

**Audubon Society of Portland  
Northwest Environmental Defense Center  
National Wildlife Federation  
Willamette Riverkeeper  
Association of Northwest Steelheaders**

**FOR IMMEDIATE RELEASE**

DATE: March 18, 2009

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**FEMA IS HAMPERING RECOVERY OF OREGON'S SALMON AND STEELHEAD  
Federal Flood Insurance Program Violates Endangered Species Act**

Portland, OR. — Oregon's floodplains are being developed at an alarming rate despite the well documented importance of protecting and restoring these areas both for the protection of critically endangered species of salmon and steelhead and to protect human health and safety. By issuing federally subsidized insurance for buildings in flood-prone areas, the Federal Emergency Management Agency (FEMA) provides insurance that is generally not available on the private market and directly enables the continued development of Oregon's floodplains. In providing this insurance, however, FEMA has violated federal law by failing to consider the impact of the resulting development on federally threatened and endangered species, according to the Audubon Society of Portland, Northwest Environmental Defense Center, National Wildlife Federation, Willamette Riverkeeper and Association of Northwest Steelheaders. These groups have notified FEMA of their intent to initiate litigation in sixty days if the agency does not take the appropriate steps to comply with the law.

Intact floodplains provide critical flood storage capacity, protect water quality, and provide habitat for fish and wildlife. The Endangered Species Act requires that federal agencies, in consultation with the National Marine Fisheries Service (NMFS), ensure that federal agency actions do not jeopardize threatened and endangered species or destroy the habitat upon which these species depend for survival and recovery. In a similar case in Washington, NMFS confirmed that floodplain development in Puget Sound is jeopardizing the survival of listed salmon and steelhead populations and destroying critical habitat. As a result of this finding FEMA must ensure that impacts of floodplain development do not push these critically endangered species further towards the brink of extinction. "The law requires agencies like

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FEMA to scrutinize their programs for impacts to species protected under the Endangered Species Act,” said Dan Rohlf, Director of the Pacific Environmental Advocacy Center, who is representing the coalition of groups. “FEMA must be held accountable and ensure their actions do not undermine ongoing salmon recovery efforts.”

Despite the findings in Washington, FEMA has failed to consult with NMFS regarding similar impacts from floodplain development to listed salmon and steelhead in Oregon. It is anticipated that this 60-day notice of intent to sue will force FEMA to go through the same consultation process in Oregon.

"We seem to have learned very little from flood events in recent years" said Audubon Society of Portland Conservation Director, Bob Sallinger. "We continue to build in our floodplains jeopardizing human life and property and degrading our ecosystem."

During the past 4 years, more than 250 new acres of floodplain were developed in the Portland Metropolitan Region and the Port of Portland recently announced plans to annex several hundred acres of floodplain into the City of Portland to allow for development on West Hayden Island.

"This issue is not just about salmon habitat. It's also about getting people out of harm's way, reducing taxpayer expenses due to flood damage, and preparing for increased stormwater due to climate change," said Dan Siemann, Conservation Director for National Wildlife Federation's Western Region. "Preventing development in floodplains benefits everybody."

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**VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

RE:   Endangered Species Act Violations: Federal Emergency Management Agency's  
      National Flood Insurance Program in Oregon

Dear Secretary Chertoff, Director Paulison, and Ms. Reinertston:

On behalf of the Audubon Society of Portland, National Wildlife Federation, Northwest Environmental Defense Center, Willamette Riverkeeper, and the Association of Northwest Steelheaders, I am writing to request that you take immediate action to remedy ongoing violations of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544 (2006), by the Federal Emergency Management Agency (FEMA) throughout much of the State of Oregon. Since the early 1990s, when the first species of salmon and steelhead were listed under the ESA, FEMA has implemented the National Flood Insurance Program (NFIP), an action that “may affect” listed salmonids, without first having engaged in consultation to ensure that the program does not jeopardize listed species or adversely modify critical habitat, as required by Section 7(a)(2) of the ESA. *Id.* § 1536(a)(2).<sup>1</sup> Moreover, because FEMA has failed to utilize its authorities in furtherance of the goals of species recovery, in consultation with the National Marine Fisheries Service (NMFS), it is in violation of ESA’s Section 7(a)(1). *Id.* § 1536(a)(1). This letter constitutes notice required by Section 11(g) of the ESA, *Id.* § 1540(g), prior to commencement of legal action.

