



PLANNING COMMISSION WORK SESSION AGENDA

Monday, October 23, 2017 - 6:00 PM

City Hall, Conference Room A, 169 SW Coast Highway, Newport, Oregon 97365

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired, or for other accommodations for persons with disabilities, should be made at least 48 hours in advance of the meeting to Peggy Hawker, City Recorder at 541.574.0613.

The agenda may be amended during the meeting to add or delete items, change the order of agenda items, or discuss any other business deemed necessary at the time of the meeting.

1. CALL TO ORDER

2. UNFINISHED BUSINESS

3. NEW BUSINESS
 - 3.A Draft Amendments to Chapter 9.85 Addressing Code (requested by Post Office)
[Draft Amendments to NMC Chapter 9.85.pdf](#)

 - 3.B Update on Interim Environmental Protections FEMA ESA Litigation
[Update on FEMA ESA Litigation.pdf](#)

 - 3.C Draft Recommendation to City Council on Vacation Rental/B&B Next Steps
[VRD Recommendation to CC.pdf](#)

4. ADJOURNMENT

Planning Commission Work Session Agenda Item Report

Agenda Item No. 2016-1738

Submitted by: Sherri Marineau

Submitting Department: Community Development

Meeting Date: October 23, 2017

SUBJECT

Draft Amendments to Chapter 9.85 Addressing Code (requested by Post Office)

Recommendation:

ATTACHMENTS

- [Draft Amendments to NMC Chapter 9.85.pdf](#)

Memorandum

To: Planning Commission/Commission Advisory Committee
From: Derrick I. Tokos, AICP, Community Development Director 
Date: October 19, 2017
Re: Draft Amendments to NMC Chapter 9.85 Relating to Addressing

The Postmaster for the Newport Post Office would like the City to adjust its addressing rules to require numeric secondary addresses because alphabetic addresses cannot be read by their automated mail sorting system. This requires a code change, which the Commission discussed and agreed to initiate at a June 12th work session.

Enclosed is a draft set of amendments. In addition to resolving the Postmaster's concerns, the changes clarify how odd and even addresses are to be applied to align with current practice.

Please review the changes and let me know if they are acceptable.

Attachments

Email from Peter Roina, Newport Postmaster, dated 5/31/17
Draft amendments to NMC Chapter 9.85

Derrick Tokos

From: Roina, Peter L - Newport, OR <Peter.L.Roina@usps.gov>
Sent: Wednesday, May 31, 2017 4:51 PM
To: Derrick Tokos
Cc: Woodbridge, Randy - Newport, OR
Subject: Secondary addressing ordinance request

Dear Mr. Tokos,
Thank you for your quick response to my inquiry today.

I would like to express my concern with the current Newport ordinance that does not require numerical secondary addressing.

The United States Postal Service uses high speed machinery to process packages, flats and letters. For the most part secondary addressing does not affect package and flat processing, unless two different routes would share a particular primary address. However, our letter sorting machine sorts approximately 97% of our letters directly to the delivery routes in delivery sequence. The Delivery Point Sequencing (DPS) machines cannot read alphabetical secondary addresses. Numerical secondary addresses are read easily and allow for streamlined processing. The alphabetical secondary address mail that is unreadable by machines has to be physically sorted by processing clerks from both the origination plant, the destination plant, and our local office, as well as by the carrier who delivers it. I am sure that you can see the added overall expense of each mailpiece, but also the likelihood of a sorting error somewhere along the way which would delay the mailpiece.

I am not requesting that existing addresses be change, just requesting that all new addresses use numerical secondary addressing.

I thank you very much for your time thus far and any future assistance you can provide.

Please feel free to contact me directly if you have any questions or concerns.

Cordially,

Peter Roina

Postmaster
Newport Post Office
(541) 574-6746



(Note: Language shown with a double underline is added. Text in ~~strikethrough~~ is deleted.)

CHAPTER 9.85 STREET NAMING AND NUMBERING

9.85.010 Purpose

To assist the public, public safety, and emergency services providers, it is in the interest of the public health, safety, and welfare to have a uniform street naming and property numbering system.

