



June 28, 2023

Via Electronic and Certified U.S. Mail

Gina Raimondo, Secretary
U.S. Department of Commerce
1401 Constitution Avenue N.W.
Washington, D.C. 20230
TheSec@doc.gov

Alejandro Mayorkas, Secretary
U.S. Department of Homeland Security
245 Murray Lane S.W.
Washington D.C. 20528
dhssecretary@hq.dhs.gov

Deanne Criswell, Administrator
Federal Emergency Management Agency
P.O. Box 10055
Hyattsville, MD 20782-8055
deanne.criswell@fema.dhs.gov

Science Kilner, Regional Env'tl. Officer
Federal Emergency Management Agency, Region 10
130 228th Street
SW Bothell, WA 98201
science.kilner@fema.dhs.gov

RE: Notice of Intent to Sue to Remedy Violations of the Endangered Species Act Regarding the Federal Emergency Management Agency's Implementation of the National Flood Insurance Program in Oregon

Dear Secretary Mayorkas, Administrator Criswell, and Officer Kilner,

In accordance with the 60-day notice requirement of the Endangered Species Act ("ESA")¹, the Center for Biological Diversity, Northwest Environmental Defense Center, Willamette Riverkeeper, and The Conservation Angler (collectively "Conservation Groups"), provide this notice of intent to sue the Federal Emergency Management Agency ("FEMA")

¹ 16 U.S.C. § 1540(g).

for its violations of the ESA relating to FEMA’s implementation of the National Flood Insurance Program (“NFIP”) in Oregon.

As detailed below, FEMA is violating the ESA by failing to implement the reasonable and prudent alternatives and measures outlined in the National Marine Fisheries Service’s (“NMFS”) 2016 Biological Opinion (“BiOp”), which found that FEMA’s implementation of the NFIP in Oregon jeopardizes seventeen ESA-listed, floodplain-dependent species and destroys or adversely modifies their critical habitat.² NMFS determined that only if FEMA makes significant changes to its implementation of the NFIP can the agency adhere to its duty to avoid jeopardy and adverse modification under Section 7 of the ESA and avoid the unlawful “take” of the threatened and endangered species. Seven years later, FEMA has not met the vast majority of the deadlines outlined in the BiOp and, accordingly, is in violation of its Incidental Take Statement and the ESA.

STATUTORY BACKGROUND

a. The Endangered Species Act

Enacted in 1973, the ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”³ The ESA provides a means to conserve the ecosystems upon which endangered and threatened species depend and a program to conserve listed species.⁴ To receive the full protections of the ESA, a species must first be listed by the Secretary of the Interior as “endangered” or “threatened” pursuant to ESA Section 4.⁵ The ESA defines an “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.”⁶ A “threatened species” is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”⁷

Section 7 of the ESA requires each federal agency, in consultation with a federal wildlife agency (in this case, NMFS) to ensure that any proposed federal action is not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of critical habitat.⁸ To “jeopardize the continued existence of” under the ESA means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”⁹

² National Marine Fisheries Service, Biological Opinion on the Implementation of the National Flood Insurance Program in the State of Oregon, NWR-2011-3197, 1 (April 14, 2016), <https://www.fisheries.noaa.gov/resource/document/biological-opinion-implementation-national-flood-insurance-program-state-oregon>, *hereinafter* “BiOp.”

³ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

⁴ 16 U.S.C. § 1531(b).

⁵ *See id.* § 1533.

⁶ *Id.* § 1532(6).

⁷ *Id.* § 1532(20).

⁸ *Id.* § 1536(a)(2).

⁹ 50 C.F.R. § 402.02.

When a listed species may be present in the action area and the proposed action may affect a listed species, the action agency must engage in formal consultation with NMFS.¹⁰

To comply with formal consultation regulatory requirements, NMFS evaluates both the current status of listed species as well as the effects of the proposed action and cumulative effects on the listed species.¹¹ Agencies are required to “use the best scientific and commercial data available” in assessing impacts to protected species during the consultation process.¹² Based on this information, NMFS must reach a “biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species”¹³

