

OREGON FLOODPLAIN REGULATION IN FLUX

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OAPA Legal Issues Workshop

Friday, December 2, 2016

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WHAT ARE THE QUESTIONS?

- Is FEMA required to consult under Section 7(a)(2) of the Endangered Species Act for its implementation of the National Flood Insurance Program?
- What can FEMA do under the NFIP for the benefit of threatened and endangered species?

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A LONG-SIMMERING ISSUE

- In 1984, the U.S. Fish and Wildlife Service concluded that FEMA's administration of the NFIP potentially jeopardized the existence of the endangered Florida Key deer.
- It took FEMA 5 years to refuse the FWS's request that FEMA consult under Section 7.

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ENDANGERED SPECIES ACT 101

- Section 9
 - Prohibits "take" of endangered species (and many threatened species).
 - "Take" means "Harass, harm, pursue, hunt, shoot, kill, trap, capture or collect, or attempt to [do so]."

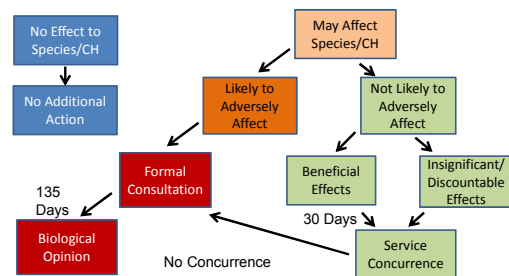
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ENDANGERED SPECIES ACT 101 (CON'T)

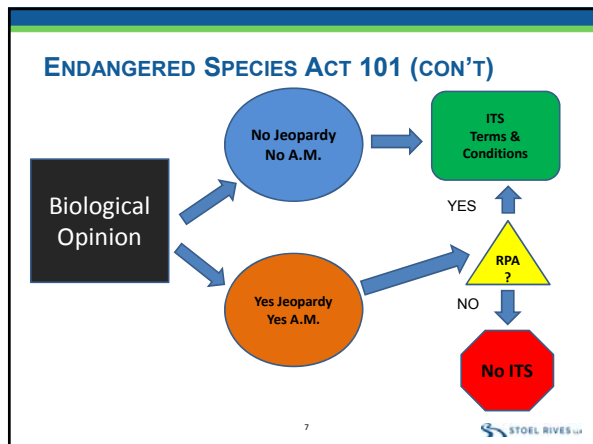
- Section 7
 - Each federal agency "shall," in consultation with NMFS or FWS, "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat]."

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ENDANGERED SPECIES ACT 101 (CON'T)




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- ### A LONG-SIMMERING ISSUE (CON'T)
- In 1990 environmental groups sued FEMA and FWS in Florida for failure to consult, and in 2003 environmental groups sued FEMA and the National Marine Fisheries Service in Washington for failure to consult on implementation of the NFIP in the Puget Sound area.
 - In 2004 and 2005 Washington and Florida federal district courts ruled against FEMA and said it must consult.
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- ### PUGET SOUND BIOP CHALLENGE
- In 2008 NMFS issued a Biological Opinion on FEMA's implementation of the NFIP in the Puget Sound area that includes "reasonable and prudent alternatives" for FEMA to implement to avoid jeopardizing listed fish.
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- ### OREGON BIOP CHALLENGE
- In 2009, environmental organizations filed lawsuit in Oregon.
 - In 2010, FEMA entered settlement agreement with environmental organizations.
 - In 2011, FEMA initiated consultation with NMFS.
 - On April 14, 2016, NMFS issued BiOp.
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- ### JEOPARDY DETERMINATION
- Oregon BiOp concludes that FEMA's implementation of the NFIP is likely to jeopardize the continued existence of 16 ESA-listed anadromous fish species and Southern Resident killer whales, and result in the adverse modification of designated critical habitat for the 16 anadromous species.
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- ### REASONABLE AND PRUDENT ALTERNATIVE
- The ESA requires that if a jeopardy determination is made for the affected species (or if destruction or adverse modification of critical habitat will result) NMFS must provide a "reasonable and prudent alternative" that would not violate ESA Section 7(a)(2) and could be implemented by the federal agency or applicant.
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RPA OVERVIEW

- Education and Outreach
- Interim Measures
- Updated Mapping
- Revised Floodplain Management Criteria
- Data Collection
- Compliance



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RPA OVERVIEW (CON'T)



Applies to "all river sub-basins in Oregon that contain ESA-listed anadromous fish determined in the BiOp to be jeopardized by the implementation of the NFIP."

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RPA 1 – EDUCATION AND OUTREACH

- Directs FEMA to design an outreach strategy to help the Oregon Department of Land Conservation and Development and local jurisdictions implement the interim and long-term RPA measures.

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RPA 2 – INTERIM MEASURES

- Directs NFIP communities to implement a specific set of measures, including limitations on development and mitigation requirements, as soon as possible.



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RPA 2 (CON'T)

- RPA 2B directs NFIP communities to identify a riparian buffer zone (RBZ) measured 170 feet horizontally from the ordinary high water mark of perennial or intermittent streams and limit the types of development allowed in the RBZ to:
 - (1) water-dependent uses,
 - (2) habitat restoration activities,
 - (3) activities that result in a beneficial gain for the species or habitat, and
 - (4) activities that will have no adverse effects on listed species or habitat.