9.85.015 Scope

The provisions of this Chapter shall apply to the naming of streets and numbering of property within the corporate limits of the City of Newport, and the renaming of streets within six miles of the corporate limits of the city.

9.85.020 Directional Designations

For the purpose of this Chapter, the urban area of the City of Newport is hereby divided into four sections having the directional designations, abbreviations, and dividing lines as listed herein.

The name or number of a public or private street within a section shall be preceded by the abbreviated directional designation of that section. The four sections are:

- A. "Northwest," abbreviated "N.W.," consisting of the area north of Olive Street and west of Pacific Coast Highway;
 - B. "Northeast," abbreviated "N.E.," consisting of the area north of Olive Street and east of Pacific Coast Highway;
 - C. "Southwest," abbreviated "S.W.," consisting of the area south of Olive Street and west of Pine Street, Cape Street, and Pacific Coast Highway; and
- "Southeast," abbreviated "S.E.," consisting of the area south of Olive Street and east of Pine Street, Cape Street, and Pacific Coast Highway.

9.85.025 Street Suffixes

Street suffixes shall be assigned to all public or private streets within a section as follows:

- A. "Street" for streets oriented north-south or east-west;
- B. "Place" for dead-end streets or short, north-south oriented street segments;
- C. "Court" for dead-end streets or short, east-west oriented street segments;
- D. "Drive" for hillside curved streets;
- E. "Way" for diagonal streets;
- F. "Circle" for circular streets;
- G. "Lane" for short, narrow, curved streets;
- H. "Boulevard" for arterial routes; and
- I. "Highway" for regional routes.

9.85.030 Street Names

- A. The existing pattern of street names designated by decision of the city or, in the absence of such a decision, as shown on County Assessor's maps, is hereby established as the street naming system for the City of Newport.
- B. An extension of a public or private city street shall continue the name of that street.
- C. Except for the extensions of existing streets, no street name shall be used which will duplicate or be confused with the name of an existing street.
- D. New public or private streets shall be named at the time they are platted as part of a subdivision or partition approved in accordance with the processes outline in Chapter 13.05 of the Newport Municipal Code. In the event that a public or private street is created independent of a subdivision or partition then the street shall be named by ordinance of the City Council.

9.85.035 Renaming City Streets

- A. An action to rename all or the portion of an existing street located entirely within the City of Newport shall be initiated by:
1. Resolution of the City Council; or
 2. A petition signed by 51 percent of the residents and businesses whose physical address would be impacted by the proposed name change. The petition shall further include signatures of support from no fewer than 100 eligible voters residing in the City of Newport.
- B. A resolution or petition initiating the renaming of a street shall include a clear description of the street or portion thereof that is to be renamed.
- C. If the resolution or petition to rename a street is in honor of an individual, then a written statement must be included describing why the individual is deserving of having a city street named in their honor.
- D. Following adoption of a Council resolution or the filing of a petition under 9.85.035(A), the Planning Commission shall conduct a public hearing on the proposed street renaming.
1. Notice of the Planning Commission hearing on the renaming proposal shall be provided by first class mail, postmarked at least 20 days prior to the hearing to all of the following:
 - a. The residents and businesses whose physical addresses would be impacted by the proposed name change;
 - b. The Newport Fire Department;
 - c. The Postmaster having jurisdiction;
 - d. The Lincoln County Surveyor;
 - e. The Lincoln County Assessor
 - f. 911 emergency dispatch;In the case of a proposed renaming initiated by petition, the individuals who signed the petition; and