If NMFS finds that the proposed action will cause jeopardy to a listed species, NMFS provides the action agency with one or more “reasonable and prudent alternatives” (“RPAs”) that, if implemented, would prevent the action agency from violating Section 7(a)(2), as well as an “incidental take statement” (“ITS”).¹⁴ The ITS specifies the impact of the taking on the species, sets forth “reasonable and prudent measures” (“RPMs”) that the consulting agency considers necessary and appropriate to minimize the impact, and includes “terms and conditions” that the action agency must comply with to implement the measures.¹⁵ Only if the action agency adopts the RPAs, RPMs, and abides by the terms and conditions, or adopts alternative measures that accomplish the same intent as those proposed by the consulting agency, is the resulting incidental take exempted from Section 9 liability.¹⁶

b. The National Flood Insurance Program

The NFIP is a federal program administered by FEMA that enables property owners to acquire insurance for properties located in flood prone areas. Established in 1968 by the passage of the National Flood Insurance Act (“NFIA”), the purpose of the NFIP is to both provide affordable insurance and encourage sensible land use that minimizes the exposure of structures to flood damage.¹⁷ Congress enacted the NFIA because post-disaster flood losses, and the subsequent federal disaster relief assistance to help communities recover from those losses, had “placed an increasing burden on the Nation’s resources” and that, as a matter of national policy, “a reasonable method of sharing the risk of flood losses is through a program of flood insurance which can complement and encourage preventative and protective measures.”¹⁸ The NFIP has two interrelated policies that can be summarized as follows:

¹⁰ *Id.* § 402.14.

¹¹ *Id.* § 402.14(g)(2)-(3).

¹² 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

¹³ 50 C.F.R. § 402.14 (g)(4).

¹⁴ 16 U.S.C. § 1536(b)(4).

¹⁵ 16 U.S.C. § 1536(b)(4).

¹⁶ 16 U.S.C. § 1536(b)(4); 50 CFR § 402.14(i)(5).

¹⁷ 42 U.S.C. § 4001(a)-(e) (2018).

¹⁸ See 82 Stat. 573 for text in original statute (1392(a) of P.L. 90-448). This language remains in the statute at 42 U.S.C. § 4001(a).

1. To provide access to primary flood insurance, thereby allowing for the transfer of some financial risk of property owners to the federal government; and
2. To mitigate and reduce the nation's comprehensive flood risk through the development and implementation of floodplain management standards.¹⁹

The NFIP has been amended a number of times, most recently by the Biggert-Waters Flood Insurance Reform Act of 2012 (“BW-12”) and the Homeowner Flood Insurance Affordability Act of 2014. BW-12 authorized and funded the national mapping program and increased flood insurance rates to reflect the actual financial risk of flooding.²⁰ Aspects of the 2012 Amendments were reworked in 2014, including repeals of BW-12, which effectively put limits on insurance rate increases and updated mechanisms to ensure that there was a degree of fiscal strength in the program. While these changes were aimed at increasing the strength and efficacy of the NFIP, implementation continues to face challenges in meeting the objective goals of the program and overcoming rapidly changing ecosystems and weather patterns created by climate change.

To carry out the NFIP, FEMA is charged with, among other responsibilities: (1) developing comprehensive criteria for land use and management that constricts development of land exposed to flood risk (known as the minimum floodplain management criteria); (2) guiding development away from lands threatened by flood hazards; (3) assisting in reducing damage caused by floods; and (4) otherwise improving the long-range land management and use of flood-prone areas.²¹ FEMA dictates minimum floodplain management standards and identifies flood hazards by providing Flood Insurance Rate maps (“FIRMs”). FEMA develops these maps through its production of Flood Insurance Studies (“FISs”), which are nationwide studies that identify areas in the U.S. that have special flood, mudslide, and flood-related erosion hazards; assess flood risk; and designate insurance zones. FEMA then develops, in coordination with participating communities, FIRMs using the FISs that depict the community's flood risk. FEMA is largely responsible for the creation of the FIRM, and the community must adopt the map into its local or state law for the map to become effective.²²

Communities may avail themselves of NFIP insurance by becoming “participating communities,” which requires communities to adopt land-use regulations in accordance with NFIP standards—standards that are intended to encourage development in a manner that reduces flood damage to properties built within floodplains.²³ Property owners are eligible for federal flood insurance only if their community is enrolled in the program, and

¹⁹ Congressional Research Service, *Introduction to the National Flood Insurance Program (NFIP)*, at 1 (Updated January 2023).

²⁰ *Id.* at 3.

²¹ 42 U.S.C. 4102(c).

²² An area of specific focus in the FIRMs is the Special Flood Hazard Area (“SFHA”). The SFHA is intended to distinguish the flood risk zones that have a chance of flooding during a “1 in 100-year flood” or greater frequency. The FIRMs and subsequent identification of the SFHAs are significant because they help determine both flood insurance rates and whether flood insurance policies are mandatory.

