

October 18, 2024



# Oregonians for Floodplain Protection

Oregon NFIP Biological Opinion,  
FEMA's Pre-Implementation Plan, and  
Impacts to Communities and Property  
Owners







# Background on Oregon NFIP Biological Opinion

- In 2009, FEMA was sued by several environmental groups in Oregon for failing to consider the effects of the NFIP on ESA listed species and their habitat in Oregon
- In 2010, FEMA settled; agreed to consult regarding the effects of the NFIP in Oregon on T&E species and designated critical habitat
- In April 2016, NMFS issued the Oregon NFIP Biological Opinion (BiOp)
- The BiOp concluded FEMA's implementation of the NFIP in Oregon jeopardizes the continued existence of T&E species and adversely modifies designated critical habitat





# Oregon NFIP BiOp (April 2016)

- BiOp includes a six element “Reasonable and Prudent Alternative” (RPA)
- RPA = NMFS’s roadmap to FEMA about how to change its implementation of the NFIP to avoid violating the ESA
- RPA is one option available to FEMA; FEMA may take an alternative course of action if it also avoids jeopardy and adverse modification
- Original deadline for RPAs 1 and 2 (not requiring regulatory change) in response to the BiOp was 2016 and 2018 respectively
- Additional deadlines for other RPAs continued through 2021 (FEMA says 2024)
- Congress, through Representative DeFazio, extended implementation period three years