- Any person who has requested notice of the hearing.
2. Notice of the hearing shall be published in a newspaper of general circulation in the city at least once within the week prior to the week within which the hearing is to be held.
- E. The Planning Commission shall consider the following factors when making a recommendation on a street renaming proposal:
1. Factors of historical significance related to persons, circumstances or events;
 2. Factors of geographical significance;
 3. Factors of street location, function or direction;
 4. Common usage of a name for the street or in the area;
 5. Prior use of the name for the street;
 6. Name consistency for a continuous route;
 7. Non-duplication of another street name; and
 8. Other circumstances that warrant consideration.
 9. In the case of a proposal to rename a street in honor of an individual, the following conditions shall be met:
 - a. The individual made significant contributions to the betterment of the city and its citizens;
 - b. The proposed change is in the best interest of the city and will not cause undue adverse impact or hardship; and
 - c. The cost of the proposed change can either be reasonably borne by the city or assigned to the petitioner(s) as a condition of approval.
- F. Following the public hearing, the Planning Commission shall forward a recommendation on the proposed street renaming to the City Council.

- G. Upon receiving the Planning Commission's recommendation, the City Council shall hold a public hearing to take testimony on the proposed name change. Notice of the hearing shall be provided as outlined in [9.85.035\(D\)](#).
- H. After conducting a hearing, the City Council by ordinance shall either rename the street or streets or by resolution shall reject the renaming proposal. Certified copies of each such ordinance shall be recorded with the Lincoln County Clerk, and filed with the county assessor and county surveyor.
- I. An ordinance adopted pursuant to this subsection shall instruct the county surveyor to enter the new names of renamed streets in red ink on the county surveyor's copy of any filed plat and tracing thereof which may be affected, together with appropriate notations concerning the same.

9.85.040 Renaming Streets Outside City Boundaries

- A. Action to rename all or the portion of an existing street located outside the City of Newport's boundaries, but within six miles of its corporate limits shall follow the above procedures, with the exception that the City Council shall only consider renaming a street upon receipt of a recommendation from the Planning Commission that the proposed renaming is in the best interest of the city and the six-mile area, in conformance with ORS 227.120.

9.85.045 Numbering of Properties

The Community Development Department shall assign address numbers for buildings or property and shall maintain records thereof according to the following:

- A. The dividing line for street numbering within the City of Newport shall be as follows:
 1. Olive Street for all buildings numbered to the north and to the south;
 2. Pine Street, Cape Street, and Pacific Coast Highway for buildings numbered to the east and west.
- B. Beginning at the dividing lines, building numbers will be increased by 100 for each block distance. One number shall be allotted for every 10 feet of street frontage.

- C. Odd and Even~~even~~ numbers shall be assigned to buildings or properties ~~on the southerly or easterly in a manner consistent with the numbering pattern in place for adjacent or nearby properties located on the same~~ sides of a public or private street.
- D. In areas where there is not an established odd/even numbering scheme, even numbers shall be assigned to properties on the southerly or easterly sides of a public or private street and odd~~Odd~~ numbers shall be assigned to buildings or properties on the northerly or westerly sides of a public or private street.
- E. Numbering of dead-end public or private streets one block in length or less shall be consecutive odd or even numbers consistent with those on the same side of the connecting street.
- F. An address number shall be assigned for each property or building in separate ownership, possession or occupancy.
- G. Where buildings are clustered on a parcel or lot, a number shall be assigned for the main to each building, ~~or office, and all other buildings within the group shall be assigned individual numbers or letters by the owner.~~
- H. Suites within multi-tenant buildings shall be assigned numeric addresses by the property owner.
- I. In the event the building address number sequence exceeds the available numbers, a suffix "A," "B," "C," etc. may be assigned.
- J. An address number or numbers shall be assigned by the Community Development Director, or designee in conjunction with the application for a building permit, a land division, or upon written request of the property owner.
- K. In case of doubt or where a question arises as to the proper number to be assigned to any building or property, the Community Development Director, or designee shall decide the question and affix the number of each building or property.

Staff: Proposed changes respond to the request from the Post Office to eliminate letters in secondary addresses. Requirements for odd-even numbering have been corrected to acknowledge on the ground conditions.

9.85.050 Notice of Address Assignment or Reassignment

When the Community Development Director, or designee, assigns or reassigns an address to a building or property, the following notification is required.