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<sup>1</sup> Continued implementation of the NFIP once consultation has been initiated but not completed, a situation not presented here, would violate Section 7(d) of the Act, which prohibits the “irretrievable commitment of resources” pending completion of consultation. 16 U.S.C. § 1536(d).

### **Background**

NMFS has listed fifteen species of salmon and steelhead that live in Oregon for part of their life cycle as threatened or endangered under the ESA.<sup>2</sup> The first of these species, the Snake River sockeye, was listed in 1991. 55 Fed. Reg. 58,619 (Nov. 20, 1991); 70 Fed. Reg. 37,160 (June 28, 2005) (maintaining endangered status in status review). Over the next two decades, NMFS listed fourteen additional ESUs in Oregon, most recently listing the Oregon Coast Coho as “threatened” in February 2008. 73 Fed. Reg. 7,816 (Feb. 11, 2008). The other thirteen listed ESUs and DPSs in Oregon include: Upper Willamette River Chinook, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Lower Columbia River Chinook, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Upper Columbia River Spring Chinook, 70 Fed. Reg. 37,160 (June 28, 2005) (endangered); Snake River Spring/Summer Chinook, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Snake River Fall Chinook, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Lower Columbia River Coho, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Southern Oregon/Northern California Coho, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Columbia River Chum, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Upper Willamette River steelhead, 71 Fed. Reg. 834 (Jan. 5, 2006) (threatened); Lower Columbia River steelhead 71 Fed. Reg. 834 (Jan. 5, 2006) (threatened); Middle Columbia River steelhead, 71 Fed. Reg. 834 (Jan. 5, 2006) (threatened); Snake River Basin steelhead, 71 Fed. Reg. 834 (Jan. 5, 2006) (threatened); and Upper Columbia River steelhead. Each of these ESUs and DPSs, except the Lower Columbia River Coho, has designated critical habitat in Oregon. *See* 58 Fed. Reg. 68,543 (Dec. 28, 1993) (Snake River sockeye and Snake River Fall chinook); 70 Fed. Reg. 52,630 (Sept. 2, 2005) (Columbia River coho, Columbia River chum, three ESUs of Chinook, and five DPSs of steelhead in Oregon); 64 Fed. Reg. 57,399 (Oct. 25, 1999) (Snake River Spring/Summer Chinook); 64 Fed. Reg. 24,049 (May 5, 1999) (Southern Oregon/Northern California Coast Coho).

Listed salmon and steelhead require for their survival and recovery properly functioning habitat, which includes healthy functioning riparian ecosystems including the 100-year floodplain of rivers and streams in Oregon. For example, in the listing decision for Oregon coast coho, NMFS found populations of coho to be in danger of extinction in the foreseeable future. As part of the critical habitat needed to ensure the survival and recovery of the species, NMFS defined as one of the Primary Constituent Elements (PCEs) “[f]reshwater rearing sites with water quantity and floodplain connectivity to form and maintain physical habitat conditions and support juvenile growth and mobility.” 73 Fed. Reg. 7,816, 7,832. Just as in previous critical habitat determinations, NMFS found that urbanization is one of the “activities that threaten the physical and biological features essential to listed salmon and steelhead.” *Id.* at 7,833. Further, the agency indicated “the quality of aquatic habitat within stream channels is intrinsically related to the adjacent riparian zones and floodplain . . . . Human activities that occur outside the stream can modify or destroy physical and biological features of the stream.” *Id.* at 7,834. In relation to

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<sup>2</sup> A “species” includes any distinct population segment (DPS) of any species of vertebrate fish or wildlife. *Id.* § 1532(16). For Pacific salmon, NMFS considers an evolutionary significant unit (ESU) a “species” under the ESA. For Pacific steelhead, NMFS uses the DPS subcategory.

