFAZIO. How can that be? Never mind, that is speculative.

But the point is, I—you know, I am having trouble tracking this whole thing. I put up a map earlier showing downtown Coos Bay, Oregon. And under what you are being forced to adopt by NMFS in declaring, you know, this area will be within the enhanced 100-year flood plain, well, we don't know what the enhanced 100-year flood plain is yet, do we?

Mr. GRIMM. We don't, sir.

Mr. DEFAZIO. We don't. So this is actually just using the existing 100-year flood plain. One would assume that when you include climate change, that these flood plains are probably going to, especially in coastal areas, become much larger.

Mr. GRIMM. Yes. From FEMA's perspective, when you include the climate change, the erosion zones, future conditions hydrology, we would expect flood plains to significantly increase and then the applicable flood plain management regulations would apply through the RPA——

Mr. DEFAZIO. So many properties now that aren't required to have Federal flood insurance in order to obtain bank financing will be required to in the future.

Mr. GRIMM. Yes, sir. When we revise our regulations, that would apply.

Mr. DEFAZIO. Now, don't you—didn't Biggert-Waters require an advisory committee for mapping? Because mapping has been con-

troversial and, in part, led to the adoption of Biggert-Waters. Is that correct?

Mr. GRIMM. Absolutely. The Technical Mapping Advisory Council was established by BW–12 to provide guidance to FEMA and advice on our mapping standards.

Mr. DEFAZIO. Right. Doesn't the National Oceanic and Atmospheric Administration, of which NMFS is a subsidiary, so to speak, don't they have a seat on that advisory committee?

Mr. GRIMM. They do have a seat on that.

Mr. DEFAZIO. OK, and has the advisory committee proposed this dramatic change to the rules?

Mr. GRIMM. The committee has proposed some future conditions mapping, some erosion mapping, not necessarily in line with what the RPAs are recommending. That is one of our concerns, is that Congress established TMAC——

Mr. DEFAZIO. Right.

Mr. GRIMM [continuing]. To provide guidance to FEMA. And when I personally was involved with the negotiations with Marine Fisheries on this, this was one of the key issues that I brought up, in that the RPAs must be aligned with recommendations from the map and advisory council, and that is one of our——

Mr. DEFAZIO. But in this case, what is being recommended for Oregon, which is going to require a regulatory change which will apply nationwide, is not following the advice of that committee.

Mr. GRIMM. There are differences.

Mr. DEFAZIO. Yes, there are. So one subagency of an agency that is represented on the advisory committee established by Congress is forcing you to exceed your legal authority, to impose more than minimum standards, and to link, you know, the Endangered Species Act to the NFIP eligibility requirements.

Now, what kind of a change is that going to be? Some say, "Oh, it is just really simple, you just reference it." Do you think that can be done in one sentence? I have never seen an administrative regulation that is one sentence long.

Mr. GRIMM. Yes, for——

Mr. DEFAZIO. I mean, usually we write 1 sentence, and you write 100 pages. So how is that going to work?

Mr. GRIMM. Thank you, sir. From FEMA's perspective, you are right, there is one reference to a legal requirement or a regulatory change in the RPAs. We are currently evaluating that. We believe there are going to be a number of other regulatory changes that are required, particularly around redefinition of the special flood hazard area and minimum standards.

Mr. DEFAZIO. OK. So to Ms. Shirley, now, you referenced the potential conflict. I mean since—it is kind of odd. Washington State, where our regional office of NMFS is based, was allowed to go with performance standards, but it is a State that does not have comprehensive, statewide land-use planning. Oregon, a State that has comprehensive, statewide land-use planning, is being told, no, you must go with a prescriptive, one-size-fits-all solution being dictated by a Federal agency to another Federal agency that will be imposed on the State.

You already talked about the logistical problems of having 232 communities change their local plans. Having been a county com-

missioner, I am quite familiar with the process, and you are right, it can be done in the timeframe we are talking about.

But one of the key things in our land-use law is compact growth, sometimes controversial—recently in the city of Eugene, which I represent—because even though it is sort of optimal for planners to densify, sometimes the people who live there don't like it. But the point is, that is probably the major goal, in addition to resource conservation, as to avoid the sprawl that many other States have seen.

But there is also another thing where communities are supposed to have a stock of buildable land, or developable land, both for commercial, industrial, and/or residential purposes. So if our core areas, particularly, you know, downtown Coos Bay, which cries out for a lot of renovation and redevelopment, is off limits, and the city wishes or has to accommodate growth, then they are going to have a very arguable case to greatly expand their urban growth boundary. Isn't that correct? I mean it seems to me the only option.

Ms. SHIRLEY. Yes, we share that concern. We also believe that the RPA, as it exists today and can hopefully be negotiated further in the future, allows for redevelopment projects that incorporate some improvement to the salmon habitat without stopping development altogether.

So I think there is a middle ground there. And through the work groups and working with FEMA we hope to find that middle ground.

Mr. DEFAZIO. But it is not—I mean it is not explicit in the RPA that those sorts of—I mean since they moved us to a dictated approach versus a performance-based approach, it is not clear we will be able to do that.

Ms. SHIRLEY. It could be difficult. The RPA is not cast in stone. It does have a little bit of flexibility, and we need to find and leverage those flexibilities.

Mr. DEFAZIO. I just—you know, as a—you know, I don't even—there is no one here I guess who can really ask the question. I mean how does Highway 101 become critical salmon habitat?

Mr. Chandler, can you help me with that one? Do you have any thoughts? I mean it is a highway, you know, and it is between the harbor and downtown. And then you have downtown, where the local newspaper—hopefully they have a reporter listening, because they are critical salmon—they should just look around the office and be really careful, because they might step on a salmon.

Mr. CHANDLER. Ranking Member DeFazio, Members, I think the answer to that probably involves working for a Federal agency that isn't here.

There is no way it is salmon habitat. And that is part of the problem, I believe, with having a—what should be a science-based approach being handled as though it was a matter of philosophy.

Yes, we in Oregon—as Congressman DeFazio has indicated, we have a long history of salmon protection, of working on natural resource protection, of having urban planning that has as its objective saving resource land. To come in and say now that a main highway or a parkway in Portland or a pick your street in any of those 232 cities in Oregon is now a salmon habitat is ridiculous.

And that has been part of our reaction to this, is that it simply doesn't make sense on the ground, as we have built in Oregon.

Most of you in your States, I know, the people who settled there settled near the waterways, because that would be silly to settle where there wasn't water. So most cities in this country are built around lakes, streams, rivers. Oregon is no different.

Most of our development is now, by State law and State and local planning, focused on those downtown core areas, as Congressman DeFazio indicated, to avoid urban sprawl. And what this does to that notion of taking those waterways off limits and now we, for 20 years' worth of land supply, or simply to keep up with the growing population, we expand out onto the farmland, which is exactly what the 50 years of policy in Oregon has said we should not do. And frankly, my industry supports that, and we are aghast at this, as well, that what we thought we were doing is now being changed by fiat, including, apparently, the designation of Highway 101 as a salmon habitat.

Mr. DEFAZIO. Thank you.

Thank you, Mr. Chairman.

Mr. BARLETTA [presiding]. Thank you. As a former mayor, I completely appreciate the effort and money that a community puts into land-use planning, infrastructure, development, and economic revitalization. I also believe that local officials are in the best position to know and understand the unique challenges facing their communities so that they can implement the best policies to benefit their citizens.

Now, from what I had heard today it sounds as if one part of the Federal Government, NOAA's Fisheries Service, is asking another part of the Federal Government, FEMA, to impose land-use restrictions on State and local government. That would certainly cause concerns and have great implications across this country.

Mr. Grimm, the Oregon RPA requires FEMA to amend existing and issue new regulations regarding development in the flood plain. From FEMA's perspective, what does that mean for people in my home State of Pennsylvania and other areas of the country?

Mr. GRIMM. Sure, thank you. When FEMA issues regulations, it impacts over 22,000 communities. We have designed our regulations so that we implement a consistent, uniform program, nationwide. One of the concerns that we have, as the RPAs are written, and the ongoing State-by-State lawsuits and implementation, is inconsistent implementation of the NFIP. So we would see, as we implement any regulatory changes to address the RPAs in Oregon, that would impact the entire United States.

Mr. BARLETTA. And from FEMA's perspective, what is the role of the NFIP? And does the Oregon RPA require you to do things outside of the roles and authorities which Congress prescribed to you?

Mr. GRIMM. Yes. From FEMA's perspective we do have concerns over a number of the RPAs being outside of our regulatory authority. For those RPAs that we believe are outside of our regulatory authority, we would work with committees and States to develop alternative RPAs such as what Ms. Shirley indicated. We are trying to work that flexibility to implement something that makes sense to communities and States.

Mr. BARLETTA. Mr. Chandler, if FEMA is forced to comply with the Oregon RPA, what will be the most significant impact on local housing development? And will that be local to only Oregon, or will there be repercussions across the country?

Mr. CHANDLER. Congressman Barletta, Members, the implications—it is a national flood insurance program. And I think FEMA, in the correspondence I have seen, has been pretty clear. They don't want to do the Oregon flood insurance program, and the Florida flood insurance program, and the California flood insurance program. So I think what you are looking at here is the template being proposed nationally.

As far as its impact in Oregon, you know, without getting too deep in the land-use weeds of my State, what this BiOp would require is a 170-foot set-back on—from the high-water mark of every stream, including ephemeral streams that only run seasonally in those 232 cities. And if you think about your own communities, or what Congressman DeFazio put on the map for Coos Bay, think of a 340-foot swath of essentially a no-build zone going through every community, or several times in that community, based on where the waters were. That is going to have a huge impact—particularly in Oregon, I suspect—because of our urban growth boundaries. But even in a State that doesn't have that, if you think about that land coming out of production, and then that development capacity of that land going someplace else in your community is going to be dramatic.

The other piece of this, of course, is that all the infrastructure planning is based upon the zoning on the books right now, whether it be Oregon or Illinois or California, it doesn't matter. Every local government is basing their infrastructure—water, sewer, roads, et cetera—on where the maps say the development is going to go if this goes into effect. And now that development goes out of those areas someplace else, then not only is the land-use pattern changed, but the infrastructure financing pattern, as well, which is going to be doubly disastrous to those communities.

Mr. BARLETTA. Thank you. The Chair now recognizes Ranking Member Carson for 5 minutes.

Mr. CARSON. Thank you. Thank you, sir.

Mr. Grimm, I understand that the Oregon reasonable and prudent alternatives required FEMA to change its regulations, guidance, and community rating service program. Will these changes be effective only in Oregon or could these changes apply nationwide, especially in the Hoosier State?

Mr. GRIMM. Yes, sir. The—when FEMA changes its regulations, they will apply to all participating communities, including over 22,000 communities, and including those nearly 1,400 communities that participate in the community rating system that are already implementing higher standards, often to the benefit of species.

Mr. CARSON. Madam Shirley, do the RPAs require the State of Oregon and/or local communities to change existing laws? And, if so, have any laws that need to be changed been identified yet? Will the procedures used by the Oregon legislature meet the timeframe even used in Oregon?

Ms. SHIRLEY. Yes. I believe we have identified a couple places where our State laws may need to change. And—but most impor-

tantly, the local communities will need to change their regulations to comply. And that is a huge challenge.

Mr. CARSON. Mayor Doyle—thank you, ma'am. You mentioned that you have met with both FEMA and NMFS over the years, yet the RPAs were still developed essentially in a vacuum. Do you feel that either Federal agency considered your comments when the RPAs were developed?

Mr. DOYLE. You know, I really don't know if that is the fact. Certainly what was ruled was not what we were looking to see happen. So I guess the answer would be a presumptive no.

Mr. CARSON. OK. Mr. Chairman, I yield back.

Mr. BARLETTA. Thank you. I now recognize Mr. Gibbs from Ohio.

Mr. GIBBS. Thank you, Mr. Chairman. I am tempted to yield my time to the ranking member, but I heard the next one is going to do that, so I am trying to understand this issue a little bit.

Mr. Chandler and Mr. Grimm, if a participating community made the choice to drop out of the National Flood Insurance Program, does that change a homebuilder's responsibility under the Endangered Species Act?

Mr. GRIMM. Not from FEMA's perspective, and not—speaking on behalf of NMFS. Everybody—communities, individuals, and State and Federal Government have responsibilities under the Endangered Species Act. If they withdraw from the flood insurance program, their—FEMA's involvement in that compliance with the Endangered Species Act, for example, through these RPAs, that would not apply. There would be other requirements that—I can't speak for NMFS or the Services, but that would apply.

Mr. CHANDLER. Mr. Chair, Congressman Gibbs, under current law, leaving out this RPA, if you have a 404 permit, for example, as a development project or subdivision, you have to go through consultation. That would not be changed. The only connection between the homebuilder that wasn't subject to current law and now is this RPA.