²³ 42 U.S.C. § 4002(b).

once a community is certified for participation, the community is subject to ongoing oversight by FEMA to ensure compliance with NFIP standards.²⁴ Communities that receive NFIP funds are expected to adopt local land use ordinances to achieve NFIP's goal of minimizing flood exposure. While community participation is voluntary, FEMA is only permitted to provide flood insurance to communities that have adopted land use codes that reflect the minimum floodplain management criteria. If a locality does not adopt laws that reflect the minimum criteria, participation in the NFIP is barred. The NFIP also provides for a voluntary incentive program, or "community rating system" ("CRS"), that provides discounts in premium rates of up to 45% to communities that employ floodplain management practices that exceed the minimum requirements of the program.²⁵

As of December 2022, the NFIP had nearly 5 million flood insurance policies, accounting for over \$1.3 trillion in coverage.²⁶ Annually, the program collects roughly \$4.6 billion in revenue from policy holder premiums, fees, and surcharges.²⁷ Nationally, as of January 2023, over 22,000 communities in 56 states and jurisdictions participate in the NFIP.²⁸ In Oregon, as of March 2021, there were 24,900 NFIP policies in force.²⁹ The NFIP's annual financial losses are significant and increase as the frequency of severe storms increase; for instance, in 2014 the program lost \$380 million, and in 2017, due to hurricanes Harvey, Maria, and Irma, the program lost over \$10 billion.³⁰ Currently the NFIP is more than \$22.5 billion in debt and, as of September 30, 2022, had nearly \$6.3 billion in unpaid Loss & Loss Adjustment Claims.³¹ In 2022 American taxpayers paid over \$280 million in interest on that debt.³²

II. FACTUAL BACKGROUND

²⁴ 44 C.F.R. §§ 59.22, 59.24.

²⁵ FEMA, *Community Rating System*, Floodplain Management (April 11, 2023), <https://www.fema.gov/floodplain-management/community-rating-system#discounts>.

²⁶ FEMA, *The Watermark: National Flood Insurance Program Financial Statements*, Work with National Flood Insurance (March 6, 2023), <https://www.fema.gov/flood-insurance/work-with-nfip/watermark-financial-statements>. Financial statements for fiscal year 2022 are available at https://www.fema.gov/sites/default/files/documents/fema_watermark-q4-fy22.pdf, and additional statistics can be found on FEMA's website at <https://nfipservices.floodsmart.gov/reports-flood-insurance-data>.

²⁷ *Id.*

²⁸ FEMA, *Community Status Book*, Work with National Flood Insurance (March 17, 2022), <https://www.fema.gov/flood-insurance/work-with-nfip/community-status-book>.

²⁹ FEMA, *Risk Rating 2.0 State Profiles*, Risk Rating 2.0 (Jan. 18, 2022), <https://www.fema.gov/flood-insurance/risk-rating/profiles>. Oregon state's risk rating profile can be found at https://www.fema.gov/sites/default/files/documents/fema_oregon-state-profile_03-2021.pdf.

³⁰ FEMA, *NFIP Debt*, Tools for Practitioners (Nov. 4, 2022), <https://www.fema.gov/case-study/nfip-debt#:~:text=Since%20Hurricane%20Katrina%20devastated%20the,in%20interest%20on%20that%20debt>.

³¹ FEMA, *Risk Rating 2.0 State Profiles*, Risk Rating 2.0 (Jan. 18, 2022), <https://www.fema.gov/flood-insurance/risk-rating/profiles>. Oregon state's risk rating profile can be found at https://www.fema.gov/sites/default/files/documents/fema_oregon-state-profile_03-2021.pdf.

³² FEMA, *NFIP Debt*, Tools for Practitioners (Nov. 4, 2022), <https://www.fema.gov/case-study/nfip-debt#:~:text=Since%20Hurricane%20Katrina%20devastated%20the,in%20interest%20on%20that%20debt>.

a. The NFIP Promotes Floodplain Development

Despite the congressional intent behind the NFIP, in practice, and as courts have consistently found, the program actually *encourages* development of floodplains by, among other activities, allowing landowners to remove their flood-prone lands from FEMA's flood hazard maps to reduce their insurance needs via filling the floodplain.³³ Indeed, the Association of State Floodplain Managers has found that the development of floodplains is not simply an incidental effect of the NFIP, but that the program “anticipates and allows” this development.³⁴