the Lower Columbia River Chinook ESU, NMFS wrote, “[m]ajor habitat problems are related primarily to blockages, forest practices, urbanization in the Portland and Vancouver areas, and agriculture in floodplains and low-gradient tributaries.” 63 Fed. Reg. 11,495; NMFS Biological Review Team, Review of the Status of Chinook Salmon in Washington, Oregon, California and Idaho under the Endangered Species Act 229, 231 (1997) (same); *see also id.* at 227 (“Urban development has had substantial impacts in the lower Willamette Valley, including channelization and diking of rivers, filling and draining of wetlands, removal of riparian vegetation, and pollution.”). NMFS has specifically indicated that habitat modifications authorized by FEMA that may affect salmonid critical habitat require Section 7 consultation. *See, e.g.*, 73 Fed. Reg. 7,816, 7,839.

### **ESA Overview**

Section 7 of the ESA establishes an interagency consultation process to assist federal agencies in complying with their duty to ensure against jeopardy to listed species or destruction or adverse modification of critical habitat. An agency must initiate consultation under Section 7 whenever it takes an action that “may affect” a listed species. 50 C.F.R. § 402.14(a). Regulations implementing Section 7 broadly define the scope of agency actions subject to consultation. *See id.* § 402.02 (defining “agency action”). The Ninth Circuit Court of Appeals has construed this term broadly. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054–55 (9th Cir. 1985); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998); *Connor v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988); *see also Nat’l Wildlife Fed’n v. Fed. Emergency Mgmt. Agency*, 345 F.Supp.2d 1151 (W.D. Wash. 2004) (holding various components of National Flood Insurance Program are discretionary agency actions requiring Section 7 consultation).<sup>3</sup> The consultation process concludes when the expert agency, in this case NMFS, issues a biological opinion on the impacts of the agency action to listed species. *See generally Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).

Pending the completion of the consultation process, agency actions that may affect listed species cannot go forward. *See id.* at 764 (“If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result. The latter, of course, is impermissible.”); *Pacific Coast Federation of Fishermen’s Associations v. Bureau of Reclamation*, 138 F.Supp.2d 1228, 1248 (N.D. Cal. 2001) (enjoining irrigation water deliveries at Klamath project pending completion of ESA consultation).<sup>4</sup>

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<sup>3</sup> The recent amendments to the 1986 regulations do not affect the applicability of the regulations to FEMA’s actions, nor do they render the cited decisions inapplicable. *See* 73 Fed. Reg. 76,272, 76,286–87 (Dec. 19, 2008). The final rule did not alter the definition of “action” discussed in these cases, and FEMA’s implementation of the National Flood Insurance Program (NFIP) satisfies the new “effects of the action” definition, given the relationship between the availability of federal flood insurance and flood plain development. *See id.* at 76,286.

<sup>4</sup> Section 7(d) applies once consultation has been initiated. To insure that agency actions do not jeopardize listed species before the consultation process has been completed, the Act provides that: “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency . . . shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would not violate subsection (a)(2) of this section.” *Id.* § 1536(d).



Separately, Section 7(a)(1) obligates federal agencies to “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed” under the Act. 16 U.S.C. § 1536(a)(1). Like the duty to avoid jeopardy, the conservation duty is discharged in consultation with NMFS. *Id.*

### **The National Flood Insurance Program**

Congress first established the National Flood Insurance Program with the passage of the National Flood Insurance Act of 1968. 42 U.S.C. §§ 4012–4129 (2000). The NFIP was subsequently broadened and modified with the passage of the Flood Disaster Protection Act of 1973, and amended again in 1994 with the National Flood Insurance Reform Act.