So, if we are not—if we take private flood insurance out, we are not subject to FEMA, we are not subject to NMFS thinking FEMA should do something, and now we are out of the program altogether. So we would not have to do any sort of hoop-jumping under the ESA, unless we already did under other Federal law.

Mr. GIBBS. That is what I kind of figured.

Mr. Grimm, in your testimony you mentioned instances in Oregon and Florida where FEMA has had to undertake consultations under the ESA and the implementation of the National Flood Insurance Program. Are you aware of similar issues potentially occurring in Ohio?

Mr. GRIMM. I am not aware of any right now in Ohio. There are other States—California, Florida, we had some in Arizona.

Mr. GIBBS. I guess, for the mayor, this RPA and the Endangered Species Act with FEMA, this is where it is all conflicting, the challenges. Can you explain that a little more, what is happening?

Ms. CARRUTHERS. Sure. Thank you very much for the question.

The difficulty for us is that it simply adds a level of bureaucracy, time, staff time that—and yields no real benefit in terms of endangered species protection. However, we are required to do it because the flood insurance program is so important to our community. We

saw no net increase in the acreage, habitat acreage that was protected. We simply saw a greater amount of paperwork, frankly.

You know, FEMA——

Mr. GIBBS. Is this another example of one-size-fits-all policy out of DC?

Ms. CARRUTHERS. Absolutely. I mean, we—you know, we—as I mentioned, we have over 30 endangered species and threatened species in the Keys. We are—for us, our environment is our economy. So we are very concerned with preserving the best aspects of that environment, and the—our ecosystem. So, you know, we seek to work with our governmental partners to do that, but only where it seems to make sense. And this is a case where it doesn't make sense, it simply complicates the process.

Mr. GIBBS. Mr. Grimm, do you agree with that, or disagree with her?

Mr. GRIMM. Could you clarify which part?

Mr. GIBBS. She is talking about, you know, obviously, in the Florida Keys, you want to protect the environment and endangered species, because that is part of your tourism, part of your whole habitat, you know, it is ecosystem. And she has basically said that this is conflicting with the local input, it is a one-size-fits-all policy coming out of DC. I'll just give you a chance to react to that.

Mr. GRIMM. Sure. Yes, it is an interesting process, the consultation process is fed-to-fed, essentially. I personally had direct involvement in the RPA negotiations, or with Marine Fisheries, and recommended performance-based standards over prescriptive, recognizing that that is how we implement the National Flood Insurance Program, so that communities can come up with different alternative ways to implement this.

So, it does add a tremendous level of complexity, I think, to local government land-use decisions and authorities.

Mr. GIBBS. Mr. Grimm, is there anything that Congress should be addressing to maybe help fix this, or help—you know, so it is a little simpler to get the process done?

Mr. GRIMM. I appreciate the opportunity to testify today to discuss the complexities of what is going on with this issue.

Mr. GIBBS. Anyone else want to respond to—Ms. Carruthers?

Ms. CARRUTHERS. Well, thank you for that question. I mean, to me, I think that being able—that directing—well, first, I am not convinced that endangered species protection is a FEMA responsibility. It think that there are plenty of other entities that take care of that issue. So, I am—I would—if it is within Congress' authority to remove FEMA from that particular aspect of this, it seems to make sense to me.

You know, conversely, the Endangered Species Act requires every Federal entity to comply with its regulations. So if we—why stop at FEMA? Why not talk about low-income housing assistance? Why not talk about mortgages in general? I mean, you know, at some point we need to be—we need to make sure that the folks who can do a particular job well are given the tools to do that job well, and everybody else gets out of the way.

Mr. GIBBS. Yes.

Ms. CARRUTHERS. Thank you very much.

Mr. GIBBS. Thank you. My time has expired.

Mr. BARLETTA. The Chair recognizes Ms. Norton for 5 minutes.

Ms. NORTON. Thank you, Mr. Chairman. I am not sure which parts of the Endangered Species Act apply to my district, the Nation's capital, District of Columbia, except for Members of Congress who may be endangered in the upcoming election.

[Laughter.]

Ms. NORTON. But I can tell you this, that iconic parts of the Nation's capital are located in a flood plain. So I have listened very carefully to this Oregon testimony, and appreciate it.

Indeed, I have just finished working with FEMA on the 17th Street levee on the Mall to prevent floods on the Mall and the surrounding Federal and home-owning communities. Just this week I had a congressional briefing on flood risks to the Nation's capital, the District of Columbia throughout, because this city is located on the banks of two rivers, the Potomac and the Anacostia.

Now, therefore, when we heard what has occurred with Oregon, despite our understanding of the Endangered Species Act and how vital it is, one of the first questions that came to my mind, Mr. Grimm, was whether FEMA has the resources to potentially apply that model nationwide, if that is what you had to do. Because you answered to Mr. DeFazio that it should apply to all States, that it would apply to all States.

Mr. GRIMM. Yes, ma'am. The resource issue is a real issue. If this applies to 22,000 communities, it is not only a resource issue at FEMA and our regional offices to implement something of this magnitude, but to our State and local and tribal partners that would also be implementing the recommendations through the National Marine Fisheries Service RPAs, if we change our regulations to implement.

Ms. NORTON. So nothing like that is envisioned, in terms of its resources. At a time when we are trying to get resources just for vital life and death matters, this is a matter of some concern.

I also listened very closely to Mr. Doyle's testimony, because Beaverton, like the District of Columbia, wanted to expand its economic development. I have just had two really huge bills to come out of this Congress, one for the Southeast Waterfront, the Southwest Waterfront. The only way to expand in the Nation's capital was to build right on the waterfront. We are very, very pleased with what is happening there. So, I have been looking very closely at the land-use decisions around there, which, by the way, have already been made, and are going to bring us extraordinary amounts of revenue.

Now, I would like to ask Mr. Grimm, in light of Mr. Doyle's testimony, I want to get an understanding of public input in the prudent—what is it, reasonable and prudent alternatives, RPA, process, why there isn't—I mean in this Congress we are used to learning from the public. So virtually any regulation I can think of has public input, so we know what we are doing, both in terms of our own district, and in terms of the administrative process itself.

So why isn't there automatic public input of the kind that I am sure you are used to? And should there be more public input? How would you go about it?

Mr. GRIMM. Thank you. It is a unique process, Federal-to-Federal. And in fact, the engagement that FEMA had with NMFS dur-

ing the development of the RPAs was unique. I personally was involved with discussions with NMFS with the Regional Administrator——

Ms. NORTON. Because I have one more question, I just want to know, is it possible to get input like the input, for example, from Beaverton before all of this occurred?

Mr. GRIMM. Yes, ma'am. What we are going to do now—input wasn't necessarily conducted through the NMFS process in the development of the RPAs. That could be, I believe, done better. I can't speak on behalf of NMFS.

However, now that the RPAs are out, FEMA's intent in implementing the RPAs is to work closely with State, community, and tribal partners to develop reasonable alternatives for any of the RPAs that aren't within our authorities, and implement——

Ms. NORTON. It is very important for the chairman to know what it is you intend to do about that input.

Mr. Chairman, with your indulgence, I just have one question about the flooding of the National Mall and the Archives.

In 2006, Federal buildings in the Federal Triangle were flooded. Horrendous pictures—for example, I remember seeing a picture of the Archives auditorium, the whole auditorium, or much of the front of the auditorium was under water. And that is all—IRS employees were put out of their headquarters for more than 6 months. So I have a real interest in who provides guidance.

Does FEMA provide any guidance to Federal agencies on their land-use decisions and mitigation strategies? How do I know that the Archives and the entire Federal Triangle is not going to be flooded again, or that they have—do I know that they have taken mitigation in—of the kind that States, for example, would be required to take?

Mr. GRIMM. Sure. Federal agencies comply with Executive Order 11988, which—for flood plain management. So each Federal agency is responsible for looking at if they are in the flood plain, mitigation strategies to reduce damages——

Ms. NORTON. Can you tell me whether that has been done for the Federal Triangle?

Mr. GRIMM. I don't, but we can follow up and——

Ms. NORTON. Mr. Chairman, I would like that information submitted to the chairman, and I am sure that they will give it to me. Very important for me to know that.

Mr. GRIMM. Yes, ma'am. Thank you.

Mr. BARLETTA. The Chair recognizes Mr. Webster from Florida for 5 minutes.

Mr. WEBSTER. Thank you, Mr. Chairman. I had a question for Mr. Grimm. You mentioned ongoing consultation regarding the implementation of the NFIP in Florida. Can you briefly discuss the basis of that consultation?

Mr. GRIMM. Sure. It is similar to other ongoing issues across other States in that we are being challenged in regard to consulting on the implementation of the National Flood Insurance Program, and its role in private—we believe, from FEMA's perspective—in private flood plain development.

So, similar to Oregon, we are being challenged at looking at implementation through the permitting process, the flood plain man-

agement, as well as our mapping standards, as we implement in communities throughout Florida.

Mr. WEBSTER. So, during the process did FEMA get any public input regarding changes in implementation to the Services?

Mr. GRIMM. For the public process in Oregon?

Mr. WEBSTER. No, Florida.

Mr. GRIMM. In Florida? I do not believe so at this point. This is a—again, similar to the Oregon—that Federal-to-Federal consultation process that doesn't necessarily include public process.

Mr. WEBSTER. Thank you very much. Yield back.

Mr. BARLETTA. The Chair recognizes Ms. Frankel from Florida.

Ms. FRANKEL. Thank you, Mr. Chair. Thank you to the witnesses for being here.

So I want to just—I want to give an example of a real dilemma that a very, very poor city in my home county has. It is called South Bay. I am just going to go through some things that I think we have already said, but—to lead up to the story here.

So Congress created the National Flood Insurance Program, as we have been talking about, NFIP, in 1968 in order to make flood insurance reasonably available to all property owners. We know that homeowners who live in a federally designated flood plain must obtain flood insurance in order to qualify for a federally backed mortgage. And I think, also, there is—there are other mortgages—even private mortgages, in some cases, requires that also.

So, in order for—and, Honorable Carruthers, I think you mentioned this—in order for a community to participate in the NFIP, it must adopt FEMA's flood plain map and meet minimum standards and regulations to mitigate flood damage. The flood maps declare what land is within a 100-year flood plain. I want to emphasize that, so I guess meaning that areas which FEMA determines will flood once every 100 years, or has a, I guess, a 1-percent chance of flooding every year for 100 years. Is that right, the 1 percenter?

Mr. GRIMM. [Nods head.]

Ms. FRANKEL. OK. The participation in NFIP and compliance with FEMA land-use directives is technically voluntary, as we have heard, but local governments have little choice but to comply with the NFIP's participation, because residents need flood insurance, and there is virtually—the private alternatives—well, in Florida, I don't even know if there is any—is there anything in Florida these days?

Ms. CARRUTHERS. Nothing significant that I——

Ms. FRANKEL. I know, I got——

Ms. CARRUTHERS. Surplus lines, possibly.

Ms. FRANKEL. I got booted out of my flood insurance. All right.

So, now I want to just talk about the dilemma with South Bay. The new flood maps deem the city of South Bay, Florida, to be completely within a 100-year flood plain, requiring the residents of this city, which is one of the least advantaged cities in our State—I mean we are talking about very, very, very poor. So it requires the purchase of costly insurance coverage from the NFIP.

Now, this is new. And the reason that FEMA has said that they are going to put South Bay in this is because of the—it is near Lake Okeechobee. Lake Okeechobee needs its levees strengthened,

which is being done by the Army Corps, which is—I don't want to say anything bad about the Army Corps, but I am just saying this has sort of been dragging for a lot of years, all right? A lot of lot of years. And now the Army Corps says it is going to complete the work on the Herbert Hoover dike in 9 years.

OK, so here is my question. Well, to get to it. Oh, if it is a 1-percent chance each year for 100 years, and this is supposed to be resolved by the Army Corps, which has been taking too long—in 9 years—why does South Bay, where one-third of them are living below the poverty line, have to pay the costly premiums now? Because they are not going to be at risk for 100 years. OK, try to give that a shot, if you can answer it?

Mr. GRIMM. Thank you, ma'am. So, FEMA maps flood plains. And one of the areas of—that we do map associated with levees. And levees have to meet certain standards in order for FEMA to reflect the reduced risk behind levees. The Army Corps builds levees and then certifies levees, and then we update the map to show that reduced risk. Once Army Corps gets through that process of constructing the levee and then certifying the levee to FEMA to certify that so that we can then remove that flood area behind the levee, and then the insurance requirements change based on that newly mapped zone.

Ms. FRANKEL. Mr. Chairman, I just ask a—OK, thank you.

I am glad to hear that. How long will that process take?

Mr. GRIMM. After the——

Ms. FRANKEL. Yes.

Mr. GRIMM [continuing]. Certifies? I don't want to say that depends, but that depends. It can take some time. It can take up to a year or two. I can't give you a certain date. I am not familiar with that particular situation. In some cases, when we have all of that data well ahead of time—hopefully that is occurring in this case, and I can certainly look into that for you to find out a little bit more about the case for your situation, though.