In addition to directly facilitating development, FEMA also plays a “broad and deep role” in floodplain management generally by, for instance, establishing floodplain management criteria and practices, monitoring community compliance, adjusting insurance premiums under the CRS based on compliance, and “several other measures that directly affect how floodplains are managed.”³⁵ Additionally, because property owners rely on FEMA's maps to determine flood risk and because insurance is not mandated outside the FEMA-delineated floodplain zones (“Special Flood Hazard Areas”, or “SFHAs”), the program also urges development just outside of the SFHAs. This results in the development of floodplains that is unregulated by FEMA despite the risk of flooding being “only marginally less than their neighbors in the SFHA.”³⁶ And due to the arbitrary and often outdated nature of FEMA's SFHA mapping, some of these unregulated areas are at even *greater* risk of flooding than are the SFHAs.³⁷ Further, once development in a particular flood-prone area begins, more development tends to follow.³⁸

Providing insurance to those who would otherwise be unable to build in floodplains also puts vulnerable communities at risk, allowing tens of millions of people to live in areas at extreme risk of flooding, hurricanes, and losses due to sea level rise and other climate change impacts. The program has been described as “externaliz[ing] the risk associated with building while imposing the added social cost of foregone ecosystem services,” for “even

³³ See, e.g., *Fla. Key Deer v. Brown*, 364 F. Supp. 2d 1345 (S.D. Fla. 2005); *aff'd by Fla. Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008) (holding that FEMA's NFIP activities promote new floodplain development and are subject to ESA Section 7 consultation); *Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d 1151 (W.D. Wash. 2004) (same); *Ecological Rights Found. V. FEMA*, 384 F. Supp. 3d 1111 (N.D. Cal. 2019) (same).

³⁴ See Association of State Floodplain Managers, *Reducing flood losses: Is the 1% chance flood standard sufficient?* Report of the 2004 assembly of the Gilbert F. White National Flood Policy Forum, National Academies Keck Center, Washington D.C. (Sept. 2004) (explaining that the NFIP allows flood areas to be filled and developed resulting in floodplain encroachment and more severe flooding, and highlighting that FEMA's regulations allow “a building built on the encroachment to be flooded by up to 1.0 [foot]”).

³⁵ *Ecological Rights Found.*, 384 F. Supp. 3d at 1121.

³⁶ BiOp at 164.

³⁷ See *id.* (“The fact that approximately 35% of NFIP damage claims in Oregon occur outside of the SFHA suggests that development is occurring in areas that actually are within the 100-year floodplain, but were not mapped as such.”)

³⁸ BiOp at 142.

the best structural measures usually fail as sufficient substitutes for intact natural capital.”³⁹

b. The NFIP’s Impact on ESA-listed Species

The NFIP’s promotion of floodplain development harms ESA-listed species that depend on wetland, riparian, coastal, and other habitat that occurs in flood hazard zones, as floodplains are “hydrologically important, environmentally sensitive, and ecologically productive areas.”⁴⁰

ESA-listed species impacted by floodplain development in Oregon include Lower Columbia River Chinook salmon (*Oncorhynchus tshawytscha*), Upper Willamette River spring-run Chinook salmon (*O. tshawytscha*), Upper Columbia River spring-run Chinook Salmon (*O. tshawytscha*), Snake River spring/summer-run Chinook salmon (*O. tshawytscha*), Snake River fall-run Chinook salmon (*O. tshawytscha*), Columbia River chum salmon (*O. keta*), Lower Columbia River coho salmon (*O. kisutch*), Oregon Coast coho salmon (*O. kisutch*), Southern Oregon/Northern California Coast coho salmon (*O. kisutch*), Snake River sockeye salmon (*O. nerka*), Lower Columbia River steelhead (*O. mykiss*), Upper Willamette River steelhead (*O. mykiss*), Middle Columbia River steelhead (*O. mykiss*), Upper Columbia River steelhead (*O. mykiss*), Snake River Basin steelhead (*O. mykiss*), Southern green sturgeon (*Acipenser medirostris*), Southern eulachon (*Thaleichthys pacificus*), and the salmonid-dependent Southern resident killer whale (*Orcinus orca*) (“orcas”).

The effects of floodplain development on these and other floodplain-dependent species are wide-ranging. For instance, modifications of the floodplain that reduce the frequency of inundation limit fish access to crucial floodplain habitat. The removal of floodplain forests and the confinement of channels also creates connectivity issues. Lack of floodplain connectivity has negative impacts on nutrient cycling, system productivity, and biodiversity, resulting in a loss of functionality of the floodplain processes that create and maintain salmonid habitat. Development of the floodplain also destroys natural erosion processes and has dramatically altered the hydrology of Oregon’s riparian areas by interrupting natural water flows and reducing groundwater elevation.