The NFIP is a federal program, administered and implemented by FEMA, that enables private property owners to purchase federal flood insurance. The NFIP is designed to provide an insurance alternative to disaster assistance to meet the escalating costs of repairing damage to buildings and their contents caused by floods, as private flood insurance was generally unavailable from the private-sector insurance companies. 44 C.F.R. § 59.2(a) (2007). Under the NFIP, local communities become eligible for federal flood insurance once they have adopted “adequate land use and control measures” consistent with criteria developed by FEMA.<sup>5</sup> 42 U.S.C. § 4012(c)(2); 44 C.F.R. § 59.22 (prerequisites for the sale of flood insurance). Flood insurance from FEMA is not available in communities that have not adopted land use criteria consistent with FEMA’s regulations. 42 U.S.C. § 4022(a)(1); 44 C.F.R. § 60.1(a).

FEMA develops, and from time to time is required to revise, “comprehensive criteria” designed to encourage the adoption of land use measures that reduce the amount of development exposed to floods, assist in reducing damage caused by floods, and “otherwise improve the long-range land management and use of flood-prone areas.” *Id.* § 4102(c). FEMA’s minimum criteria for local floodplain management are encoded in federal regulations at 44 C.F.R. § 60.3. Although the statute authorizes FEMA to adopt regulations for the general protection of the floodplain, the existing regulations are primarily designed to minimize damage to structures and water systems during flood events, and eliminate the possibility that structures will exacerbate floods by increasing flood levels. *Id.*; FEMA, *National Flood Insurance Program: Program Description* (Aug. 1, 2002) (“Program Description”), at 2 (“The emphasis on floodplain management requirements is directed toward reducing threats to lives and the potential for damages to property in flood-prone areas.”). The criteria are not designed or intended to protect aquatic habitat, imperiled species, or other environmental values.

FEMA oversees communities’ participation in and eligibility for the NFIP in an ongoing manner. “FEMA monitors communities to ensure that they have adopted an ordinance that meets or exceeds the minimum NFIP floodplain management criteria and to ensure that they are

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<sup>5</sup> A “community,” for purpose of the NFIP, is defined as any “state, areas, or political subdivision . . . which has the authority to adopt and enforce floodplain management ordinances for the area under its jurisdiction.” 44 C.F.R. § 59.1. A list of NFIP communities in Oregon is attached as Appendix A to this letter. Most of these communities are within the 55% of Oregon’s land area that constitutes listed salmonids’ habitat.

effectively enforcing their ordinance.” Program Description, at 12. FEMA conducts community visits and contacts to ensure proper implementation of NFIP requirements. *Id.* A community’s failure to implement and enforce NFIP minimums can result in probation or suspension from the program, which would make federal flood insurance unavailable in that community. 44 C.F.R. § 59.24. Moreover, FEMA implements a Community Rating System (CSR), a separate, voluntary program to encourage local floodplain management regulation that exceeds the regulatory minimums. Under the CSR, floodplain management regulation above NFIP minimums is rewarded with lower insurance rates for insureds. *See* 55 Fed. Reg. 28,291 (July 10, 1990); Program Description, at 22 (noting that one goal of CSR is to “protect natural and beneficial floodplain functions”).

FEMA further implements the NFIP through development and revision of maps and other information that identify flood-prone areas. 42 U.S.C. § 4101. These maps, known as Flood Insurance Rate Maps (FIRMs), identify various categories of flood hazard areas in which land use and building criteria are to apply. *See* 44 C.F.R. § 64.3 (identifying different zones on FIRMs). The maps are required to be updated at least every five years to accommodate new information. *Id.* § 4101(e). Individuals can request and obtain from FEMA a Letter of Map Revision (LOMR) if they can show an inaccuracy or change in the map that affects the status of their property 44 C.F.R. Pt. 72.