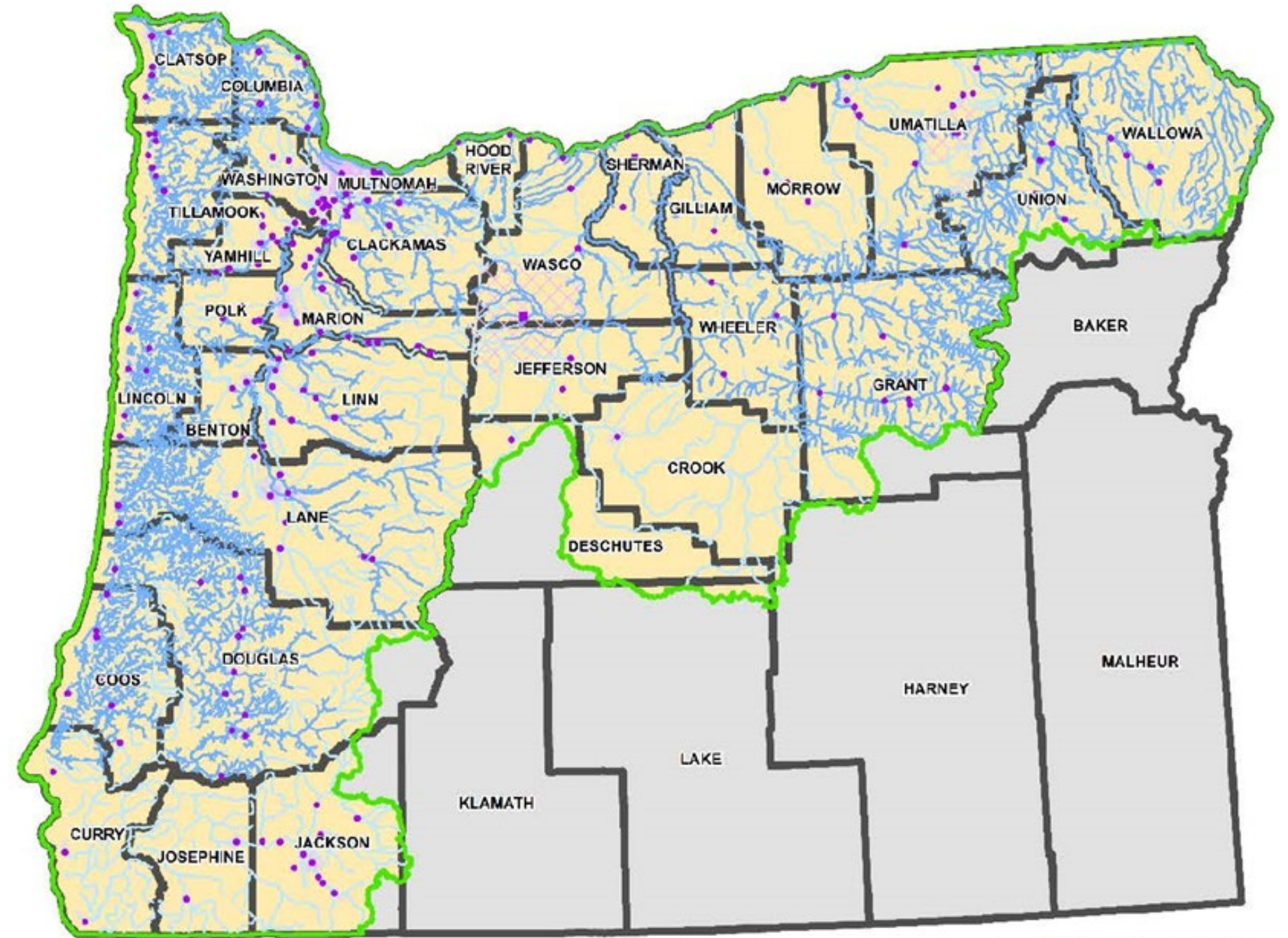






# Areas Subject to Oregon NFIP BiOp

- Applies within 31 of Oregon's 36 counties
- Applies to more than 230 NFIP-participating communities (counties, cities and towns)



1 in = 60 miles 1:3,801,600

## OREGON NFIP BIOP ACTION AREA

2021.09.28

### LEGEND

- OREGON NFIP ACTION AREA
- CRITICAL HABITATS (SALMON/STEELHEAD)\*
- MAJOR STREAMS
- COUNTIES
- NFIP PARTICIPATING TRIBES
- NFIP PARTICIPATING COMMUNITIES

### ABOUT

This map displays the Oregon NFIP BIOP Action Area where critical habitats for salmon and steelhead (and areas upstream of those habitats) are displayed in relation to NFIP participating tribes and jurisdictions. Most NFIP-participating communities within Oregon have all or a portion of land within the BiOp Action Area, with the exception of Baker, Harney, Klamath, Lake, and Malheur Counties.

\*Critical Habitats are via NOAA Fisheries: <https://www.fisheries.ncaa.gov/resource/map/critical-habitat-salmon-and-steelhead-all-west-coast>





# OFP's First Lawsuit Challenging BiOp and FEMA's implementation

In 2017, OFP filed suit in the DC District Court challenging:

- The accuracy/legality of the BiOp itself => BiOp does **not** comply with the requirements of the ESA
- The legality of the RPA => RPAs do **not** meet the requirements of the ESA
- FEMA's authority to implement the RPA =>
  - Nothing in the NFIP authorizes FEMA to act to protect T&E species and habitat; only people and property; and
  - Even if such authority did exist, FEMA has not adopted regulations that enable it to implement the RPA or other measures aimed at protecting T&E species or habitat
- FEMA failed to complete NEPA regarding any proposed action to implement the RPA or other measures







# OFP's First Lawsuit Challenging BiOp and FEMA's implementation

- Lawsuit dismissed in 2018 on the grounds that:
  - OFP members could not demonstrate an injury in fact since FEMA had not taken any action to implement the BiOp/RPA; and
  - FEMA had not taken any action yet so the claim was not ripe
- FEMA represented to the court and OFP that it would not take any action toward implementing the RPA or other measures until after FEMA had completed NEPA environmental review and issued a Record of Decision (ROD).