Ms. FRANKEL. Well, I am glad to know that it will eventually be alleviated, but I—I mean it is not—you know, what can happen to a community, even in a period of 9 years, in a few years where people can't get mortgages for houses, and you have a economically devastated area now. Could you imagine the devastation when people cannot buy homes any more? I mean it is a pretty bad situation.

And the delay being caused not by anything that the people are doing or not doing, but the Federal Government in fixing a problem. So, you know, I just—I thank you for your answer, but I don't think the people in South Bay are going to be happy with it.

And I yield back.

Mr. BARLETTA. Thank you. The Chair recognizes Mr. Davis for 5 minutes.

Mr. DAVIS. Thank you, Mr. Chairman, and I am glad I got to follow my colleague, Ms. Frankel. You know, 9 years with the Corps of Engineers is like a 100-yard dash.

[Laughter.]

Mr. DAVIS. So that is pretty good. Try representing the Mississippi River, where we have multiple levees and multiple State issues. And some of the concerns that you brought up, you know,

about there seems to be a race sometimes between FEMA and the Corps of Engineers to figure out what is going to cost constituents more. Levees need to be upgraded and our locals are making the investments to upgrade those levees.

And at the same time, like in my State of Illinois, we are in a different region than Missouri is. So the different regions have different priorities as to where they are going to update their flood maps, you know, geographically, first. To me it would seem more—it would seem like it would be a commonsense approach to update those via regional capacities, like along the river, along the populated areas, versus rural areas. And that is something I know we have discussed with your office.

I do want to get to mitigation. And Mr. Grimm, would you agree that States like Illinois have invested in mitigation, you know, post-1993 and in 1995 floods, you know, we have moved towns completely off of the flood plain, into higher ground, because we don't want to have those liabilities during future flood events.

Mr. GRIMM. Absolutely, sir. I know the State very well, and your State is very progressive.

Mr. DAVIS. Well, thank you. I will even take the term "progressive" today as a compliment.

[Laughter.]

Mr. DAVIS. We—Illinois has removed flood-prone properties, thus costing the taxpayers less in future flood events. But we are a State, too, that is punished because of our population, and where our center is, in the northeast corner of the State. So when we have disaster declarations, where most of the disasters hit in Illinois, they are in rural areas and we don't meet the threshold.

Now, other States that don't have the same problem, would you agree that they may not be incentivized to participate in the mitigation program as much and invest as much in mitigation or participate in hazard mitigation?

Mr. GRIMM. Could you clarify? I am——

Mr. DAVIS. So States—smaller States that don't have a higher threshold to meet to have a disaster declared each and every time a disaster occurs, regardless of whether it is in an urban or rural area of their State, are they, under the current program, less incentivized to invest in mitigation because they are going to be awarded a disaster declaration, whereas States like Illinois, high population, one part of the State, we don't get declared. We are not—we don't have access to those resources in a disaster declaration that States surrounding us do, even in the same disaster.

So, we have invested more on the front end, on the mitigation side. To me it seems there is no incentive for smaller States, less populous States, a lower threshold, there is no incentive, in my opinion, to invest the dollars in mitigation.

And I would—so that is my question to you. Do you believe that is true?

Mr. GRIMM. Well, I think the pre-disaster/post-disaster mitigation discussion is a very interesting and tough discussion. As you know, HMGP dollars for mitigation, the Hazard Mitigation Grant Program, provide dollars post-disaster.

Mr. DAVIS. But the States have to invest, locals have to invest. They have to take the time to do it. And it seems to me that, the

way the current FEMA formula exists for disaster declarations, it disincentivizes them from investing long term like States like Illinois are forced to do.

Mr. GRIMM. I think there is the other side of the coin with pre-disaster mitigation, and the pre-disaster mitigation program that provides States that don't have as many disasters, provides dollars available.

For example, this year we had $100 million available under the pre-disaster mitigation program. We just announced those awards. We receive four times the dollar—in applications than dollars available. So there is, to your point, a huge——

Mr. DAVIS. That is——

Mr. GRIMM [continuing]. Need for mitigation.

Mr. DAVIS. That is great. And I have got another question, so let me reclaim my time.

But I would urge you, in the next flood on the Mississippi River—and there will be one—take a helicopter ride down the river. Look left in Illinois, and look at the—you know, the limited damage because of mitigation, and then look right, and you will see whole towns flooded, still. So there is a lack of incentive, I still believe that.

Now, are you—does the mitigation division run the LOMA process?

Mr. GRIMM. Yes.

Mr. DAVIS. OK.

Mr. GRIMM. Federal insurance mitigation? Yes.

Mr. DAVIS. Yes. It is the process that my homeowners have to follow when FEMA, the new map, declares their house or property in the flood plain.

What is the average time it takes for a LOMA request to be decided by FEMA right now?

Mr. GRIMM. I don't have that. That is a little bit out of my program lane. I would be glad to get those statistics for you, though.

Mr. DAVIS. OK, because we have a problem with updated maps that are not accurate right now. And I think there needs to be a better, more succinct process in place that costs taxpayers less.

Sure, we want an appeal process, but I just don't necessarily think the LOMA process is as efficient as it could be, and I hope you take that message back. And I have run out of——

Mr. GRIMM. I will. Thank you, sir.

Mr. BARLETTA. Thank you. The Chair recognizes Mr. Curbelo from Florida for 5 minutes.

Mr. CURBELO. Thank you very much, Mr. Chairman, although Mr. DeFazio has, I think, dissected this issue very effectively, as he is known to do, I do have a couple questions.

And I first want to note I know a lot of communities throughout the country invest a lot in resiliency and mitigation, and that is certainly the case in the Florida Keys, and not just to mitigate against the risks of traditional flooding and disasters, which we are accustomed to in Florida, but Florida Keys is also leaning forward and thinking about climate change and rising sea levels—natural, when you live at sea level near the sea. So, I know just how much communities like the Florida Keys invest and dedicate resources to these efforts.

So, Mayor Carruthers, I want to ask you, these RPAs—and mitigation is important to this committee, I have actually filed legislation in support of Chairman Barletta to promote smarter mitigation throughout the country, but does anything in these RPAs in this policy scheme promote smarter mitigation policies that are making the Florida Keys less vulnerable?

Ms. CARRUTHERS. Thank you, Congressman, for your question.

You know, as I see that, no. In other words, the RPAs don't have anything to do with how one mitigates if one were to build. It only has to do with where one builds, and those issues are already addressed through our restrictions such as our categorization of each property, based on its environmental sensitivity, based on its location, whether it is near a population center, or U.S. 1, or not, based on its habitat quality. So that doesn't really impact—have anything to do with mitigation against damage from flood.

Mr. CURBELO. And, Mr. Grimm, I want to ask you. NFIP in the Florida Keys is a way of life. It is just part of who we are. And I have an interest in representing my community and preserving a strong, robust, healthy NFIP. Do you fear that some of these policies could undermine NFIP and perhaps could ultimately encourage communities to opt out and weaken the program?

Mr. GRIMM. From a FEMA perspective, what I am concerned about is inconsistent implementation across the Nation as a result of the RPAs, and as we implement regulations that affect all communities.

You know, as you know, Congress designed the NFIP to be implemented at the local and State level where land-use authority resides, and that is how we have been implementing it since 1968, and working with communities to make smart mitigation strategies and implement mitigation decisions.

Mr. CURBELO. So do you perceive any threats to the NFIP as a result of these issues that we are encountering in Oregon and throughout the country?

Mr. GRIMM. I think the inconsistent implementation of the NFIP across the Nation could be a significant challenge.

Mr. CURBELO. Thank you very much. I yield back, Mr. Chairman.

Mr. BARLETTA. Thank you. The Chair recognizes Mr. Hanna from New York for 5 minutes.

Mr. HANNA. I am going to yield my time to the ranking member, Mr. DeFazio.

Mr. DEFAZIO. I thank my friend. I thank the gentleman.

Mr. Grimm, what exact climate change model are you going to use?

Mr. GRIMM. I think the best answer for that is we are still looking at available data for that model, and particularly looking at the mapping and advisory council recommendations, and what they would recommend to FEMA.

Mr. DEFAZIO. Yes, I could point you to Oregon State University, where we have a couple of world-renowned climate change scientists, who say that, actually, there are incredibly contradictory models, which are both scientifically credible, for Oregon, where we may have more or less flooding. We may have way less rain and precipitation—i.e., you know, we may actually maybe have a smaller 100-year flood—that is one model. The other model is, oh, no,

it is going to be a huge expansion. So, how the heck are you going to figure that out?

Mr. GRIMM. That is something we are still working out, sir.

Mr. DEFAZIO. Yes. OK. Yes, that is going to take some interesting work.

So does that have anything to do with—you sent a letter which caused a tremendous amount of concern that they—you know, on June 13th, that communities could either voluntarily impose a temporary moratorium on all flood plain development that adversely impacts ESA-listed species—that would be like repaving Highway 101, for instance—or voluntarily implement interim measures found in the RPA until all permanent RPA elements are in place.

Now, I understand that this was supposed to kick in on the 13th of September, or—and it hasn't. What is the delay? How long are you going to delay imposing this new restriction?

Mr. GRIMM. So the RPA 1 required outreach and education. That letter was part of meeting the requirements from National Marine Fisheries Service in implementation of RPA number 1.

Interesting part about these RPAs are there are two sets of RPAs, the interim measures, as you pointed out, and the long-term measures that, you know, go out to 2021. We have some options, as you point out, in terms of a community could adopt that type of prohibition. FEMA has no intent to go and suspend or implement compliance until we get our guidance out. Our intent is to work with the States, communities, and National Marine Fisheries——

Mr. DEFAZIO. Well, what is the new deadline? I mean you had a deadline before. Is there a new deadline? Have you set it?

Mr. GRIMM. No, we have not set a new deadline.

Mr. DEFAZIO. OK. And when do we anticipate we might know what the new deadline is?

Mr. GRIMM. I can get back to you on that, sir.

Mr. DEFAZIO. OK, all right. And then, there is, of course, an exception. "Where implementation of the mitigation standards set forth above is impracticable, a community may propose alternative mitigation standards"—sounds good—"which will be acceptable if both FEMA and National Marine Fisheries Service agree the alternative standards provide the resource protection equivalent to that provided by the measures above."

You have experts in your agency that can make these sorts of determinations on that?

Mr. GRIMM. No, we don't have biologists on staff, per se. We can, you know, contract out, for example, to get those services. That is my understanding of that particular alternative, and that is one that I had involvement in negotiating. That is the type of flexibility that we wanted to get in there. My understanding, though, is that the——

Mr. DEFAZIO. It is not much flexibility if you include NMFS——

Mr. GRIMM. I——

Mr. DEFAZIO [continuing]. Giving them veto power.

Mr. GRIMM. Yes, sir.

Mr. DEFAZIO. You know, I find this all very extraordinary. We have two Federal agencies that consult with one another. It seems like one that can bully or overrule you and require you to do things

that are beyond your legal authority, or at least propose them, and no public involvement.

I mean I am really familiar with the National Environmental Policy Act. I mean why—you know, this is—it seems to me it is, like, way outside of what NEPA usually requires by Federal actions. This is a Federal action. Why doesn't NEPA apply, which requires a public process, before you propose something? Why doesn't that apply in this case?

Mr. GRIMM. I can't speak on behalf of the National Marine Fisheries Service in terms of the process with development of the RPAs.

Mr. DEFAZIO. Yes.

Mr. GRIMM. You know, as I stated, the process that was used was very unique, that FEMA got, I believe, extra time to try to negotiate and work through these RPAs to make them more flexible. And from a FEMA perspective, as well, when, for example, we work with communities to either develop ordinances or new mapping products, even, we do hold series of committee meetings in the mapping process, for example, to get data, to talk through——

Mr. DEFAZIO. Right. I—no, I was involved with that, and a county commissioner——

Mr. GRIMM. Yes.

Mr. DEFAZIO. Just one more quick point, Mr. Chairman.

So now that NMFS—and my understanding is they say, well, we don't like what we did in Washington State, because, A, they don't have comprehensive land-use planning, unlike Oregon, so they have much more sprawl and that, but we gave them flexibility, but it is not working sufficiently, but now we are going to have a new prescriptive approach in Oregon, which we hope to apply nationwide to every State in the Union, no matter how different or diverse they are, or what species.

How do we get Washington State to move—you know, I mean, what are our options up there? If what they are doing is insufficient, is their RPA, you know, permanent, with all this flexibility? Or is there a way to challenge that and say, gee, I think now Washington State needs to fall under the new prescriptions in Oregon?

Mr. GRIMM. Two parts to that. FEMA believes the—from a FEMA perspective—that the Washington State RPA is working, and we appreciate the flexibility in that implementation so we can work with communities.