Issuance of flood insurance policies occurs through two mechanisms. First, FEMA may enter into arrangements with private insurance companies wherein approved insurers offer and administer federal flood insurance to qualified applicants. 44 C.F.R. § 62.23. Such private insurers are referred to as “write your own” (WYO) companies. WYO companies collect premium from insureds, and after retaining a portion to cover costs, submit the remainder to the U.S. treasury. *See generally* 44 C.F.R. Pt. 62, App. A. Loss payments are made by the WYO company, and reimbursed by FEMA. *Id.* Contractual agreements between FEMA and individual WYO companies are renewed annually, and either the company or FEMA can elect not to continue a company’s participation in the program. *Id.* FEMA is required to conduct triennial reviews of WYO companies’ practices. 44 C.F.R. Pt. 62, App. B. Approximately 95% of the FEMA-administered flood insurance in the nation is through the WYO program. Program Description, at 16. The other avenue for administration of flood insurance to insureds is through FEMA directly (NFIP Direct). 44 C.F.R. § 62.1. Under NFIP Direct, a servicing agent issues flood insurance policies in FEMA’s name directly to insureds.

Participation by a community in the NFIP is, technically, voluntary. However, as a practical matter, failure to enroll in the NFIP can significantly affect current and future property owners in the community’s floodplains and the availability of federal financial assistance in the flood-prone areas of the community. For example, if a community chooses not to participate in the NFIP, various types of federal assistance, such as mortgages from a federally insured or regulated bank and Veterans Administration loans, are prohibited if the building used to secure the assistance is in the 100-year floodplain. 42 U.S.C. § 4012a. The National Flood Insurance Act also prohibits other federal agencies such as the Federal Housing Administration and the Small Business Administration from making or guaranteeing a loan secured by a building in a floodplain unless the flood insurance has been purchased. *Id.* Federal flood insurance cannot be

purchased for buildings in non-participating communities. *Id.* §§ 4202, 4106. As a result, virtually all communities in the United States that have floodplains within their boundaries have elected to participate in the NFIP.

**Implementation of the NFIP in the State of Oregon is a Federal Action That Must Comply with the ESA.**

Despite the Western District of Washington's 2004 order requiring FEMA to consult on listed salmonids in Washington, FEMA has neglected its Section 7 obligations in Oregon. *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F.Supp.2d 1151 (W.D. Wash. 2004). Just as with chinook in the Puget Sound region of Washington, implementation of the NFIP in Oregon is a federal agency action that "may affect" Upper Willamette River Chinook, Lower Columbia River Chinook, Upper Columbia River Spring Chinook, Snake River Spring/Summer Chinook, Snake River Fall Chinook, Oregon Coast Coho, Lower Columbia River Coho, Southern Oregon/Northern California Coho, Columbia River Chum, and Snake River Sockeye, each of which is a listed ESU of Pacific salmon. NFIP implementation in Oregon also "may affect" Upper Willamette River steelhead, Lower Columbia River steelhead, Middle Columbia River Steelhead, Upper Columbia River Steelhead, and Snake River Basin steelhead, each of which is a listed DPS of Pacific steelhead. Moreover, all but one of these stocks of salmon and steelhead currently have designated critical habitat, which implementation of the NFIP in Oregon "may affect."<sup>6</sup> Accordingly, it is subject to the strict substantive and procedural standards imposed by ESA's Section 7. To date, however, no consultation with NMFS has taken place. Likewise, FEMA has failed to utilize its authorities to promote the conservation of listed species, in consultation with NMFS, in violation of ESA Section 7(a)(1).

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). A review by the U.S. Supreme Court of the ESA's "language, history, and structure" convinced the Court "beyond doubt" that "Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174. "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, *whatever the cost.*" *Id.* at 184 (emphasis added). To accomplish this purpose, the ESA includes both substantive and procedural provisions that are designed to protect and recover imperiled species. In order to meet these obligations, the Supreme Court declared that "endangered species [have] priority over the 'primary missions' of federal agencies." *Id.* at 185.

Implementation of the NFIP is an "agency action" requiring Section 7 consultation. Regulations implementing Section 7 broadly define the scope of agency actions subject to consultation. *See* 50 C.F.R. § 402.02 ("agency action" includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies"). The Ninth Circuit and district courts within it have construed this term broadly to include ongoing agency actions when the federal agency retains some discretion over how an action proceeds. *Nat'l*

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<sup>6</sup> NMFS is currently reviewing whether it should designate critical habitat for the threatened Lower Columbia River Coho salmon.



