



Date: September 26, 2022

From: Bob Sallinger, Conservation Director, Audubon Society of Portland

To: Portland Planning and Sustainability Commission

Re: Floodplain Resilience Plan

Dear Members of the Portland Planning and Sustainability Commission,

Please accept the following comments from Audubon Society of Portland regarding the Portland Floodplain Resilience Plan. Healthy and intact floodplains are essential for the health and safety of our community, to protect water quality, provide fish and wildlife habitat, and provide resilience in the face of climate change. As more and more cities in the United States suffer catastrophic floods, the importance of floodplain protection looms larger and larger. Portland has its own tragic history of flooding and continues to see significant flood events as recently as spring of 2022. Yet, too many communities, including Portland, continue to allow irresponsible, unmitigated floodplain development. Developers get rich, our communities is put at direct risk, and our environment is degraded.

Background:

Cities, including Portland rely on the Federal Emergency Management Agency (“FEMA”) National Flood Insurance Program (“NFIP”) to provide low cost, taxpayer subsidized flood insurance when they allow development in flood prone areas. Without this taxpayer subsidized flood insurance most development would not be possible. In 2009, Audubon Society of Portland sued FEMA (*Audubon Society of Portland et al. v. FEMA*), asserting that FEMA’s management of the NFIP Program was violating the Endangered Species Act’s protections for federal listed salmonids in Oregon. This litigation ultimately resulted in a [Biological Opinion](#) (“BiOp”) issued by the National Marine Fisheries Service in 2016 which concluded that FEMA’s flood insurance program violates the Endangered Species Act by subsidizing development in floodplains that jeopardize the continued existence of salmon, steelhead and Southern Resident Killer Whales

and adversely modifies the designated critical habitat of anadromous fish species in Oregon. NMFS included a list of six reasonable and prudent alternatives (“RPAs”) that FEMA should incorporate into its program in order to ensure compliance with the Endangered Species Act. In order to avoid violating the Endangered Species Act, both FEMA and local jurisdictions that allow development in floodplains must comply with the BiOp.

For the past several years, the City of Portland has been proceeding with a phased approach to updating its floodplain regulations to comply with the BiOp. The City adopted new regulations for the South Reach of the Willamette River in Phase 1 (2020). It has been proceeding with Phase 2 of this process to update floodplain protections for the rest of the City except the North Reach of the Willamette, portions of the Columbia Corridor and Johnson Creek which were assigned to later phases of this process. While Audubon questions the need for phasing and the extended timeframe over which this work is being conducted, we were generally supportive of the Discussion Draft for the current phase which was released in 2021. To be clear, Audubon believes that the entire City could have been done in a single process instead of being spread out over multiple phases and multiple years, but felt that the work that was contained within this phase generally conformed to the terms of the BiOp.

It is therefore deeply disappointing that in the Proposed Draft that is now before the Planning and Sustainability Commission, the BPS has chosen to eliminate/ delay substantial portions of the work that was contained in the 2021 Discussion Draft. The omissions are significant enough that we no longer believe that the plan is anywhere near sufficient to meet the terms of the BiOp and that the City has significant legal exposure under Section 9 of the Endangered Species Act for development projects that it permits to proceed forward in the floodplain. We would further assert that this legal exposure likely extends backwards for any development projects that the City has permitted to proceed since the BiOp was released in 2016. We want to emphasize here that jeopardy decisions under the Endangered Species Act are not common--the fact that the 2016 BiOp determined that floodplain development in Oregon was jeopardizing the existence of listed salmon, steelhead and resident killer whales (that depend on salmon for food) should be taken seriously.

We urge the Bureau of Planning and Sustainability, in the strongest possible terms, to make the following changes to the the Floodplain Resilience Plan:

- 1) **Restore Title 24 Amendments to the Floodplain Resilience Plan:** One the most significant elements of the Floodplain Resilience Plan is the inclusion of enhanced requirements for balanced cut and fill. Balanced cut and fill refers to compensatory mitigation that must occur when a floodplain is filed and/or/ built upon, thereby reducing capacity for flood retention and habitat value. BPS has provided two explanations for the removal of Title 24 amendments. Neither are credible.
 - a) First BPS asserts that Title 24 is not under the purview of the Planning and Sustainability Commission and therefore does not belong in the Floodplain Resilience Plan. In fact, the Floodplain Resilience Plan was developed by a multi-bureau team so that it would be comprehensive and not confined to the immediate purview of BPS. Further, many BPS plans contain code amendments that go beyond the immediate purview of BPS. The City of Portland could not function if BPS planning processes were constrained to the degree that staff now appear to suggest is appropriate. The Floodplain Resilience Plan should proceed forward through the PSC and onto Council as a complete, holistic package.
 - b) Second BPS asserts that it would be challenging to do balanced cut and fill mitigation because the City, itself, does not currently have a mitigation bank. This line of argument seems highly specious. The City has known every step of the way along this process that it does not have an mitigation bank and would not have one when this plan moved forward for adoption. Why is this issue coming up at the eleventh hour? Also, while the City, itself, does not have a mitigation bank, there are privately operated mitigation banks along the Lower Willamette that could serve exactly the same function. For those developers who are unable to mitigate on their own property, there are other entirely viable options available. Finally, balance cut and fill is not a new thing in the City of Portland. This plan merely enhances the balanced cut and fill requirements that are already in City code. The City had been doing balance cut and fill, albeit at a substantially lower level, for decades. We agree that the City should, for myriad reasons, create its own mitigation bank. In fact, the City has been discussing this need for more than twenty years. However, the absence of a City owned mitigation is not a credible basis for removal of Title 24 Amendments.