Floodplain development also eliminates wetlands, wetland and riparian vegetation, and limits channel dynamics—even relatively small increases in floodplain development “could cause channel instability and should be avoided by limiting floodplain encroachment and providing adequate landscape measures and stormwater management strategies.”⁴¹ Further, where urbanization influences the watershed, point source and non-point source pollution—including from sediment, pesticides, herbicides, fertilizers, gasoline, and other

³⁹ K.J. Bagstad et al., *Taxes, Subsidies, and Insurance as Drivers of United States Coastal Development*, 63 *ECOLOGICAL ECON.* 285, 288 (2007).

⁴⁰ *Ecological Rights Found.*, 384 F. Supp. 3d at 1121.

⁴¹ JV Ward et. al., *Biodiversity of Floodplain River Ecosystems: ecotones and connectivity* (1999), available at <https://onlinelibrary.wiley.com/doi/abs/10.1002/%28SICI%291099-1646%28199901/06%2915%3A1/3%3C125%3A%3AAID-RRR523%3E3.0.CO%3B2-E>.

contaminants—causes a cascade of effects by destroying the aquatic life relied upon by salmon (which in turn serve as a food base for orcas).

Floodplain encroachment affects the entire riverine ecosystem, as it confines and channelizes rivers, transforming complex aquatic habitat into simplified channels incapable of supporting native species that rely on diverse habitat features for food, shelter, and reproduction. Filling floodplains is particularly harmful because it converts seasonally aquatic areas into uplands, displacing floodwater to areas occupied by roads, homes, and businesses. Floodplain encroachment occurs not only by filling floodplains, but also by placing structures in areas that are relied upon by fish species during periods of inundation.

For these and other reasons, the floodplain development incentivized by the NFIP, and which would not occur but for it, harms species and destroys the ecological functionality of wetland, riparian, and coastal areas.

c. Previous Litigation

In 2009, the Northwest Environmental Defense Center, Audubon Society of Portland, National Wildlife Federation, and Association of Northwest Steelheaders sued FEMA for the agency's failure to consult with NMFS on the impacts of the NFIP's implementation in Oregon on the above-mentioned ESA-listed species in violation of Section 7 of the ESA. In July 2010, the parties reached a settlement agreement that required, in part, that FEMA request formal consultation on three aspects of the NFIP: (1) implementation of 42 U.S.C. 4102(c), which requires FEMA to use land use criteria to reduce development in flood-prone areas; (2) mapping of floodplains and revisions thereof under 42 U.S.C. 4101(a)(1); and (3), the implementation of the Community Rating System pursuant to 42 U.S.C. 4022(b)(1). In August 2012, FEMA and NMFS began formal consultation. The resulting biological opinion ("BiOp") was released on April 14, 2016.

d. The 2016 BiOp

NMFS concluded in its 2016 BiOp that FEMA's continued implementation of the NFIP in Oregon was likely to jeopardize the continued existence of seventeen ESA-listed anadromous fish species and orcas and would result in the destruction or adverse modification of designated or proposed critical habitat for the fish species.⁴²

The BiOp focused on three elements of the agency's NFIP implementation: (1) regulatory floodplain management criteria, (2) floodplain mapping, and (3) the CRS program. The BiOp concluded that:

The NFIP, through the three described discretionary elements, leads to development in the floodplain environment. The reduction in floodplain habitat function is constant, incremental, permanent, and self-

⁴² BiOp at 1. Jeopardy opinions are extremely rare and demonstrate highly consequential ESA violations.

propagating. Once development occurs in an area, subsequent development follows.⁴³

NMFS further identified several particular “weaknesses” in the NFIP that render the program “likely to increase mortality and decrease fitness of anadromous fishes that occupy floodplains and the adjacent stream or river,” and concluded that “FEMA’s [implementation of the NFIP] does not provide the necessary assurances that [its effects] will not appreciably reduce the likelihood of both the survival and recovery of the affected species.”⁴⁴ The BiOp specifically found that:

The effects of development on in-channel areas include: reduced channel length and area, reduced habitat complexity, reduced prey availability and modified food web, modified hydrology, increased peak flow volumes and velocities, decreased low flow volumes, reduced cover, reduced bank stability, increased erosion, increased suspended sediment and turbidity, modified sediment loads, reduced levels of large wood, increased pollution, increased water temperature, decreased dissolved oxygen, increased bed coarsening, increased substrate embeddedness, increased risk of downstream fish displacement, increased risk of egg scour, increased predation, and modified salinity gradients in tidally influenced reaches. The effects of development on off-channel areas include: reduced habitat complexity, reduced cover, reduced access to small tributary and off-channel areas, increased exposure to pollution, reduced prey availability, reduced refuge from high velocities, reduced refuge from high water temperatures, and increased risk of entrapment and impingement.”⁴⁵

Given that FEMA’s operation of the NFIP in Oregon was found to jeopardize listed species and adversely modify their critical habitat, NMFS provided a RPA that, if employed, would result in FEMA’s ability to implement the NFIP without violating the ESA.

The RPA is composed of six elements:

1. Notice, education, and outreach to NFIP participating communities in Oregon regarding the outcome of FEMA’s consultation with NMFS on the implementation of the NFIP in Oregon.
2. Interim measures that FEMA and its NFIP participating communities can promptly implement to reduce the impacts of floodplain development on natural floodplain functions needed to support listed species. These interim measures are to be implemented during the 8.5-year time frame anticipated for FEMA to complete the mapping updates and implement the modifications to the NFIP’s minimum criteria and reporting requirements identified in elements 2 through 5 of the RPA.

⁴³ BiOp at 142.

⁴⁴ BiOp at 142.

⁴⁵ BiOp at 140-41.

3. Revised mapping protocols to improve the identification of special hazard areas, including channel migration zones and areas of future risk.
4. Revised floodplain management criteria to provide greater certainty that the impacts of development in areas of high hazard will be avoided, minimized, and mitigated to protect natural floodplain functions.
5. Data collection and reporting requirements needed to accurately track floodplain development impacts and RPA implementation.
6. Compliance and enforcement strategies to ensure that effects of floodplain development pursuant to the NFIP are avoided or reduced throughout the action area.⁴⁶

NMFS emphasized that these “measures [were] identified as necessary to ensure that the NFIP avoids jeopardy to listed species and avoids destruction and adverse modification of critical habitat for those species.”⁴⁷ NMFS also stressed the importance of RPA Element 2 (“RPA 2”), which NMFS anticipated would be implemented “as soon as possible” to “ensure that existing natural floodplain functions are maintained pending full RPA implementation.”⁴⁸

The BiOp also included a series of deadlines for implementation of the RPAs. RPA 2’s interim measures were to be in effect by March 15, 2018, and measures pertaining to RPA 4 were to be in effect by January 1, 2019. NMFS contemplated that there would be a level of trial and error necessary to facilitate effective implementation and accounted for time to make regulatory revisions. Accordingly, full implementation was to be achieved by January 1, 2021.

Given that FEMA’s implementation of the NFIP in Oregon results in the incidental take of listed species, NMFS issued an ITS. That ITS, in turn, assumed that FEMA would implement the RPA laid out in the BiOp. NMFS explained that “while changes to the implementation of the NFIP in Oregon made by the RPA will allow implementation while no longer jeopardizing those ESA-listed species or destroying or adversely modifying their designated critical habitat,” “it will not wholly avoid take.”⁴⁹ NMFS asserted that take to the anadromous fish species would still occur after the RPA was fully implemented, but to an extent not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat. The ITS also included RPMs and terms and conditions that consisted of reporting requirements relating to FEMA’s implementation of the RPA. Notably, the ITS did *not* cover orcas, for NMFS concluded that implementation of RPA 2 would negate a significant amount of harm the NFIP causes to Chinook salmon, the orca’s main prey base.

Pursuant to Section 7(a)(1), NMFS also issued conservation recommendations for FEMA to take, including strengthening regulatory foundations for ESA compliance,

⁴⁶ BiOp at 274-75.

⁴⁷ BiOp at 277.

⁴⁸ BiOp at 278.