*Wildlife Fed'n v. Fed. Emergency Mgmt. Agency (NWF v. FEMA)*, 345 F.Supp.2d 1151, 1174 (W.D. Wash. 2004) (“FEMA’s implementation of the NFIP . . . is a discretionary “agency action” for the purposes of Section 7(a)(2) of the ESA”); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054–55 (9th Cir. 1994) (requiring ESA consultation on ongoing implementation of national forest management plans); *see also Defenders of Wildlife v. Env'tl. Prot. Agency*, 882 F.2d 1294, 1299 (9th Cir. 1989) (“Even though a federal agency may be acting under a different statute, the agency must still comply with the ESA.”); *Water Watch of Oregon v. U.S. Army Corps of Engineers*, 2000 WL 1100059 (D. Or. June 7, 2000) (holding reopener provisions in pre-ESA contracts that enable agency to renegotiate terms trigger consultation requirement); *Wash. Toxics Coal. v. Env'tl. Prot. Agency*, 2002 WL 34213031, at \*3 (W.D. Wash. July 2, 2002) (“When Congress vests an agency with responsibility for administering a statute . . . the ESA nevertheless applies to agency actions taken pursuant to that statute.”). NFIP implementation easily fits within the scope of the term. *NWF v. FEMA*, 345 F.Supp.2d at 1173–74 (holding that mapping, eligibility criteria and community rating system components of NFIP each constitute “agency action” within the meaning of Section 7). In addition, only discretionary agency actions are subject to Section 7 consultation. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928 (9th Cir. 2008) (holding Section 7 applied to federal operation of the hydropower system in the Columbia Basin because Congress imposed “broad mandates” to the federal agencies regarding dam management, “rather than directing the agency to take specific actions”). Through the NFIP, Congress imposed “broad mandates” on FEMA, “rather than directing the agency to take specific actions.” *See id.* Therefore, implementation of the NFIP easily fits within the ambit of “agency actions” subject to Section 7 consultation.

Just as FEMA’s implementation of the NFIP “may affect” listed salmonids in Puget Sound, implementation of the program “may affect” steelhead and chinook, coho, chum, and sockeye salmon in Oregon. *Id.* at 1176–77 (holding “FEMA’s implementation of the NFIP ‘may affect’ the Puget Sound chinook salmon, thus triggering the formal consultation requirement of Section 7(a)(2) of the ESA”). The threshold for such a determination is low. *See* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement . . . .”). As outlined above, urban development in Oregon is one of the chief causes of the decline of salmon and steelhead, and remains a serious threat to recovery. Congress enacted the NFIP, in part, in response to the unavailability of private insurance for floodplain development. 42 U.S.C. § 4002(a)(2) (“The availability of Federal loans, grants, guarantees, insurance and other forms of financial assistance are often determining factors in the utilization of land and the location and construction of public and of private industrial, commercial, and residential facilities.”).<sup>7</sup> Since loans and other financing for construction in floodplain areas is generally unavailable without flood insurance, FEMA’s provision of flood insurance is a major factor in land use decisions in floodplains. In short, FEMA’s implementation of the NFIP has the result of encouraging development in flood-prone areas, which are critically important to the protection and recovery of imperiled Pacific

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<sup>7</sup> In passing a separate law, the Coastal Barrier Resources Act, 55 U.S.C. §§ 3501–3510, Congress found that “certain actions and programs of the Federal Government have subsidized and permitted development on coastal barriers” at taxpayer expense. *Id.* § 3501(a)(4). The Act prohibited new federal expenditures, including federal flood insurance that would facilitate new development on coastal barriers. *See* 42 U.S.C. § 4028; Program Description, at 7.

salmon and steelhead, further degrading this habitat and hindering recovery. *See NWF v. FEMA*, 345 F.Supp.2d at 1176 (noting “development is ‘reasonably certain to occur’ as a result of [NFIP implementation]”); *see also Florida Key Deer v. Paulison*, 522 F.3d 1133, 1144 (11th Cir. 2008) (“FEMA has the authority in its administration of the NFIP to prevent the indirect effects of its issuance of flood insurance by, for example, tailoring the eligibility criteria that it develops to prevent jeopardy to listed species. Therefore, its administration of the NFIP is a relevant cause of jeopardy to listed species.”).