# FEMA's Draft Implementation Plan

- In October 2021, FEMA issued its Draft Implementation Plan
- Draft Plan varies from RPA and focuses on preserving and restoring three main floodplain functions:
  - Flood storage => limit new fill or require compensatory flood storage to offset any new fill
  - Water Quality => limit new impervious surface and heightened stormwater requirements (LID and non-structural approaches)
  - Riparian Vegetation => restrict removal within 170-feet of a water feature
- Draft Plan includes direction to avoid new non-water dependent development in the floodplain
  - Restricts future land divisions in floodplain
  - Allowance for one unit per existing parcel to avoid takings claims provided the development preserves three floodplain functions



# FEMA's Draft Implementation Plan

- In March 2023, FEMA began the NEPA process to evaluate the impacts of its Draft Plan.
- FEMA elected to prepare an EIS recognizing that the impacts of its Plan are likely significant to NFIP-participating jurisdictions and floodplain property owners.
- FEMA's schedule for balance of EIS has slipped
  - Original plan:
    - Draft EIS – Summer 2024
    - Final EIS/ROD – Spring 2025
    - Community Implementation – beginning Fall 2025 with 18 month roll out
  - Revised plan:
    - Draft EIS – “early 2025”
    - Planning 75-day comment/public outreach period
    - Final EIS and ROD expected in 2026
    - Full community implementation expected by 2027
- Find FEMA's Quarterly updates at:
  - [www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration](https://www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration)





# Key Concerns with FEMA's Approach

- Consultation between FEMA and NMFS – but resulting requirements imposed on state and local governments
- No regulatory basis for the proposed requirements; FEMA has declined to go through rulemaking
- FEMA eager to shift the burden to local governments irrespective of whether the new standards work with existing Oregon policies and laws
- Unclear whether NMFS will accept FEMA's Implementation Plan
- Communities who decline to adopt the new standards will be removed from the NFIP. Result:
  - NFIP flood insurance no longer available
  - Community will not qualify for federal disaster assistance
  - Community will not qualify for federal funding for projects in the FEMA floodplain







# FEMA's "Pre-Implementation Compliance Measures"

- In response to pressure from lawsuit filed by the Northwest Environmental Defense Center and the Center for Biological Diversity, **FEMA has abandoned its prior commitment to complete EIS before implementing any changes.**
- FEMA has stated that NFIP participating communities in Oregon must select a PICM option by Dec. 1, 2024. The options include:
  - Adopting a model ordinance that considers impacts to T&E species and their habitat and requires mitigation to a "no net loss standard,"
  - Choosing to require a habitat assessment and mitigation plan for floodplain development on a permit-by-permit basis, or
  - Prohibiting floodplain development in the Special Flood Hazard Area.
- Communities must begin collecting information on their floodplain permitting to document compliance beginning Jan. 31, 2025.







# FEMA's Pre-Implementation Measures

- Additionally, as of August 1, 2024, FEMA stopped processing new applications for Letters of Map Revision based on Fill (LOMR-F) and Conditional Letters of Map Revision based on Fill (CLOMR-F)
  - This will impact owners who seek to have their properties removed from the SFHA after placing fill on a lot to raise the building pad above BFE
  - Exception for projects that are undergoing ESA Section 7 consultation due to a federal nexus (non-FEMA federal permit/authorization or funding)







# FEMA's Pre-Implementation Measures

## Key Components of the FEMA's Model Ordinance

- “No Net Loss” standard. Includes:
  - No Net New Fill in areas of the floodplain that could be fish habitat
  - No Net New Impervious Surface in the floodplain
    - If no net increase in impervious surface is “not feasible,” impose restrictive stormwater management standards (e.g., LID, green infrastructure, or professional stormwater retention)
  - No Net Loss of trees 6” dbh or larger in the floodplain
- Exceptions: Normal maintenance of roads, utilities, levees and other structures (e.g., re-roofing or replacing siding), routine agricultural and silviculture practices. Exception does not include expansion of paved areas.