⁴⁹ BiOp at 314.

improving levee habitat quality, making CRS modifications to protect natural floodplain functions in part by incentivizing communities to take greater protective steps, and establishing minimum lot size for flood hazard areas.

e. The Continued Decline of Oregon’s Floodplain-Dependent Species

Since NMFS’ production of the 2016 BiOp, the seventeen ESA-listed species impacted by FEMA’s implementation of the NFIP have continued to decline, and their habitats have continued to degrade. For instance, NMFS’ 2022 5-year review for the Lower Columbia River coho salmon indicated that its populations have further declined since 2016, and any improvements “have been slight, and [are] overshadowed by declines in abundance and productivity.”⁵⁰ Similarly, the considerable declines in Upper Columbia River steelhead have “largely eras[ed] gains observed over the past two decades for all four populations.”⁵¹ The Snake River spring/summer run Chinook salmon populations have likewise suffered sharp declines, and most are at “high overall risk” for extinction; declines range from 9-96%, and four of the 31 populations have been extirpated.⁵² The Snake River sockeye salmon is predicted to go extinct in the near future—its numbers have declined from 137 to just 16 fish, a decline of 84%.⁵³ Orcas also remain on a path to extinction. Their remarkably low numbers have declined even further since the 2016 BiOp was produced, and as of 2022 just 73 individuals remained, down from 81 individuals.⁵⁴

f. Deadline Extensions and FEMA’s Inaction

In 2018, Congress enacted a three-year deadline extension for FEMA to implement the BiOp.⁵⁵ Consequently, the deadline to implement RPA 2’s interim measures became March 15, 2022, with full implementation (including any necessary regulatory revisions), occurring by January 1, 2024. However, despite having an additional three years to bring the implementation of the NFIP in Oregon into compliance with the ESA, FEMA has yet to implement RPA 2 and it is obvious that the agency will not meet the January 2024 deadline for the remaining RPA measures.

Instead, the agency has spent its time on unnecessary administrative activities that have served only to delay implementation of the RPA, including by spending several years producing a sparse “Draft Implementation Plan for NFIP-ESA Integration,”⁵⁶ then waiting an additional one and a half years to begin a National Environmental Policy Act (“NEPA”) review process for that plan.⁵⁷ FEMA’s insistence on going through a NEPA process—which

⁵⁰ National Marine Fisheries Service, NOAA Technical Memorandum NMFS-NWFSC-171, Biological Viability Assessment Update for Pacific Salmon and Steelhead Listed Under the Endangered Species Act, 143 (Jan. 2022), <https://doi.org/10.25923/kq2n-ke70>.

⁵¹ *Id.* at 33.

⁵² *Id.* at 49.

⁵³ *Id.* at 64.

⁵⁴ *Southern Resident Orcas*, Oceana (2022), <https://usa.oceana.org/responsible-fishing-southern-resident-orcas/>.

⁵⁵ Disaster Recovery Reform Act of 2018, Pub. L. No. 115-254, §1246, 132 Stat. 3185, 3469 (2018).

⁵⁶ Federal Emergency Management Agency, Draft Oregon Implementation Plan for NFIP-ESA Integration (Oct. 2021).

⁵⁷ The plan is currently in the earliest phase of NEPA review, the “scoping” period. FEMA held a full 60-day comment period to receive public input, then, on May 25, 2023, inexplicably *extended* this comment period an additional 32 days, injecting further delay into the process. *See* FEMA, *National*

will likely take *several* additional years to complete—before implementing the science-based, environmentally-reviewed RPA represents a curious change in position given that the agency did not conduct NEPA review before implementing BiOp-mandated measures in other states. As FEMA continues to prolong full implementation of the RPA, Oregon’s floodplains and the species that depend on them continue to be imperiled by FEMA’s implementation of the NFIP.

III. LEGAL VIOLATIONS

a. FEMA is Violating Section 7 of the ESA by Causing Jeopardy and Destruction or Adverse Modification of Critical Habitat to ESA-Listed Species in Oregon.

The ESA prohibits agencies from jeopardizing the continued existence of listed species, adversely modifying their critical habitat, and causing “take” of listed species.⁵⁸ Section 7(a)(2) of the ESA directs federal agencies to consult with the Services to provide them with expert advice in ensuring that their actions do not violate these provisions. However, FEMA implemented the NFIP in Oregon without giving any consideration to its procedural and substantive obligations under the ESA for over four decades. The agency only consulted on the effects of its activities on listed species and their critical habitat because conservation groups filed suit. Once consultation was finally complete, NMFS issued a jeopardy opinion, finding that FEMA’s implementation of the NFIP encourages and facilitates floodplain development that jeopardizes the continued existence of seventeen ESA-listed species and destroys or adversely modifies the habitat of sixteen of those species.⁵⁹

The RPA contained in the BiOp was intended to allow for FEMA’s operation of the NFIP in Oregon while avoiding impacts to listed species that jeopardize the continuous existence of those species as well as adversely modify their critical habitat. FEMA’s failure to implement the vast majority of the RPA—despite having seven years to do so—means that the effects of the agency’s actions are largely the same, or worse, as when the BiOp was produced. Instead of taking meaningful action to reduce the jeopardy the agency is causing to salmonids and orcas, as well as ongoing harm to their critical habitat, FEMA has delayed implementation of the RPA at every turn.