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RPA 2 (CON'T)

- Broad definition of "development" that includes vegetative removal (p. 297-98).
- Repairs or remodels are considered to have "no adverse effect" provided there is no expansion of the existing footprint.
- Applies to all river sub-basins in Oregon that contain ESA-listed fish determined in BiOp to be jeopardized.

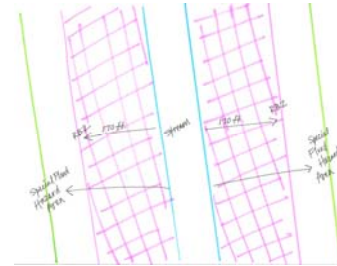
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RPA 2 (CON'T)

- RPA 2A directs NFIP communities to require that all “development” in the Special Flood Hazard Area (SFHA) be mitigated to achieve no net loss of natural floodplain functions.
- Again, broad definition of “development” that includes vegetative removal.

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RPA 2 (CON'T)



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RPA 2 (CON'T)

- RBZ operates as a “no touch” zone given the broad definition of development and the limited types of development allowed.



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RPA 3 – UPDATED MAPPING

- Directs FEMA to more accurately map flood hazard areas and flood-related erosion hazard areas.
Deadline: March 15, 2018, September 15, 2019, or January 1, 2021.

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RPA 4 – REVISE FLOODPLAIN MANAGEMENT CRITERIA

- Directs FEMA to revise its regulatory floodplain management criteria (based on the results of the mapping effort) to avoid, minimize, and mitigate adverse effects of flood development.
Deadline: January 1, 2019 or January 1, 2021.
- BiOp provides that interim measures are insufficient by themselves to avoid jeopardy, so permanent program will likely be more onerous.

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RPA 5 – DATA COLLECTION

- Directs FEMA to work with NFIP communities to collect and report floodplain development information.



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RPA 6 - COMPLIANCE

- Directs FEMA to ensure that NFIP communities are compliant with the revised floodplain management criteria.



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IMPLEMENTATION

- DLCD is working with FEMA and local communities to implement the BiOp in Oregon.
- DLCD assistance will include:
 - Workshops
 - Guidance
 - Model ordinance
 - Technical assistance

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IMPLEMENTATION (CON'T)

- FEMA guidance
- DLCD workshops (summer 2016)
- DLCD workgroups
 - Guidance and model code
 - Implementation priorities, obstacles, timeline

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IMPACTS ON DEVELOPMENT

- Grandfathering (p. 292)
 - Development for which the *start of construction** occurs on or before September 15, 2016 is grandfathered.
 - *Start of construction* – Includes substantial improvement, and means the date the building permit was issued, provided the actual start of construction, repair, reconstruction, rehabilitation, addition placement, or other improvement was within 180 days of the permit date.

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IMPACTS ON DEVELOPMENT (CON'T)

- Local Implementation
 - “NMFS anticipates that FEMA and NFIP communities, with NMFS’ support and assistance, will begin implementing the [interim measures] as soon as possible, and that all communities will be implementing these measures within 2 years of the date of the [BiOp].”

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IMPACTS ON DEVELOPMENT (CON'T)

- Goal-Post Rule
 - Applicants are protected under ORS 215.427(3)(a) and 227.178(3)(a), which provide that if the application was complete when submitted or is made complete within 180 days, only the standards and criteria existing on the date the application was submitted govern.

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IMPACTS ON DEVELOPMENT (CON'T)

- Vesting
 - *Clackamas County v. Holmes*, 265 Or 193 (1973) – When the development has reached a certain stage, the property owner is said to have acquired a “vested right” to continue the development and subsequently to put the use to its intended function. The point in the development of the use at which time the property owner is said to have acquired a “protected use” or “vested right” is not easily defined.

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IMPACTS ON DEVELOPMENT (CON'T)

- Holmes factors:
 - Ratio of expenditures incurred to the total cost of the project;
 - The good faith of the landowner;
 - Whether the landowner had notice of the proposed changes to the law before starting the improvements;
 - Whether the expenditures have any relation to the completed project or could apply to various other uses of the land;
 - The kind of project, the location, and the ultimate cost; and
 - Whether the landowners’ acts have risen beyond mere contemplated use or preparation.

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QUESTIONS?



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RESOURCES

- Washington BiOp, http://www.fema.gov/media-library-data/20130726-1900-25045-9907/nfip_biological_opinion_puget_sound.pdf
- Oregon BiOp, http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf
- Oregon BiOp (RPA Only), http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_rpaonly_nwr-2011-3197.pdf
- NMFS Frequently Asked Questions, Oregon BiOp, http://www.westcoast.fisheries.noaa.gov/publications/habitat/fact_sheets/oregon_fema_biop_qanda_april2016.pdf
- DLCD's NFIP BiOp Implementation web page, http://www.oregon.gov/LCD/pages/nfip_biop.aspx
- Contact for DLCD NFIP BiOp listserv, Amanda Punton, amanda.punton@state.or.us

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