# Major Concerns with FEMA's PICMs

- The BiOp itself remains invalid and should not be implemented
- PICMs exceed FEMA's legal authority and address issues outside the scope of the NFIP
- By implementing the PICMs before completing environmental review under NEPA, FEMA is violating federal law and its commitment to Oregon's NFIP-participating communities
- FEMA is implementing the PICMs without first evaluating their environmental consequences or hearing from the public or NFIP-participating communities
- PICMs were announced with no warning and no involvement from State or local jurisdictions
- Any of the PICM options will be devastating to housing production, economic development, critical infrastructure and other community development in the floodplain
- FEMA's model ordinance is untested and difficult to implement
- Smaller communities with fewer resources will prohibit all new development in the floodplain in the near term, compromising the vitality of those communities







# Cities' Options in the face of FEMA's PICMs

- Comply with FEMA's call for action by implementing one of the PICMs
- Respond that you are considering your options, but do not believe that FEMA has authority to require implementation of the PICMs. Default into permit-by-permit habitat assessment approach.
- Respond that you are considering your options, but are awaiting the results of the Environmental Impact Statement before making a decision. Default into permit-by-permit habitat assessment approach.







# Cities' Options in the face of FEMA's PICMs – cont'd

## From FEMA's PICM Fact Sheet:

What if a community's adoption process timeline does not allow us to meet the December 1<sup>st</sup> deadline for implementing a PICM?

While FEMA recognizes that the time it takes to implement a PICM varies by community, there is still an obligation to abide by ESA requirements. If a community cannot implement a PICM by the December 1<sup>st</sup> deadline, **FEMA will work with the community to consider alternative options to remain compliant with the ESA requirements in the interim.**

What penalties are communities looking at if they cannot meet the December deadline?

Communities will default to the permit-by-permit option if no selection was given to FEMA by December 1<sup>st</sup>. If FEMA does not hear from a community, the agency will contact them to identify what technical assistance is needed to implement PICM. **If a community has no PICM implemented by July 31<sup>st</sup>, 2025, FEMA will prioritize an audit of floodplain development activities that occurred in the community, specifically focused on the PICM time-period to assess what has occurred and any mitigation that would have been required for development that occurred.**







## Cities' Options in the face of FEMA's PICMs – cont'd

- FEMA has explained that they will not request documentation of compliance for communities that select the permit-by-permit approach ***until January 2026***.
- For communities that do not implement a PICM, FEMA's plan is to begin the standard Community Assistance Visit/Community Assistance Contact approach.
- **BOTTOM LINE: While FEMA is using strong language (saber rattle), the consequences of taking a slow approach (wait and see) presents a **LOW RISK\*** to local jurisdictions.**

*\* Of course, I am not currently your attorney, but this is what I am telling my clients based on extensive discussions with FEMA and review of FEMA's materials.*







# | 44 CFR 60.3(a)(2) does NOT require jurisdictions to implement the PICMs.

- NFIP-participating communities must adopt floodplain development standards at least as restrictive as those set forth at 44 CFR 60.3
- FEMA has cited 44 CFR 60.3(a)(2) as the legal basis for requiring compliance with the PICM
- *But* 44 CFR 60.3(a)(2) provides only that local governments “assure that all necessary **permits** have been received from those governmental agencies from which approval is **required** by Federal or State law”
- *No basis in the regulations for requiring implementation of the PICMs – and FEMA knows that but they are hoping NFIP-participating jurisdictions will comply*







# Coalition and Renewed Challenge

## **NFIP-participating communities may also join with OFP in a renewed challenge to the BiOp and FEMA's implementation efforts**

Dozens of public and private sector entities have formed the [Oregonians for Floodplain Protection](http://www.floodplainprotection.org) coalition to assist coalition partners in

- Engaging with federal and state elected leaders,
- Supporting NFIP participating jurisdictions in responding to FEMA,
- Increasing awareness among property owners and members of the public, and
- Evaluating options for challenging the NFIP BiOp and FEMA's implementation efforts

Learn more at [www.floodplainprotection.org](http://www.floodplainprotection.org)







# Have questions or want more information?

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