Indeed, the deadline for the implementation of RPA 2’s interim measures—which, in 2016, NMFS mandated that FEMA employ “promptly”⁶⁰—has passed by more than a year, and it is clear that FEMA is not on track to have the remaining RPA elements deployed by January 1, 2024. As a result, FEMA’s implementation of the NFIP, which the BiOp determined causes jeopardy and destruction or adverse modification of critical habitat to the ESA-listed species, violates the ESA. The seventeen ESA-listed species addressed in the BiOp continue to be harmed by FEMA’s implementation of the NFIP, and their habitat continues to be destroyed and degraded. Continued operation of the NFIP in Oregon absent FEMA’s employment of the RPA or an alternative to the RPA that accomplishes the same intent is unlawful. These substantive violations of ESA Section 7 require FEMA to

Flood Insurance Program – Endangered Species Act Integration in Oregon, Oregon (May 25, 2023), <https://www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration>.

⁵⁸ 16 U.S.C. §§ 1536(a)(2), 1538.

⁵⁹ BiOp at 273-74.

⁶⁰ BiOp at 274.

immediately and dramatically alter its implementation of the NFIP to reduce adverse impacts to the ESA-listed species and their critical habitat, or to cease providing federal flood insurance within the range of affected salmonids.⁶¹

b. FEMA is Violating Section 9 of the ESA because It is Causing Illegal Take of Salmonids Through Its Implementation of the NFIP in Oregon.

In 2016, NMFS determined that FEMA's implementation of the NFIP in Oregon jeopardizes seventeen ESA-listed species and subsequently issued an ITS. The ITS assumed full implementation of the RPA and specified that take would occur even once the RPA was implemented, but to an extent not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat. FEMA's failure to implement a vast majority of the RPA means that FEMA's implementation of the NFIP in Oregon is causing take that exceeds the ITS. Accordingly, the agency's activities are causing illegal take of salmonids and orcas in violation of Section 9.

CONCLUSION

This letter provides the 60 days' notice required under the ESA of the Conservation Groups' intent to sue FEMA for violations of the ESA unless FEMA agrees to immediately begin implementing the RPA. We are interested in discussing ways to resolve these issues without litigation, to achieve protections for Oregon's anadromous fishes and orcas in the most efficient and expeditious manner possible. Please don't hesitate to contact us if you wish to discuss this matter further.

Sincerely,

Chelsea Stewart-Fusek, Attorney
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
cstewartfusek@biologicaldiversity.org

Lindsey Hutchison, Staff Attorney
Willamette Riverkeeper
1210 Center St.
Oregon City, OR 97045
lindsey@willametteriverkeeper.org

Mary Stites, Attorney
Northwest Environmental Defense Center
10101 S. Terwilliger Boulevard
Portland, OR 97219
mary@nedc.org

Rob Kirschner, Legal and Policy Director
The Conservation Angler
P.O. Box 13121
Portland, OR 97213
rob@theconservationangler.org

⁶¹ Further, the duty to avoid jeopardy and take of the species and adverse modification of critical habitat continues during the consultation process should FEMA reinstate consultation. Accordingly, should FEMA and NMFS reinstate consultation here, FEMA must still implement measures that at the very least accomplish the intent of RPA 2 in the interim; section 7(d) of the ESA prohibits federal agencies from making irreversible and irretrievable resource commitments during the consultation process that have "the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)." 16 U.S.C. 1536(d). Since NMFS has already specified measures FEMA must take to avoid 7(a)(2) violations, the agency must at a minimum implement measures consistent with RPA 2 during a reinstated consultation. Its failure to do so would be an additional violation of the ESA.

Copies Sent via Certified U.S. Mail to:

Secretary Gina Raimondo
U.S. Department of Commerce
1401 Constitution Avenue N.W.
Washington, D.C. 20230

Secretary Alejandro Mayorkas
U.S. Department of Homeland Security
245 Murray Lane S.W.
Washington D.C. 20528

Administrator Deanne Criswell
Federal Emergency Management Agency
P.O. Box 10055
Hyattsville, MD 20782-8055
deanne.criswell@fema.dhs.gov

Regional Env'tl. Officer Science Kilner
Federal Emergency Management Agency, Region 10
130 228th Street
SW Bothell, WA 98201