If we do change our regulatory requirements, that would apply nationwide. And I imagine it is—I am kind of speculating here—it could impact the way Washington implements the current——

Mr. DEFAZIO. So existing RPAs could be impacted because of the regulatory changes that are going to be necessary to implement the dictates of NMFS for Oregon?

Mr. GRIMM. I believe that is a possibility, sir.

Mr. DEFAZIO. Well, I hope my colleagues from the other 49 United States are listening.

Thank you, Mr. Chairman.

Mr. BARLETTA. The Chair recognizes Dr. Babin for 5 minutes.

Dr. BABIN. Thank you very much, Mr. Chairman. Local officials in my district in La Porte, Texas, have expressed to me their concerns about FEMA rules regarding properties that are bought out

via the FEMA program to purchase homes that have experienced repetitive losses as a result of flooding. And we have seen quite a bit of it over the last few years there.

FEMA rules prevent the property from being redeveloped in a manner that would not eliminate the risk of further property loss. So removal of these properties also permanently reduces the tax rolls for these municipalities, and also the revenue for communities that are not able to expand their boundaries.

They have also told me that FEMA's enforcement of property maintenance guidelines for those properties they have purchased has been seriously inadequate, as properties have not been kept up to local community standards. Frequently, the properties are overrun with weeds and grass and violation of local property maintenance codes.

So, Administrator Grimm, I would ask you. What are your thoughts in revisiting this program to give local communities an opportunity to reacquire and redevelop these properties so that they can be better put to use?

Mr. GRIMM. Sure. Thank you, sir.

Dr. BABIN. Yes, sir.

Mr. GRIMM. Under our grant programs, there is a number of mitigation options. Acquisitions is one of those options. It is a voluntary program, so that, as a community develops its mitigation strategies, it will submit—the community will submit projects to the State, who will then submit projects to FEMA. And that can happen either post-disaster, under our Hazard Mitigation Grant Program, under our flood mitigation assistance program that is largely directed at these repetitive loss properties, or under our pre-disaster mitigation program.

Under all three of those grant programs, voluntary programs for property owner to participate in the acquisition, the grantee, the State, and the community—the sub-grantee, generally—sign an agreement to de-restrict those properties in perpetuity, as you point out, to prevent future losses.

Under our current framework and laws and authorities and program implementation, that does not permit certain development back on to those properties. It has to be compatible with open space. FEMA—for example, parks, recreation——

Dr. BABIN. Right.

Mr. GRIMM. Preserving natural beneficial functions with the—under the Endangered—in line with, for example, this discussion on endangered species. Over the years, FEMA has spent approximately $2.5 billion on acquisitions in this—across the Nation to acquire acquisition properties, at-risk properties, and keep those in perpetuity.

Dr. BABIN. OK. And then what advice would you give to local officials who are dealing with this maintenance and upkeep issues?

And also, if I could, I would like to have your commitment that you or one of your officials could reach out directly to the officials in La Porte, Texas, and work with them to address as many issues as you can under the existing law and FEMA policy.

Mr. GRIMM. Yes, sir. We will have somebody reach out directly to those officials following this hearing. And in—could you repeat the——

Dr. BABIN. Yes. The first one was what advice would you give these officials when you do reach out to them?

Mr. GRIMM. So I think, as communities and States develop their mitigation strategies, that is really the time and place to start thinking about whether or not they want to do that activity. Because, frankly, sir, sometimes when you do the onesies and twosies, it creates a checkerboard pattern, and it creates a situation that you are talking about. So, working through hazard mitigation planning, and looking at long-term strategies, and whether or not we—the community wants to go down that mitigation option.

Dr. BABIN. Thank you very much. This has been a ongoing problem, not only in my district and districts to the west, but also across the Sabine, over in Louisiana, where we are going to wind up having lots of neighborhoods and whole sections of communities and cities that are going to be ghost towns. They want to know how to deal with that.

So, thank you very much. I appreciate you reaching out to my constituents in La Porte.

Thank you, and I yield back the balance of my time, Mr. Chairman——

Mr. BARLETTA. Thank you. The Chair recognizes Mr. Costello from Pennsylvania for 5 minutes.

Mr. COSTELLO. Thank you, Mr. Chair. By the way of brief background, I used to be a township supervisor in Chester County, and we handled all land-use approvals. I then went on to be a county commissioner in Chester County. I see we have the NACo letterhead here; I was a proud member of NACo. But I never—I also was an attorney, a land-use lawyer who regularly dealt with regulations in terms of ultimately getting a project to the approval stage.

I share that with you because it is usually the case that a developer and a municipal official will find ways to disagree with one another during the course of an application. So the fact that you have NACo here and you have the homebuilders here, both saying that this is highly problematic, I think is very, very telling.

It concerns me that the status quo, as it exists right now, is not going to work, moving forward. It is simply unmanageable, and it is only going to get worse. And when you have RPAs that, for all intents and purposes—and I agree with the assertion by FEMA that additional set-aside land outside of the flood plain is outside of your jurisdiction, and yet you are being told, even though you have jurisdiction, that you must do that, I think that is highly problematic.

And what is going to continue to happen, or what is at least plausible, and I would submit as predictable, is what is happening is you will have an organization come in, file suit, if for no other reason than to simply expand the amount of developable—excuse me, to reduce the amount of developable land. And by developable land, I mean private property. And to Dr. Babin's point, land that comes off the tax rolls.

I don't understand how FEMA must essentially subordinate jurisdiction on this issue. And I just want to share a couple other points I found relevant, and then I will just open up to whomever would like to respond.

And most particularly comes from the—from NACo, from the mayor. Although participation in NFIP is technically voluntary, "local governments have little choice but to comply with the participation requirements." In this way, participation requirements effectively serve as Federal regulations that force local governments to adjust their policies in order to maintain eligibility for the program.

That is one thing that you must deal with FEMA. And I don't mean this to be disrespectful towards FEMA, but there have been many times, as local officials, we voice frustration with FEMA. Not in your emergency response, but as it particularly relates to the flood plain management program. Now it is only going to become more frustrating. And it is not FEMA's fault, it is who FEMA has to deal with as a third party.

So I will invite any of you to pick up where I left off. But let me just say for the record this is not going to work, moving forward. Like, this will persist and it will essentially—and it will become, it already has become, a tactic that is going to be used in every single community, in every single State across this country, until we sit back and say, "OK, somewhere along the line things went askew. How do we fix it?" I think we need to fix it now.

I do think that there is a preemption issue here, where FEMA essentially needs to reassert its jurisdiction and the ESA cannot find its way in the middle of how we go about delineating flood plains and implementing the flood insurance program. Forty seconds.

Ms. CARRUTHERS. If I may, thank you, Congressman Costello. And I think you framed the issue correctly.

You know, we see FEMA as a partner in protecting our community, particularly as it relates to flood and disaster response. However, this is an area that is outside of its realm of responsibility, and it is outside of its wheelhouse. And we don't believe it adds value to the process, and it essentially creates an unfunded mandate for local governments.

Fifteen percent of our staff and of our operating budget is for growth management, and we only issue 197 permits a year. It does not make sense. And it is primarily because of regulations like this that we are forced to comply with——

Mr. COSTELLO. Well, I mean, I would say—I would agree with you that FEMA—you view FEMA as a partner. I would think that FEMA wants to be that partner. I would ask FEMA to share—and the other thing that it is going to do is it is going to drive up costs on the private landowner side. It is also going to drive up the costs of approvals and the ultimate cost of whatever ultimately is able to get built. It is also going to drive up the cost of insurance for everybody.

But from the FEMA perspective, what is the solution, if—in a perfect world, what is the solution to how to address the encroachment on your jurisdiction?

Mr. GRIMM. So I think one of the big concerns that we have are the prescriptive nature. So the flexibility that we have seen in other areas, or increased flexibility in general, on the way this can be implemented at the State and local level——

Mr. COSTELLO. And by "prescriptive," you mean essentially ad hoc. Like, I mean——

Mr. GRIMM. The——

Mr. COSTELLO. Every community—I mean it is going to be a different flavor all across the—there is no uniformity, right?

Mr. GRIMM. Correct. You know, we are concerned about that uniform implementation. But the performance-based standards over prescriptive standards that are reflected in the Oregon RPA——

Mr. COSTELLO. The final point that I would make—I know I have gone well over my time, but if I could just make this—I think it becomes very difficult to evaluate risk when you don't have uniformity, because you, in essence, aren't necessarily guaranteeing or providing the same standard or level of standard uniformly across the country when you don't have uniformity as it relates to implementation of NFIP standards in the first instance. I mean, that is just another piece of it.

Now, that would be for the underwriters, but I just—this is very unworkable, and this concerns me greatly.

Thank you for allowing me to go over. I yield back.

Mr. BARLETTA. Thank you. The chair will now begin a second round.

OK, the Chair will now recognize Mr. Graves for 5 minutes.

Mr. GRAVES OF LOUISIANA. Thank you, Mr. Chairman. I want to thank the—Mr. DeFazio for bringing these issues up.

I had a few questions. Number one, Mr. Grimm, H.R. 2901 passed the House unanimously, as I recall, a few months ago, and that would effectively allow for private insurers to offer flood insurance. If someone—if that were to become law and folks were to offer private insurance, would this have an effect on property owners, if they use private flood insurance, as opposed to going through NFIP?

Mr. GRIMM. As related to the implementation of the RPAs?

Mr. GRAVES OF LOUISIANA. Yes, that is correct.

Mr. GRIMM. So it is the participation in the flood insurance program and the flood plain management standards that would take precedence——

Mr. GRAVES OF LOUISIANA. So as long as——

Mr. GRIMM. So——

Mr. GRAVES OF LOUISIANA. But if a community chose—if a community, if a county, if a parish in Louisiana, if a city chose to opt for entirely private insurance, would this apply?

Mr. GRIMM. And withdrew from the flood insurance program?

Mr. GRAVES OF LOUISIANA. That is correct.

Mr. GRIMM. Then, no, FEMA would not be involved with implementing the RPAs through our FEMA program.

Mr. GRAVES OF LOUISIANA. OK. So we would have dire consequences for these endangered species. I am being facetious. OK, so I just wanted to make that point.

Number two, let me ask another question. In regard to some of the elevation requirements that are in place regarding having to build above base flood elevation, in this case—and I apologize, having gone through some of the specific details in Oregon as much as, obviously, Mr. DeFazio has, but is elevating above these flood plains, is that an option under these RPAs in some areas?

Mr. GRIMM. That is one of the options we want to explore on the alternatives. Right now there are certain prohibitions entirely in

certain parts of the flood plain. So, from FEMA's perspective, that is not an option in some areas of the flood plain. In other areas, where they give us—we talked about a alternative a little while ago. That is what we would want to explore. And that is the type of performance-based standard that we implement in the NFIP.

Mr. GRAVES OF LOUISIANA. All right, I am going to pivot to a couple of other questions.

If someone's vulnerability under NFIP—meaning their actuarial risk increased not as a result of something they did, but maybe as a result of something their neighbor did, how would that work in regard to the premiums that homeowner would be paying?

So, give you a scenario. If I had a creek in my backyard and decided I didn't like it any more, and I decided to fill it in, which then made the water run and make my neighbor's home more vulnerable, what would happen in that case?

Mr. GRIMM. So, under the flood plain management regulations, that would be in a—going along with the scenario here, that would be—fill in the flood way that the local community would have to go permit, they would go through a no-rise certificate, we call it, so——

Mr. GRAVES OF LOUISIANA. Now, what would happen if that scenario resulted from the Federal Government's actions?

Mr. GRIMM. We would have to work with that other Federal partner to evaluate any impacts upstream or downstream to eliminate any upstream or downstream——

Mr. GRAVES OF LOUISIANA. And the State of Louisiana, following Biggert-Waters and the subsequent tweaks that occurred in 2014, folks have seen flood insurance rates increase, in some cases, 1,000 percent in some of the extreme cases. And FEMA blames this upon actuarial analyses that have been done. Yet when you look at the actual vulnerability, it is largely tied back to Federal Government actions, specifically the U.S. Army Corps of Engineers. Do you think that is fair?

Mr. GRIMM. I am not familiar with that particular case. The insurance——

Mr. GRAVES OF LOUISIANA. Do you think it is fair if someone's vulnerability or risk of flooding increased because of someone else's actions, that they should be paying higher premiums?

Mr. GRIMM. The NFIP requirements prohibit a neighbor—in your example, for example—to increase flood hazards on a downstream or upstream neighbor. So we would look to the communities to ensure that is not happening.

Mr. GRAVES OF LOUISIANA. OK. But in this case, again, it would be the Federal Government that is causing this to happen.

I want to change gears again. Something else that we have been spending a lot of time focused on—I heard Mr. Davis citing the U.S. Army Corps of Engineers—right now in the Federal Government you have hazard mitigation policies. And, as you have stated FEMA runs, I think, three different programs that you could—predisaster mitigation, hazard mitigation, and others, where you could potentially mitigate some risk or vulnerabilities.

