



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

Washington, DC 20515

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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 NFIP¹ 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 2012² and amended by the Homeowner Flood Insurance Affordability Act of 2014³. 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 threatened, 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

Oregon: 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

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.

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
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The Honorable Denny Doyle, Mayor
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The Honorable Heather Carruthers, Commissioner
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Mr. Jon Chandler
Chief Executive Officer
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