In fact, the Biological Opinion (Puget Sound BiOp) evaluating the effects of the NFIP in Puget Sound, which was prepared in accordance with the judicial order in *NWF v. FEMA*, determined that FEMA’s implementation of the program not only may affect listed salmonids in Puget Sound, but actually jeopardizes their continued existence. NMFS, Final Biological Opinion on the Implementation of the National Flood Insurance Program in the State of Washington: Phase One Document – Puget Sound Region 149 (Sept. 22, 2008) [hereinafter Puget Sound BiOp]. In the Puget Sound BiOp, “NMFS’s analysis during the consultation support[ed] the conclusion that FEMA’s activities do lead to floodplain development in Washington State, some of which affects the habitat of listed species.” *Id.* at 3. Moreover, an independent review of the NFIP concluded the “program encourages . . . the development and environmental transformation of wetlands and coastal areas, or that it does little to impede these impacts.” *Id.* at 4. The same is true in Oregon. Additionally, NMFS indicated that Phase Two of its two-part Washington BiOp will focus on the 13 listed salmonid species existing outside the Puget Sound region. *Id.* at 1. Many of these Washington ESUs also live in Oregon during their life cycles, including Upper Columbia River Spring Chinook, Snake River Spring/Summer Chinook, Snake River Fall Chinook, Lower Columbia River Chinook, Snake River sockeye, Columbia River Chum, Upper Columbia River steelhead, Middle Columbia River steelhead, Upper Columbia River steelhead, and Snake River steelhead. Just as FEMA has an obligation to consult on the effects of its implementation of NFIP on these listed salmonids in Washington, so, too, does it have an obligation to consult on the effects of the program just across the Columbia River in Oregon. Regrettably, despite a court order requiring FEMA to consult in Washington, the agency has elected to ignore the clear requirements of the ESA with regard to listed salmonids in Oregon.

Since FEMA’s ongoing implementation of the NFIP within Oregon is a federal agency action that may affect the listed salmonids, FEMA must remedy its continuing failure to comply with the ESA by immediately requesting consultation from NMFS. Until FEMA requests Section 7(a)(2) consultation on its ongoing implementation of the program, no activities may go forward under the NFIP, including those activities arising as a result of FEMA’s mapping, minimum floodplain management criteria, and the CRS. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056–57 (9th Cir. 1994) (“Only after the Forest Service complies with § 7(a)(2) can *any* activity that may affect the protected salmon go forward.” (emphasis added)). Once consultation has been initiated, activities under the NFIP may not go forward to the extent that an activity represents an “irreversible or irretrievable commitment of resources as prohibited by § 7(d).” *Id.* at 1057 n. 15; 16 U.S.C. § 1536(d) (“After initiation of consultation required under [§ 7(a)(2)], the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of

foreclosing the formulation or implementation of any reasonable and prudent alternative measures . . . .”). The Reasonable and Prudent Alternative found in the Puget Sound BiOp provides sound guidance to FEMA as to the types of activities and circumstances under which activities may go forward under the NFIP during consultation for species and habitat similar to those found in much of Oregon. *See* Puget Sound BiOp at 150–63.

Regarding the process through which the BiOp arises, the organizations listed above believe NMFS should employ a phased BiOp, like the one used in Washington State. Phase I should cover the NFIP’s impacts to salmonids in the Portland metropolitan area and the Lower Columbia, where the majority of development in salmonid critical habitat takes place. Phase II should encompass the remainder of Oregon.

If you would like to discuss the contents of this letter, or believe that anything contained herein is in error, please feel free to contact me at (503) 768-6707 or [rohlf@lclark.edu](mailto:rohlf@lclark.edu).

Sincerely,

Daniel J. Rohlf  
PEAC Director

Janet Napolitano *et al.*

March 18, 2009

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**APPENDIX A: List of NFIP Communities in Oregon**