The Corps of Engineers has a flood protection program. HUD did their design competition. Under this budget request Interior now has—well, there is an attempt for Interior to create a resiliency

program. What efforts are you all taking at FEMA to try to coordinate with all of these various resilience efforts and programs out there to reduce your liability under NFIP?

Mr. GRIMM. So some of the design competition, for example, my staff participate on those panels to look at the different types of projects.

Mr. GRAVES OF LOUISIANA. Do you engage with the Corps of Engineers? Do you engage with other agencies, as well?

Mr. GRIMM. Absolutely. We have a very close relationship——

Mr. GRAVES OF LOUISIANA. So in the case of Louisiana, where we just had a 1,000-year flood, 7 trillion gallons of water come down, 31 inches of rain in 36 hours, in some areas; there was a Corps of Engineers project that has been around since the early 1980s, been around about 30 years. The only component of the project that has been built is this little bayou control structure that literally is a bathtub that connects to nothing. It is not designed to be a reservoir. It is just—it is a component of a project that doesn't connect to anything yet—30 years, yet this is on track, as I understand it to be, the fourth most costly flood disaster in U.S. history. Extraordinary vulnerabilities to the flood insurance program.

Do you see that as being good use and good stewards of taxpayer dollars, to have this fundamental disconnect and a 30-year project with the Corps of Engineers, yet all of this hundreds of millions of dollars are now going to be expended by NFIP?

Mr. GRIMM. Yes, I can't speak for the Corps of Engineers on funding for the project or where it stands, in terms of——

Mr. GRAVES OF LOUISIANA. Last question, Mr. Chairman.

Under the Hazard Mitigation Grant Program and other programs, there are many cases the State of Louisiana has tried to come in and use those funds to help protect entire communities, not just elevate individual homes, which does have a role in some cases. But let's keep in mind, when flood is coming, you elevate individual homes, the homes are now islands. Their cars are flooded, they can't get to the job, grocery stores, or whatever else.

Do you think it is reasonable to restrict or prevent Hazard Mitigation Grant Program funds to be used to build out these federally authorized projects that Congress itself at some point said was worthwhile and in the public interest? Do you think that that duplication of benefits or restriction or prohibition on using those funds is—really makes much sense?

Mr. GRIMM. Well, right now we are prohibited from using the dollars for——

Mr. GRAVES OF LOUISIANA. I am aware of what right now is, but I am wondering if you think that is reasonable policy.

Mr. GRIMM. It is——

Mr. GRAVES OF LOUISIANA. To leave a project in the construction process for 30 or 40 years, leave people vulnerable. You got money on the table, design for resilience, but then prohibiting them from building a project that achieves——

Mr. GRIMM. Yes, it is the current law that we have to follow.

Mr. GRAVES OF LOUISIANA. But that wasn't my question. Do you think it is appropriate? Do you think it is reasonable?

Mr. GRIMM. I think the funds that FEMA has for mitigation that we work through State and local governments that then

prioritize—so, for example, in Louisiana right now we are going to work very closely with the State of Louisiana to develop mitigation strategies that may involve flood control projects at the local or State level, or mitigation strategies for individual homeowners. We will certainly coordinate with the Corps of Engineers on a Federal project. However, we are prohibited from cost sharing on those projects, by law.

Mr. GRAVES OF LOUISIANA. So you think it is unreasonable. You agree with me. Thank you.

Mr. BARLETTA. I now recognize Mr. DeFazio for an additional 5 minutes.

Mr. DEFAZIO. Thank you, Mr. Chairman. Mr. Chairman, first I would like to ask unanimous consent to put three letters in the record. One is from the Governor of the State of Oregon, expressing concerns about the potential implementation and concerns with the RPA. One is from myself, listing many concerns about this. And the third is from the Oregon delegation, or from six Members of the Oregon delegation, also expressing concern.

Mr. BARLETTA. So ordered.

[The letters referenced by Congressman DeFazio are on pages 85–92.]

Mr. DEFAZIO. Thank you, Mr. Chairman.

So, Ms. Shirley, under Oregon law, measure 49 requires local communities to compensate property owners for any portion of land taken. What is going to happen with that under this proposal, this proposed RPA?

Ms. SHIRLEY. Yes. We are evaluating that, the measure 49 issue at my office. And measure 49 has a off-ramp for activities that reduce hazards. And so, to the extent to which the RPAs reduce hazard, they would likely not be measure 49——

Mr. DEFAZIO. Yes, but the whole intent of this RPA is not hazards. That is the problem——

Ms. SHIRLEY. Yes, exactly. That is where I was going next. But if the RPA does not directly relate to hazard reduction, then there could potentially be measure 49 claims.

Mr. DEFAZIO. So, large areas, as the mayor of Beaverton mentioned—I was just looking at more maps in Coos Bay, where there has been State and local investment for hopeful massive redevelopment—and those areas become unbuildable, then the State is potentially on the hook for those costs.

Ms. SHIRLEY. That is exactly why we want to work with FEMA to——

Mr. DEFAZIO. Right, but FEMA is being forced to do this by NMFS, and——

Ms. SHIRLEY. Well, FEMA and NMFS. But yes, it is our intention not to create unbuildable lands.

Mr. DEFAZIO. Right.

Ms. SHIRLEY. To the maximum extent that we are able to do. But we do have that——

Mr. DEFAZIO. Right. But without flexibility, as we have heard many times from the Administrator, that is going to be very hard to do.

Ms. SHIRLEY. It could be difficult.

Mr. DEFAZIO. Yes.

Ms. SHIRLEY. It is going to be a tough road to hoe.

Mr. DEFAZIO. Yes. Mr. Chandler, you also mentioned the takings issue. Do you want to——

Mr. CHANDLER. Mr. Chair, Congressman DeFazio, yes, that is a—should be a very great concern for local governments and the State, because it is part of Oregon State law. And as one of the examples of things that NMFS simply didn't ask about when they were doing this because of the lack of consultation with State or local governments—you asked an earlier question about the options that were available.

One of the reasons that nothing has happened on the moratorium side, for example, is that Oregon statutes are very restrictive about when a local government can declare a development moratorium. Keeping NMFS happy is not one of the provisions.

So, we simply cannot do that in Oregon. The measure 49 issue, the land-use issue, all of this adds up to exactly why we are very happy this issue is in front of this Congress. This needs to be resolved. This is causing—if it does forward the way it is written, with the best intentions of FEMA and the State notwithstanding, it is going to cause tremendous damage: policy damage, financial damage, local governments, private sector, across the board. And as Mayor Carruthers has indicated, in her district, probably with very little impact on the actual species, it is purported to be the basis for the regulation in the first place.

Mr. DEFAZIO. Right. I just want to go back to that again, Mayor. I mean you went through a process that went on for how long?

Ms. CARRUTHERS. Thank you, Congressman DeFazio. Well, let's see. Probably since 1990, frankly, when the environmental groups sued the Government, sued FEMA and NFIP. We were not party to that suit. There was a settlement agreement between NFIP and Fish and Wildlife that resulted in these RPAs that we now are forced to enforce.

But in the 15 years that it took for this suit to get—to be finalized, and the settlement to be reached, we had already been in the process of updating our comprehensive plan to protect endangered species. And, frankly, everything that is in the RPAs was simply taken from our data and our regulations and repackaged and given back to us to enforce in a new way.

So, it literally resulted in no net value to the process, no net improvement in protection of endangered species that we already care very much about.

Mr. DEFAZIO. And I assume there was some cost associated with this.

Ms. CARRUTHERS. There is cost and, frankly, I haven't added it up. But as I mentioned earlier, we have a huge growth management department, and we have essentially no growth in our country. We have property owners that have not been able to—that were not able to build.

And it also, you know, contributes to our issues with takings, as Mr. Chandler said, as well. We have huge takings issues in our county, and we litigate against those. So it has been quite a burden on our residents.

Mr. DEFAZIO. And no net gain or——

Ms. CARRUTHERS. Improvement.

Mr. DEFAZIO [continuing]. Substantial change. That is just extraordinary.

Thank you, Mr. Chairman.

Mr. BARLETTA. Thank you. And I would like to thank you all for your testimony. Your comments have been helpful to today's discussion.

If there are no further questions, I would ask unanimous consent that the record of today's hearing remain open until such time as our witnesses have provided answers to any questions that may be submitted to them in writing, and unanimous consent that the record remain open for 15 days for any additional comments and information submitted by Members or witnesses to be included in the record of today's hearing.

Without objection, so ordered. I would like to thank our witnesses again for their testimony today. If no other Members have anything to add, the subcommittee stands adjourned.

[Whereupon, at 12:01 p.m., the committee was adjourned.]

STATEMENT OF

MICHAEL GRIMM

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FEDERAL EMERGENCY MANAGEMENT AGENCY

U.S. DEPARTMENT OF HOMELAND SECURITY

BEFORE THE

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

"EXAMINATION OF FEMA'S LIMITED ROLE IN LOCAL LAND-USE DEVELOPMENT SYSTEMS"

Submitted By

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

September 21, 2016

Introduction

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

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

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

National Flood Insurance Program

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

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

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

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

Floodplain Management

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

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

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

Mapping

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

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

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

Community Rating System

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

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

ESA Consultations

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

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

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

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

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

Path Forward in Oregon

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

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

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

Path Forward Nationally

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

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

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

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

Question#:	1
Topic:	NOAA RPA's
Hearing:	An Examination of FEMA's Limited Role in Local Land Use Development Decisions
Primary:	The Honorable Lou Barletta
Committee:	TRANSPORTATION (HOUSE)

Question: Do you think the reasonable and prudent alternatives (RPAs) issued by National Oceanic and Atmospheric Administration's (NOAA) Fisheries Service promote or support smart mitigation practices that actually make our communities less vulnerable to disaster? Could the implementation of these requirements within the floodplain actually result in fewer communities participating in the National Flood Insurance Program (NFIP) or even worse, undermining the current NFIP program?

Response: Some of the RPA elements may promote better mitigation practices, and thus more sustainable floodplain development, and some of the RPA elements may limit development. While many elements of the National Marine Fisheries Service (NMFS) RPA may promote better mitigation practices and thus more sustainable floodplain development, some of the RPA elements likely will have the effect of limiting development in high hazard areas of the floodplain and areas prone to flood related erosion (e.g., channel migration zones).

FEMA has concerns that full implementation of the RPA, as written, may result in some communities, particularly large, undeveloped rural communities, deciding to withdraw from the program. Rural communities, as well as small and impoverished communities, are sometimes challenged with meeting the NFIP's minimum floodplain requirements to join and to maintain NFIP participation. They may be discouraged from participation if they view the RPA as imposing additional burdens.

Question#:	2
Topic:	Potential Costs
Hearing:	An Examination of FEMA's Limited Role in Local Land Use Development Decisions
Primary:	The Honorable Lou Barletta
Committee:	TRANSPORTATION (HOUSE)

Question: What is the potential cost or economic loss to states and local government and the private sector if Federal Emergency Management Agency (FEMA) fully complies with the RPA? What will this cost the federal government and ultimately the taxpayer?

Response: Beyond FEMA's Congressional mandate to map the 1 percent annual chance flood, FEMA has not developed an estimate of the additional costs to incorporate the recommended higher standards as contained in the Oregon RPA, including mapping erosion and channel migration zones, larger floodways, and future conditions hydrology through 2050 that incorporates climate change, sea level rise, and build out conditions. FEMA does not have the data or tools to fully estimate potential economic losses from the limitations on floodplain development that may result from implementation of the RPA.

Question#:	3
Topic:	Addressing the Needs
Hearing:	An Examination of FEMA's Limited Role in Local Land Use Development Decisions
Primary:	The Honorable Lou Barletta
Committee:	TRANSPORTATION (HOUSE)

Question: Is there a more logical way to address the needs and objectives of NOAA's Fisheries Service and FEMA's flood insurance program? Does this issue require a legislative fix and if so, what would that look like?

Response: FEMA is committed to working with NOAA's National Marine Fisheries Service (NMFS) to implement, to the extent possible, the Reasonable and Prudent Alternative (RPA) in Oregon. FEMA believes there are alternative approaches that we believe would achieve the same results in a manner that is more consistent with the way that FEMA approaches National Flood Insurance Program (NFIP) implementation nationally. Specifically, the approach taken in Puget Sound, following a similar consultation with NMFS, was written in a manner that would accommodate performance-based standards, which provided communities flexibility to implement an approach to preserve ESA-listed species and their designated critical habitat in a manner that is consistent with local decisions on land use. Some Puget Sound communities have expressed concerns with the implementation of the Puget Sound RPA. FEMA worked closely with NMFS, the State, communities, and stakeholders to implement the RPA in that region.

FEMA does not have a position with respect to whether a legislative fix is appropriate, but looks forward to working with Congress if it explores legislative options and encourages Congress to include NMFS and the U.S. Fish and Wildlife Service in those discussions.