2) **Restore C-zone overlays for floodplains in the Columbia Corridor that are not in Heavy Industrial, General Industrial 2 or General Employment 2 zoning:** The current phase does not cover flood plains located in IH, IG2 or EG2 zones due to a lack of a current Economic Opportunities Analysis required under Goal 9. However, the Discussion Draft of the Floodplain Resilience Plan did include protections for floodplains located on non-industrial lands in the Columbia Corridor, specifically, application of C-zones. The current Review Draft eliminates those protections based on the premise that the City now wants to do the entire Columbia Corridor Plan including floodplain updates as a single process. In other words, BPS is now proposing to intentionally leave identified vulnerable floodplains in the Columbia Corridor (for which it has already completed all analysis and developed code language and maps) for an indefinite and likely extremely extended period of time so that it can consolidate code changes in the Columbia Corridor into a single process. This is inconsistent with past practice; BPS has made other code changes applicable to the Columbia Corridor outside of a comprehensive Columbia Corridor Planning Process. Also, we have very low confidence that the City will follow through anytime in the near future. The EOA is years behind schedule and the Columbia Corridor Planning Process has been talked about for nearly two decades. There is simply no credible basis for the City to delay protecting non-industrial floodplains that have been identified, mapped and for which it already has code language.

3) **Reconsider elimination of Title 33 Protections for developed floodplains:** Protections for floodplains in the South Reach of the Willamette that were adopted by Council in 2020 in Phase 1 included Title 33 protections for developed floodplains. The Discussion Draft for Phase 2 (the current phase) also included Title 33 protections for developed floodplains. BPS now proposes to eliminate Title 33 protections for developed floodplains in Phase 2, and retroactively remove them from developed floodplains that were protected in Phase 1. BPS bases this decision on the argument that these protections provide relatively little environmental benefit but require an onerous review process. While we are potentially open to this modification, we do not believe that BPS has provided enough analysis to support this decision. We would like to see more detailed analysis, especially any data that BPS can provide regarding how this has worked to date in the South Reach. Further, we would urge BPS to make it explicitly

clear that while Title 33 may not apply to developed floodplains, Title 24 balanced cut and fill requirements will be applied. There is no question that expanded development in both the undeveloped and developed floodplain has significant impacts on flood storage capacity.

- 4) **Expedite the Economic Opportunities Analysis (EOA) and future phases of the Floodplain Resilience Plan:** It has now been more than a decade that the City has been using lack of a current EOA as a basis for delaying critically important environmental protections on industrial lands (IH, IG2, EG2). This is particularly troubling since the City updated the EOA in 2016, but then failed to advance long delayed environmental initiatives in a timely manner, allowing the EOA to become outdated again. The current EOA update process is already a couple of years behind schedule and moving at a glacial pace. The list of environmental programs that have been delayed on industrial lands (primarily the North Reach and Columbia Corridor) includes the North Reach River Plan, Portland Tree Code, Willamette Greenway Updates and now, the Portland Floodplain Resilience Plan. The delays are also undermining important decision-making associated with the Portland Harbor Superfund Process. The impacts of these delays have significant implications for the health and safety of our community, for our ability to protect and restore the Willamette River, for imperiled species and for the City to achieve its climate action and climate justice goals. Even with the challenges of recent years, the ongoing delays related to the EOA and the domino effect that this has on other important planning processes is both unacceptable and inexplicable. BPS must expedite an inclusive EOA process and then pivot immediately to advancing other delayed processes, including future phases of the Floodplain Resilience Plan.

- 5) **BPS should reevaluate whether tree mitigation required in the Floodplain Resilience Plan is adequate to meet the requirements of the FEMA BiOp:** Appendix 2.8-C of the BiOp (Page 398) contains detailed mitigation requirements to ensure compliance with the BiOp. We would urge the City to include a chart that details how the Floodplain Resilience Plan substantively meets each of these requirements. In particular, we would request that the City look closely at the temporal mitigation that is required for trees and other habitat values. Specifically the BiOp requires that habitat mitigation, including trees, be increased if there is a significant time delay between when trees and other habitat is removed and when new mitigation habitat will achieve the

same functional value. Put more simply, a newly planted tree does not have the same functional value as a mature tree and will not attain the same functional value for years to come. The BiOp requires that these temporal delays be mitigated.

Conclusion:

We are deeply disappointed by substantial floodplain protections that have been removed in the current Proposed Draft of the Floodplain Resilience Plan. It is all the more concerning because, based on recent City performance on environmental issues, these delays are likely to be extended and potentially permanent. It is also highly likely that we will see substantial floodplain development during this period that place both the City and developers in direct violation of the Endangered Species Act.

The Floodplain Resilience Plan contains six full pages of existing City plans, policies and declarations created by the City reflecting its commitment to floodplain protection. However words on the page need to translate to action on the ground. Those words will have little meaning if the PSC advances the substantially weakened version of the Floodplain Resilience Plan that is now being presented. We consider this plan to be one of the most significant steps the City can take to create resilience in the face of climate change. We also consider it essential to advancing climate justice and the health and safety of our communities. Finally, it is necessary to comply with the Federal Endangered Species Act. We believe that since the release of the BiOp in 2016, the City has been and, based on the Proposed Draft, is likely to continue to approve both public and private development activities that violate the ESA.

We appreciate your consideration of these comments and look forward to working with the City as this effort progresses.

Respectfully,

A handwritten signature in black ink that reads "Bob Sallinger". The signature is written in a cursive, slightly slanted style.

Bob Sallinger
Conservation Director
Audubon Society of Portland