Question#:	4
Topic:	Regulate Privately Funded Development
Hearing:	An Examination of FEMA's Limited Role in Local Land Use Development Decisions
Primary:	The Honorable Peter A. DeFazio
Committee:	TRANSPORTATION (HOUSE)

Question: Does FEMA think it has the authority to regulate privately funded development on private lands under the National Flood Insurance Program? Please explain FEMA's rationale.

Response: FEMA does not have the authority to regulate privately funded development on private lands under the National Flood Insurance Program (NFIP). The power to regulate floodplain development, including requiring and approving permits, inspecting property, and citing violations, requires land-use authority. This falls under a state's Police Powers, which the Constitution reserves to the states, and the states delegate this power to their respective political subdivisions.

Congress established the NFIP as a voluntary Federal program through which property owners in participating communities can purchase Federal flood insurance as a protection against flood losses. In exchange, participating communities must enact local floodplain management regulations that meet or exceed FEMA's program requirements for floodplain development, which are intended to reduce flood risk and flood-related damages. In addition, FEMA identifies and maps the nation's floodplains so that areas of risk are discernible by planners, developers, and the public. Maps depicting flood hazard information are used by FEMA to promote broad-based awareness of flood hazards, provide data for rating flood insurance policies, and determine the appropriate minimum floodplain management criteria for flood hazard areas.

Question#:	5
Topic:	Floodplain Management Standards
Hearing:	An Examination of FEMA's Limited Role in Local Land Use Development Decisions
Primary:	The Honorable Peter A. DeFazio
Committee:	TRANSPORTATION (HOUSE)

Question: Under the National Flood Insurance Act, FEMA has authority to develop floodplain management standards that communities must adopt in order to participate in the NFIP. Why does FEMA believe this authority is limited to developing only "minimum" standards and not more restrictive standards to prohibit development in floodplains?

Response: Congress found that a unified national program for floodplain management was an essential element of an effective NFIP. Therefore, Congress granted limited authorization to FEMA to "develop comprehensive criteria designed to encourage, where necessary, the adoption of adequate state and local measures which, to the maximum extent feasible, will constrict the development of land which is exposed to flood damage where appropriate, guide the development of proposed construction away from locations which are threatened by flood hazards, assist in reducing damage caused by floods, and otherwise improve the long-range land management and use of flood-prone areas." FEMA's 1986 report, prepared by the Interagency Floodplain Management Task Force to provide a Unified National Program called for "wise decisions and management for the Nation's floodplains to reduce losses of life and property from flooding and losses of natural and beneficial floodplain values from unwise land use" and also for "strategies and tools for flood loss mitigation and for the preservation and restoration of natural floodplain values."

Question#:	6
Topic:	Costs of Carrying Out the RPA
Hearing:	An Examination of FEMA's Limited Role in Local Land Use Development Decisions
Primary:	The Honorable Peter A. DeFazio
Committee:	TRANSPORTATION (HOUSE)

Question: NMFS claims that the RPA is "economically feasible because, while FEMA (and local communities) will see some increased administrative costs from implementation of the RPA, including compliance with the monitoring and reporting requirements, those costs will be insignificant in terms of the FEMA budget and will be balanced by the financial benefits provided by the RPA." Does FEMA agree that the costs of carrying out the RPA will be insignificant? We have heard from Oregon's Department of Land Conservation and Development (DLCD) and numerous Oregon communities that expertise and financial resources are very limited. Will FEMA be providing resources to the state and local communities to assist them in any compliance mechanisms established by FEMA?

Response: FEMA does not agree that the costs of carrying out the Reasonable and Prudent Alternative (RPA) will be insignificant in the context of the budget appropriated specifically for mapping and floodplain management program that would be impacted by RPA implementation. That program is a small portion of the Federal Insurance and Mitigation Administration budget; which, in turn, is a small portion of the FEMA budget.

FEMA does not have FY17 and FY18 funding identified to provide resources to the states and local communities, however, in Oregon, FEMA has provided additional one-time FY16 funding of approximately $368,000 through the Community Assistance Program-State Support Services Element (CAP-SSSE) to the Oregon Department of Land Conservation and Development (DLCD) to provide support of the RPAs.

Question#:	7
Topic:	Amend Regulations
Hearing:	An Examination of FEMA's Limited Role in Local Land Use Development Decisions
Primary:	The Honorable Peter A. DeFazio
Committee:	TRANSPORTATION (HOUSE)

Question: The RPA requires FEMA to amend its regulations to include an Endangered Species Act (ESA) standard. Some have claimed that this will be an easy one sentence change to FEMA's regulations. Does FEMA agree that any regulatory changes required by the RPAs can be accomplished with one sentence? If FEMA amends its regulations, how many communities will be affected?

Response: No, FEMA does not agree this will be "an easy one-sentence change" to its regulations. The RPA requires FEMA to revise its regulations to incorporate an ESA-based standard approach into the regulatory floodplain management criteria. The performance standard in the regulations must be sufficiently detailed to give communities direction on how to follow the standard and allow FEMA to ensure community compliance after it is adopted. FEMA will apply any regulatory revision nationwide to all 22,000 NFIP-participating communities because the NFIP is a national program with national standards. In addition, although FEMA has not mapped out which other changes mandated by the RPA cannot be done through guidance and will need regulation changes, we expect that a number of the Program changes required by the RPA will necessitate additional regulation changes.

Question#:	8
Topic:	Updating Flood Maps
Hearing:	An Examination of FEMA's Limited Role in Local Land Use Development Decisions
Primary:	The Honorable Lois Frankel
Committee:	TRANSPORTATION (HOUSE)

Question: The NFIP serves an important role in strengthening the resiliency of our communities. The federal government should use programs like the NFIP to protect property owners and to reduce the exposure of our communities to risk. I am a firm believer that investments in mitigation and prevention save lives and money by building resilience to natural disasters and reducing the need for spending on recovery.

However, as we have heard today, it is important that as we create programs aimed at mitigating risk, we do so with input from local communities so that we truly understand their implications. I have heard from community members in Connecticut who have had difficulty resolving issues with the FEMA about the accuracy of FEMA's Flood Insurance Rate Maps (FIRMs). I hope that FEMA will continue to work with local communities to ensure the NFIP works as intended. While we clearly have a responsibility to encourage our communities to develop in a smart and sustainable manner, we must be sure to do so in a way that is workable on the local level.

I realize that it is not the primary subject of today's hearing but I would like to ask a few questions regarding FEMA's flood hazard mapping process. Mr. Grimm, it is my understanding that communities can request a revision or update to a flood hazard map if accompanied by technical data. However, I have heard from community members in Connecticut who tell me that the cost of hiring an engineering firm to acquire the sufficient technical data is prohibitive. How can a small town, with a limited budget, work with FEMA to ensure the flood hazard maps are accurate?

It is also my understanding that FEMA must revise and update its flood hazard maps if a determination is reached that a revision or update is necessary. How would FEMA go about deciding when a revision or update is necessary? What does FEMA need from Congress to ensure that FEMA has the resources required to make sure every flood hazard map in our community is accurate and up to date?

Response: FEMA is required by statute to review Flood Insurance Rate Maps (FIRMs) every 5 years and to revise and update FIRMs (a) upon a determination by the Administrator that such revision or updates are necessary or (b) upon request from any state or community if accompanied by technical data sufficient to justify the requested change and the unit of government making the request agrees to provide funds in an amount determined by the Administrator (42 USC § 4101(f)). Part of FEMA's Risk MAP program strategy is to invest more in monitoring the validity of published flood hazard information and tracking mapping needs. Risk MAP products complement the regulatory Flood Insurance Rate Maps (FIRMs) are provide supplemental flood hazard data for informational purposes only, such as Changes since Last FIRM and depth grids.

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These products do not alter the regulatory Special Flood Hazard Areas that are reflected on the FIRMs.

The principal factors that drive the need for updated flood hazard analyses are:

- *Physical changes*: such as manmade influences which may include new bridges culverts, levees, development in the floodplain or natural terrain changes that can be analyzed through Light Detection and Ranging (LiDAR);
- *Climate changes*: such as recent flood disasters;
- *Engineering methodology changes*: such as improved computer models, better understanding of the physics of water flow and smart flood sensors deployed in the field.

Keeping pace with these changes is important and failing to do so could lead to unwise land use decisions and construction standards, thereby putting homeowners at increased risk while providing a false sense of security. Conversely, overstated hazards can result in potentially unnecessary construction costs and incorrect insurance rating decisions. Sound, reliable flood hazard information is a necessary component of ensuring the fiscal soundness of National Flood Insurance Program (NFIP).

FEMA works with stakeholders to ensure that flood hazard information on Flood Insurance Rate Maps reflects existing conditions and is aligned with flood risk. This work involves documenting the engineering gaps that require a map update based on the three principal factors mentioned above using FEMA's Coordinated Needs Management Strategy (CNMS). CNMS is a geospatial system that leverages a watershed validation evaluation strategy used to track the assessment process, document engineering gaps and their resolution, and aid in prioritization for using flood risk as a key factor for areas identified for flood map updates. Communities and stakeholders can notify FEMA through the Regional offices with any input that will assist with the evaluation process for documentation with CNMS that may lead to updates to the flood hazard maps.

The results of these evaluations and other flood hazard data update needs identified throughout the mapping lifecycle are managed systematically and allow FEMA to effectively quantify the inventory maintenance required. This watershed validation evaluation provides the necessary data required to identify the flood hazard engineering data and map needs and associate them with the level of risk for that geographic area. Through Risk MAP, FEMA updates the flood hazard data by watershed where necessary so that FEMA's flood hazard data is in agreement with other Federal agencies' scientific data within the watershed. However, Risk MAP products are informational, not regulatory. Risk MAP products do not alter how or where FEMA's minimum standards

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for land use and development apply, nor affect community requests for revisions to the regulatory maps.

As it relates to the accuracy of FEMA's flood maps, we are continually improving our standards as science, technology, and available data improves. This has been ongoing since the beginning of the mapping program and continues through discussions with the Technical Mapping Advisory Council (TMAC). The original TMAC led to Map Modernization, which overhauled the map inventory for over 90% of the United States population and made significant improvements in the accuracy and usability of the maps.

However, there were issues that were not addressed. FEMA continued working with stakeholders and flood mapping experts, including hiring the National Academies of Science to look at the scientific credibility of our maps. They found our methods credible, but highlighted the need to use more accurate elevation data and more model backed analysis for floodplains.

FEMA adopted new standards to address these recommendations. FEMA also realized that since some resistance to the maps is based more on a community's reaction to the information rather than the credibility of the information itself, we must work harder to help communities and the public understand their risk and understand what actions they can take to reduce it. As a result, we implemented Risk MAP with increased community engagement and new products that can help communicate risk more holistically.

Oregon
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TESTIMONY OF CHRISTINE SHIRLEY

NATIONAL FLOOD INSURANCE PROGRAM COORDINATOR, STATE OF OREGON

BEFORE THE
HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
SEPTEMBER 21, 2016

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

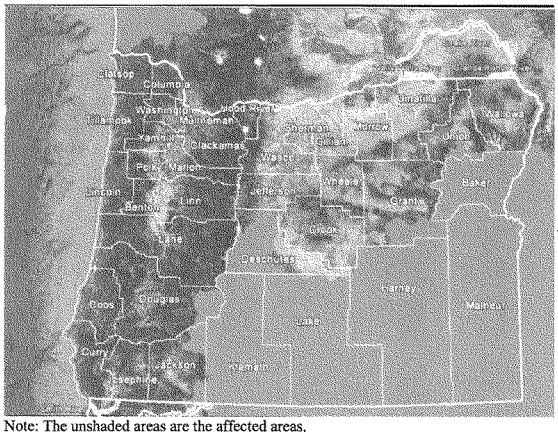
I am pleased to be here today to discuss the State of Oregon's perspective on the National Flood Insurance Program in light of Endangered Species Act (ESA) consultations and the resulting changes to the program. My name is Christine Shirley and I am the National Flood Insurance Program Coordinator for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

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

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

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

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



Note: The unshaded areas are the affected areas.
Source: FEMA https://www.oregon.gov/LCD/docs/FEMAs_NFIP_ESA_Consultation_OR.pdf

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

[1] Source:
http://www.westcoast.fisheries.noaa.gov/publications/habitat/fact_sheets/oregon_fema_biop_factsheet_2016.pdf

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADDENDUM - RPA SUMMARY

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

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

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

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

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

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

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

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

TESTIMONY of

Denny Doyle

Mayor

City of Beaverton, Oregon

before

The House of Representatives

Committee on Transportation and Infrastructure

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

September 21, 2016

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

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

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

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

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

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

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

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

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

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

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

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



Written Statement for the Record

The Honorable Heather Carruthers
County Mayor, Monroe County, Florida

on behalf of the National Association of Counties

for the hearing

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

before the

House Committee on Transportation and Infrastructure
United States House of Representatives

September 21, 2016
Washington, D.C.

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

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

About NACo

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

About America's Counties

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

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

About Monroe County, Florida

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

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

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

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

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

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

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

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

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

- **Second, NFIP is of vital importance to the economic health of flood-prone communities, and imposing additional species protection regulations through the program will force local governments to significantly alter the land use policies that they have carefully crafted.**

- **Third, species protection regulations carried out through NFIP have typically been one-size-fits-all solutions that consider neither the variance in local communities nor their existing species protection efforts. Because of this, their implementation results in land use policies**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Closing

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



Testimony of Jon Chandler

CEO, Oregon Home Builders Association

On Behalf of the

National Association of Home Builders

Before the

House Transportation and Infrastructure Committee

Hearing on

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

September 21, 2016

Introduction

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

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

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

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

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

Background

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

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

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

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

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

Legal Battles on ESA

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

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

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

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

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

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

[1] 16 U.S.C. § 1536(a)(2).
[2] *Id.* While the FWS is responsible for most species, NMFS has authority over certain marine species.
[3] 16 U.S.C. § 1536(b)(3)(A).
[4] 16 U.S.C. § 1536(b)(3)(A).
[5] *Key Deer v. Paulison*, 522 F.3d 1133, 1139 (11th Cir. 2008).
[6] *Id.* at 1140.
[7] *Id.* at 1142-43.

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

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

Oregon Case

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

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

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

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

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

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

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

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

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

[12] *Id.* page 286.

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

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

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

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

Effect on Development

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

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

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

[13] *Id.* page 279.

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

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

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

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

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

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

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

[14] *Id.* pg. 289.
[15] *Id.* pg. 290.
[16] *Id.* pg. 290.
[17] *Id.* pg. 279.
[18] *Id.* pg. 279.

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

Duplicative Requirements

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

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

According to the Services' permitting data, they conducted nearly 90,000 informal and formal consultations from 2008-2015.[20] Nearly two thirds of all 90,000 Section 7 consultations conducted by the Service were for land development or construction activities that required a federal permit – typically a wetlands permit under the Clean Water Act (CWA) Section 404. This data demonstrates how the majority of private residential land development or construction activities require a federal wetlands permit and are already fully regulated by the Service to ensure the protection of endangered species, regardless of whether or not the NFIP is subject to ESA.

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

Intent of NFIP

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

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

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

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

FEMA's Floodplain Mapping Program

Congress directed FEMA to "identify and publish information with respect to all floodplain areas...within five years following August 1, 1968."[22] In addition, FEMA must review and update these maps every five years[23] and correct and update these maps, if information is provided to FEMA proving that the existing map is incorrect.[24]

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

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

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

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

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

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

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[22] 42 U.S.C. § 4101(a).
[23] 42 U.S.C. § 4101(e).
[24] 42 U.S.C. § 4101(f).
[25] U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) "Not Likely toAdversely Affect" Determination for the Implementation of the National Flood Insurance Program in the State of Oregon.* April 14, 2016. Page 280. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.
[26] *Id.* pg. 280.

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

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

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

FEMA's minimum eligibility criteria

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

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

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

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[27] 44 C.F.R. 64.3(a)(1).
[28] 44 C.F.R. 60.3.
[29] 42 U.S.C. § 4102(a).
[30] 42 U.S.C. § 4102(c).
[31] U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) "Not Likely toAdversely Affect" Determination for the Implementation of the National Flood Insurance Program in the State of Oregon.* April 14, 2016. Page 328. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

Restricting development to 5-acre lots will have a pronounced impact on home building. According to the Census Bureau, the average lot size in the Pacific Division[32] is .15 acres.[33] Using this data, the NMFS is requiring lots in the flood plain to be 33 times larger than the average lot. Furthermore, requiring large lots, in combination with the urban growth boundary, will cause lot prices and home prices to increase—thereby significantly curbing the development of affordable housing.

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

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

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

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

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[32] Alaska, California, Hawaii, Oregon, and Washington

[33] Siniavskaia, Natalia "Lots in 2015 are Smallest on Record" (7/11/2016) http://eyeonhousing.org/2016/07/lots-in-2015-are-smallest-on-record/.

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

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

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

[37] 44 C.F.R. §60.

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

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

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

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

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

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

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

As an example, we can contrast the eligibility requirements of the NFIP with Congress's authorization for states to operate the Clean Water Act's NPDES[40] permitting program. Under the CWA, the EPA issues NPDES permits unless the state has submitted its own program to the EPA for review and EPA has approved such program. The EPA must approve the state's program unless it determines that the state's program fails to satisfy nine criteria.

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[39] 33 CFR §§ 332.1 - 332.8 & 40 CFR §§ 230.91 - 230.98.
[40] National Pollutant Discharge Elimination System (NPDES).

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

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

Conclusion

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

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

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

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

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[41] 551 U.S. 664 (2007).
[42] *Id.* at 661.
[43] *Id.* at 663.
[44] *Id.* at 665-67.
[45] http://www.nahb.org/generic.aspx?genericContentID=161065&channelID=311.

KATE BROWN
Governor

June 17, 2016

W. Craig Fugate
Administrator
U.S. Department of Homeland Security/FEMA
500 C Street, SW
Washington D.C. 20472

Subject: Response to Federal Emergency Management Agency (FEMA) June 13, 2016, notice to local governments regarding FEMA's implementation of the Reasonable and Prudent Alternative arising from National Marine Fisheries Service (NMFS) Biological Opinion

Dear Mr. Fugate:

On June 15, 2016, FEMA forwarded to the Department of Land Conservation and Development (DLCD) a copy of FEMA's June 13, 2016, letter to National Flood Insurance Program (NFIP) communities in Oregon. The letter is required by the NMFS Biological Opinion and Reasonable and Prudent Alternative (RPA) to provide notice of the outcome of the Endangered Species Act (ESA) consultation between FEMA and NMFS.

The State was taken aback by the letter's poor attempt to communicate with local governments on what is required of them at this time, and what is not required. I request that FEMA avoid undue burdens and premature punitive actions on local governments and Oregon communities by providing clear information to local governments and greater procedural input into the guidelines and standards to be developed by FEMA over the course of the coming years.

I was also disappointed in the tone of the letter and its inconsistent, confusing and erroneous messages. For example, I am deeply concerned that the letter implies local governments are required to take actions in direct response to the RPA. The RPA does not apply directly to NFIP communities. The RPA states that "... the locus of accountability for these ESA duties rests upon FEMA." The letter also inappropriately threatens enforcement actions before FEMA has even developed an implementation plan.

The letter indicates an alarming abdication of FEMA's responsibilities as the implementing agency for the NFIP. FEMA determines how to interpret and implement the RPA. Oregon expects the federal government to be a partner with the State, local and tribal governments in implementing federal programs. I call on FEMA to work closely with local communities, tribal

governments, state agencies and stakeholders in FEMA's development of standards and guidelines that protect endangered salmon and steelhead, and the economic vitality of our communities.

The Department of Land Conservation and Development has scheduled several meetings around the State at FEMA's request. FEMA Region X previously indicated the intent of these meetings is to gather local community input to inform FEMA's development of an RPA implementation plan. It is critical that FEMA engage local communities, tribal governments and the State to inform FEMA's implementation of the RPA.

Oregon will continue to advocate strongly for local communities, and for actions that benefit healthy salmon and steelhead habitat consistent with Oregon's land use program. Oregon looks forward to working with FEMA on a collaborative process to ensure that revised floodplain management standards meet multiple social, economic and environmental needs.

Sincerely,

Governor Kate Brown

KB:ia

cc:

Roy Wright, Associate Administrator
Michael Grimm, Assistant Administrator Mitigation
Kenneth Murphy, Region X Administrator
Will Stelle, NOAA West Coast Regional Administrator
Mark Carey, FEMA Region X Mitigation Division Director
Kim Kratz, National Marine Fisheries Service
Oregon Congressional Delegation
Senate President Peter Courtney
House Speaker Tina Kotek
Senate Republican Leader Ted Ferrioli
House Republican Leader Mike McLane
Richard Whitman, Natural Resource Policy Director
Jim Rue, Department of Land Conservation and Development
Mike McArthur, Association of Oregon Counties
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Congress of the United States
House of Representatives

June 28, 2016

Mr. Will Stelle
Administrator, West Coast Region
National Marine Fisheries Service
7600 Sand Point Way NE, Bldg 1
Seattle, WA 98115-0070

Dear Mr. Stelle:

I am writing to convey my objections to the Reasonable and Prudent Alternative (RPA) issued by the National Marine Fisheries Service (NMFS) as part of its April 2016 Biological Opinion (BiOp) regarding the Federal Emergency Management Agency's (FEMA) implementation of the National Flood Insurance Program (NFIP) in Oregon. The RPA demonstrates a fundamental misunderstanding of the purpose of the NFIP and its impact on private floodplain development. Private floodplain development is not attributable to, or caused by, FEMA's implementation of the NFIP and, as such, it should not be treated as federal action subject to Section 7 consultation requirement under the Endangered Species Act (ESA).

The NFIP was first created because Congress found that it was uneconomical for the private insurance industry alone to make flood insurance reasonably available to those in need of flood insurance protection. The intent of the program was to reduce future flood damage to structures through community developed floodplain management ordinances (guided by FEMA floodplain mapping) and provide protection for property owners against potential losses through an insurance mechanism that requires a premium to be paid for the protection. Community participation in the NFIP is voluntary. It is based on an agreement by a community to adopt a floodplain map identifying flood-prone areas, and to subsequently institute floodplain regulations for those flood-prone areas. In return, the federal government agrees to provide primary flood insurance to individuals and businesses within the community. In order for an individual to participate in the NFIP, the community must have opted into the NFIP, meaning the community must have adopted maps and floodplain ordinances for the area in which the individual resides.

This process is consistent with a State's authority to determine land use. A State may delegate its land use jurisdiction to a local government or other political authority, as it has done in Oregon. In Oregon, the State and local communities have public notice and comment procedures that must be followed when proposing land use ordinances or regulations. Nothing in the NFIP pre-empts a state's, or local government's, authority to determine how lands within its jurisdiction

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should be used. Nothing in the NFIP grants FEMA regulatory authority over land use, and NMFS cannot use the guise of the ESA to expand FEMA's jurisdiction under the NFIP into federal land use regulation.

In addition to my overall disagreement with NMFS regarding whether Section 7 of the ESA should even apply to private development, I have a number of specific concerns about the RPA NMFS developed to achieve ESA compliance. Specifically, RPA Element 2 sets forth interim measures FEMA must impose on local communities to substantially limit the types of development allowed in the Riparian Buffer Zone (RBZ) to specified activities (e.g., water dependent activities, habitat restoration activities, activities that benefit species or habitat). The RPA prescribes a RBZ measured 170 feet horizontally from the ordinary high water mark of certain streams and does not explicitly limit the RBZ to the floodplain, meaning that land outside the actual floodplain could be impacted.

I have already heard that the RBZ provision will have a severe impact on the timber and agricultural industries in Oregon because the BiOp explicitly expands the definition of "development" to include "removal of vegetation or other alteration of natural site characteristics (including any remnant natural characteristics existing in a degraded site)". The Federal government owns about 60% of Oregon's forestland, yet it is the 35% of Oregon's privately owned forests that accounts for 76% of the state's timber harvest. Meanwhile, Oregon forestland owners must adhere to some of the strictest environmental standards in the country through compliance with the Oregon Forest Practices Act. NMFS's overreach to restrict forest practices further through an irrational RBZ will hurt an industry that is vital to the livelihood of thousands of Oregonians.

All RPA requirements should be based on the best available science, and that science should be incorporated as part of the Biological Opinion. As the 170-foot RBZ illustrates, Element 2 imposes arbitrary and prescriptive mitigation requirements of natural floodplain functions. There is little, if any, scientific/factual justification for the specific mitigation measures required by NMFS.

The interim measures in Element 2 also require FEMA to recommend that the State prioritize floodplain development buyouts based on the presence of high priority salmonid populations, rather than prioritizing buyouts that reduce the risk of losses to life and property, which is the mission and purpose of the NFIP.

RPA Element 3 requires FEMA to use best available science when mapping. However, NMFS also requires FEMA to use specific mapping requirements and protocols, regardless of the appropriateness of the required mapping methods for the areas being mapped or whether use of these costly measures would result in a significantly more accurate map.

Under Element 3, FEMA is effectively being required to expand the Special Flood Hazard Area on flood maps to include future conditions, which means that additional property owners of buildings in these areas will be required to meet NFIP requirements and purchase flood insurance. Furthermore, as discussed below, Element 4 will substantially reduce or restrict the amount and type of development that may occur in a High Hazard Area.

RPA Element 3 requires FEMA to anticipate climate change and land use changes caused by increased population growth and depict these areas on flood maps as Area of Future Conditions Flood Hazard. The Biggert-Waters Flood Insurance Reform Act of 2012 authorized the Technical Mapping Advisory Committee (TMAC) to make recommendations to FEMA with respect to mapping or revising maps to accommodate for these activities. This effort is already underway. Requiring FEMA to map future conditions, and providing specific details about how this should be done, is contrary to, and undermines, Congress' explicit direction under Biggert-Waters to establish a process for how mapping standards and procedures will be developed for future FEMA flood maps. It is completely inappropriate for NMFS to dictate to FEMA incorporation of specific climate and population changes where the science may be inconclusive. Furthermore, NOAA can utilize its seat on the TMAC to make sound scientific recommendations that address these potential future conditions.

RPA Element 4 requires FEMA to revise its regulations to incorporate an ESA performance standard into the regulatory floodplain management criteria. By requiring FEMA to impose these RPA requirements through regulation, instead of through guidance as they did in Washington State, NMFS is taking a one size fits all approach that will have nationwide application. Additionally, any other RPA-required changes that require rulemaking will also be applied to all NFIP participating communities, not just Oregon communities.

Element 4 also imposes restrictive land use and development standards once flood risks are mapped by prohibiting almost all new development and substantial improvements in high hazard areas. Similarly, RPA Element 4B (ii)'s prohibition on redrawing the floodway to accommodate new development is effectively a prohibition on development in the floodway without regard to its effects on species or habitat. Such blanket prohibitions are not only outside FEMA's authority, but they are imposed arbitrarily, without any assessment of whether the specific prohibited floodplain development would actually cause adverse effects to ESA-listed species or habitat.

Along the Oregon Coast, most of the areas that are desirable for economic opportunities due to access to transportation corridors also tend to be areas that fall within the 100-year floodplain. These historic working waterfronts are the lifeline for communities that routinely lag behind the economic growth of the rest of the state. Stripping away development opportunities, through a one-size-fits-all approach, will destroy coastal economies.

Furthermore, requiring FEMA to develop standards governing the creation of new development parcels, disallowing partitioning of land to create new parcels, developing standards governing the minimum permissible size of new development parcels, and limiting the footprint of new structures to 10% or less of total lot size, and other stringent requirements, exceeds FEMA's authority. FEMA is not a land use regulatory agency and has no authority over privately funded development on private lands by private developers. FEMA has no authority to issue or deny floodplain development permits, nor does it have authority to establish the terms and conditions attached to such permits.

NMFS indicates that the intent of the RPA is "to provide an alternative to the proposed action that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that will avoid jeopardy and adverse modification." The RPA does not meet NMFS's intended purpose. As described above, FEMA does not have the legal authority to carry out several of the proposed actions. Many of the recommendations are not economically or technologically feasible in Oregon. In fact, the RPA will have severe detrimental economic effects in Oregon by restricting development as well as agricultural and timber industry activities. There are workable ways to protect endangered species and their habitat without cutting off Oregonian's livelihood. Had NMFS reached out to the State, local communities, and interested stakeholders to develop the RPA, recommendations that accomplish the intention of the RPA could have been developed. Instead, NMFS developed the RPA in a vacuum, and, as a result, I do not believe it will accomplish the intended purpose.

Sincerely,

PETER DeFAZIO
Member of Congress

Congress of the United States

Washington, DC 20515

June 28, 2016

W. Craig Fugate
Administrator
Federal Emergency Management Agency
500 C Street S.W.
Washington, D.C. 20472

Dear Administrator Fugate:

In Oregon, 271 communities depend on the National Flood Insurance Program (NFIP) to provide flood insurance. The many waterways that contribute to Oregon's natural beauty and robust economy also make our state prone to flooding. Given the reach and importance of the NFIP in Oregon, it is essential that it is administered with the utmost transparency and clarity. We are deeply concerned about recent steps FEMA has taken to implement the Reasonable and Prudent Alternative (RPA) in the National Marine Fisheries Service (NMFS) Biological Opinion on changes to NFIP.

On June 13, 2016 FEMA Region X sent letters to National Flood Insurance Program (NFIP) communities in Oregon addressing changes to Oregon's NFIP structure that would be occurring over the next four and half years. Although we understand this letter may have served to fulfill a requirement to provide notice of NMFS April 14, 2016 Biological Opinion and Reasonable and Prudent Alternative (RPA), the letter was confusing and alarming to many who received it.

We understand that FEMA is responding to NMFS's Biological Opinion and RPA, which assumes FEMA will exceed its congressionally authorized authorities by requiring communities to prohibit private development in order to participate in the NFIP. This is all the more reason for FEMA to work closely with Oregon's NFIP communities and state partners to establish mitigation and compliance measures that are not overly burdensome and do not exceed FEMA's legal authority.

The letter explains that there are two stages of implementation— interim measures over the next two years and permanent program changes to the NFIP. It also suggests that NFIP communities have the following options: "voluntarily impose a temporary moratorium on all floodplain development that adversely impacts ESA listed species or their habitat, or voluntarily implement the interim measures found in RPA element 2." Voluntarily imposing a temporary moratorium on all floodplain development that could adversely impact Endangered Species Act (ESA) listed species or their habitat is not an option for Oregon NFIP communities. Communities cannot be expected to implement these or any other measures without thorough guidance and consultation with FEMA.

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The letter is particularly disappointing because it threatens enforcement action against communities but does not offer a timeline for when that reporting requirement is expected to take effect or guidance on how communities can fulfill reporting requirements. Requirements to mitigate potential impacts to species and habitat, per the RPA, will be necessary, but responsibility for providing acceptable mitigation options falls to FEMA. FEMA needs to provide clear guidelines on how and when communities must comply with revised NFIP requirements.

Oregon is one of the first states affected by significant changes to the NFIP based on ESA, Section 7 consultations, but NFIP communities across the nation will also be subject to program changes in the future. Because Oregon is at the forefront of nationwide NFIP changes, it is in the best interest of FEMA to get implementation in the state right. Therefore, we suggest that FEMA increase staffing resources in Oregon throughout the implementation process in order to better communicate with every NFIP community in the state. We also ask that community input and concerns be considered and responded to at every step of the implementation process.

With some of the strongest land use laws in the country, Oregonians deserve a collaborative process with FEMA on NFIP RPA implementation— one that addresses protection of salmon and steelhead habitat, but is also economically and socially feasible. Thank you for your attention to our concerns and taking leadership on establishing a clear, transparent, and collaborative process. We look forward to a response to this letter that includes an update on how FEMA plans to increase staffing resources, communicate more clearly, and seriously consider community input throughout this process.

Sincerely,

PETER DeFAZIO
Member of Congress

RON WYDEN
United States Senator

JEFF MERKLEY
United States Senator

EARL BLUMENAUER
Member of Congress

KURT SCHRADER
Member of Congress

SUZANNE BONAMICI
Member of Congress

KATE BROWN
Governor

September 29, 2016

The Honorable Bill Shuster
Chairman
House Transportation and Infrastructure Committee
2251 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Peter DeFazio
Ranking Member
House Transportation and Infrastructure Committee
2251 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

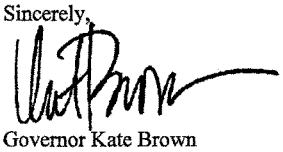
Dear Chair Shuster and Ranking Member DeFazio:

Thank you for holding the hearing on September 21, 2016, "An Examination of FEMA's Limited Role in Local Land Use Development Decisions." As the Committee heard, the State of Oregon is at the forefront of a federal directive which has implications related to local land use and access to flood plain insurance for states and local governments across the nation. I was particularly encouraged by the engagement and interest of committee members during the hearing and I want to extend an offer of assistance to your committee and your colleagues as you continue your examination of this important issue.

Oregon is proud to be a leader in land use planning and species recovery. It is the Oregon way to find collaborative solutions that support local communities and Oregon's natural environment for the betterment of our economy and quality of life. Sound floodplain management protects people, property, habitat function, and other values. However, I am greatly concerned that the recommendations in the Reasonable and Prudent Alternative for an additional federal layer of floodplain management over Oregon's long-standing land use program will be too costly and difficult for local governments to implement, and is unrealistic in scope and timing. Further, I have significant concerns whether the recommendations can be implemented in a way that supports the goals of our existing land-use structure, and meets species recovery goals in the most effective way. In June, I wrote a letter to the Federal Emergency Management Agency (FEMA) expressing my disappointment with the agency's initial communication with local governments. Since then I have become convinced that FEMA's implementation timelines are simply unworkable.

Again, I appreciate the Committee's interest in Oregon's experience to date and how it might have repercussions for floodplains nationally. Oregon will continue to advocate strongly for local communities, and for floodplain management standards that meet multiple social, economic, and environmental needs. I stand ready to provide you and your colleagues with additional information as the process in Oregon unfolds.

Sincerely,



Governor Kate Brown

KB:dj

ASSOCIATION OF STATE FLOODPLAIN MANAGERS, INC.
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September 21, 2016

Honorable Bill Shuster
Chairman
House Committee on Transportation and Infrastructure
Washington D.C. 20515

Honorable Peter DeFazio
Ranking Minority Member
House Committee on Transportation and Infrastructure
Washington D.C. 20515

Dear Chairman Shuster and Ranking Member DeFazio,

It is well recognized that since its establishment in the late 1960's, the NFIP has made major contributions to the nation's approaches to identifying, managing and reducing the risks of flood hazards, to encouraging active floodplain management and helping to moderate the often devastating impacts floods have on the nation's people and their communities. For example, the minimum land use and building standards of the NFIP now result in over $1.7 billion in avoided flood losses annually.

But despite these efforts, flood damages have continued to increase and it has been widely recognized for years that much more could and should be done to avoid or reduce these and future damages. One area has lagged is that of strengthening and better integrating the NFIP with a broad range of efforts to protect and restore the natural and beneficial functions and values of our rich heritage of floodplain ecosystems and resources. Floodplains represent some of our most important water resources, constitute basic natural resource infrastructure, and contribute in a myriad of ways to the health and vitality of our communities and our future.

ASFPM strongly urges re-initiation of the effort started in 2012 to prepare a programmatic Environmental Impact Statement (EIS) of the NFIP and completion of rulemaking to address, on a nationwide and programmatic level, impacts to endangered species as well as other impacts on the environment.

On May 16, 2012, FEMA published a Notice of Intent to prepare an EIS. The notice indicated that the EIS was being prepared to consider new information relating to the environmental impacts of the NFIP, to update the 1976 EIS on the NFIP, and to consider potential changes to the program's implementation. It also identified a Purpose and Need statement for evaluating the NFIP proposed action and alternatives. It further identified a proposed action and alternatives for consideration with the proposed action being: "*to modify the NFIP based on changes identified through the evaluation process to enhance floodplain management standards including provisions to address endangered species and habitat concerns.*" At that time, ASFPM provided comments applauding FEMA's effort but encouraged a more open process, wider consideration of alternatives, and a more robust Purpose and Need reflective of recent NFIP reforms by Congress than was being proposed. In theory, if the programmatic EIS effort had been

completed and updated rules issued, it would have precluded the need for such comprehensive state-by-state consultations such as what has transpired with the Oregon Biological Opinion.

Our 2012 comments are still very much relevant today and are more important than ever. Since that time Congress has enacted further reforms of the NFIP in 2014 (between the 2012 and 2014 reforms, Congress created nearly 80 sections of new law). Further, the Council on Environmental Quality (CEQ) updated the guidance for completing programmatic EISs in 2014. ASFPM ultimately believes that a unified national approach to changing the NFIP through the EIS process is a preferable alternative to state-by-state or regional determinations. Through the programmatic EIS process, FEMA has an extraordinary opportunity to take a hard look at the current dangerous, unsustainable pattern of expanding flood risks and damages, and seek alternatives that improve floodplain management, and increase the protection and restoration of critical environmental resources to better protect people, communities, wildlife, and the safety and security of present and future generations. Further, ASFPM believes that climate change considerations must be a major input into the programmatic EIS effort.

While we are under no illusion that this will be an easy task for FEMA and the appropriate agencies with whom FEMA will consult, it is nonetheless necessary for FEMA and the appropriate agencies to put forward a good faith effort. We believe that a good many of the environmental (including endangered species) issues can be addressed through this programmatic EIS effort and consultation and if there are issues to be resolved, there are tiered approaches so more site specific issues can be handled at a later time. Due to changes in the NFIP as well as updated guidance for the programmatic EIS process, ASFPM recommends:

- A re-initiation of the programmatic EIS process to include an update Purpose and Needs statement that is more broad than what was initially proposed in 2012 to also include critical issues such as climate change, integration of disaster relief programs, community participation/eligibility, hazard mitigation efforts and the identification and mapping of floodplains in addition to impacts on the environment and wildlife,
- A proposed new and more robust set of alternatives to broadly reflect programmatic changes and direction since 2012,
- A robust public scoping effort, and
- Revised draft rules for the NFIP upon completion of the programmatic EIS.

Thank you for considering our thoughts, concerns and recommendations.

Respectfully,

Chad Berginnis
Executive Director
Association of State Floodplain Managers