- A. Notice of the address assignment or reassignment shall be provided within 14 days after assignment or reassignment and given to:
 1. The Postmaster having jurisdiction;
 2. The Lincoln County Assessor
 3. 911 emergency dispatch; and
 4. Local utility providers.
- B. In the event of an address reassignment, first class mail notice shall be provided to the property owner.

9.85.055 Placement of Address Numbers

- A. The property owner or owner's agent shall place the address number assigned by the Community Development Director, or designee, on a building or property at the earliest practical time. For new buildings, the address shall be placed within 30 days of occupancy.
- B. For buildings, numbers shall be placed on the door or door frame of the main entrance to the structure, or as near thereto as practical.
- C. Numbers may also be affixed as follows:
 1. On a sign on the property;
 2. On a mailbox adjacent to the building, except for grouped mailboxes; or
 3. In such other location as to be legible from the street.
- D. Address numbers shall be permanently affixed and treated such that they will not rust or corrode. Numbers shall not be less than three inches in height and shall comply with [Title X](#) of the Newport Municipal Code regulating signs.

(Chapter 9.85 adopted by Ordinance No. 2019 on October 3, 2011; effective November 2, 2011.)

After the Council, the Department Director or designee may assign a street name to a building or portion of a building, including a portion of a building, if the following conditions are met:

A. The street name is not already in use on the same street or on an adjacent street.

B. The street name is not already in use on a street in the same area.

C. The street name is not already in use on a street in the same area.

D. The street name is not already in use on a street in the same area.

E. The street name is not already in use on a street in the same area.

B. In the event of a conflict between the street name and the name of a building or portion of a building, the street name shall prevail.

C. The street name shall be approved by the Council or its designee.

A. The street name shall be approved by the Council or its designee. The street name shall be approved by the Council or its designee if the street name is not already in use on the same street or on an adjacent street, if the street name is not already in use on a street in the same area, if the street name is not already in use on a street in the same area, and if the street name is not already in use on a street in the same area.

B. For buildings, the street name shall be approved by the Council or its designee. The street name shall be approved by the Council or its designee if the street name is not already in use on the same street or on an adjacent street, if the street name is not already in use on a street in the same area, if the street name is not already in use on a street in the same area, and if the street name is not already in use on a street in the same area.

C. Notwithstanding the above, the street name shall be approved by the Council or its designee.

D. The street name shall be approved by the Council or its designee.

E. The street name shall be approved by the Council or its designee. The street name shall be approved by the Council or its designee if the street name is not already in use on the same street or on an adjacent street, if the street name is not already in use on a street in the same area, if the street name is not already in use on a street in the same area, and if the street name is not already in use on a street in the same area.

F. The street name shall be approved by the Council or its designee.

D. A street name shall be approved by the Council or its designee. The street name shall be approved by the Council or its designee if the street name is not already in use on the same street or on an adjacent street, if the street name is not already in use on a street in the same area, if the street name is not already in use on a street in the same area, and if the street name is not already in use on a street in the same area.

Planning Commission Work Session Agenda Item Report

Agenda Item No. 2016-1739

Submitted by: Sherri Marineau

Submitting Department: Community Development

Meeting Date: October 23, 2017

SUBJECT

Update on Interim Environmental Protections FEMA ESA Litigation

Recommendation:

ATTACHMENTS

- [Update on FEMA ESA Litigation.pdf](#)

Memorandum

To: Planning Commission / Commission Advisory Committee
From: Derrick I. Tokos, AICP, Community Development Director 
Date: October 18, 2017
Re: Update on FEMA ESA Litigation Interim Environmental Protections

On June 27, 2016, the Planning Commission held a work session regarding correspondence the City received from the Federal Emergency Management Agency (FEMA) indicating that local jurisdictions will have to change their rules for development within the 100-year floodplain to avoid jeopardizing Endangered Species Act (ESA) listed species. This came about as a result of litigation in the federal courts and a settlement agreement.

Interim protection measures will be the first to trigger. They are discussed in some detail in a lengthy National Oceanographic and Atmospheric Administration (NOAA) Fisheries biological opinion. The FEMA letter indicated that the interim measures were to be implemented by April 14, 2018. In January of 2017, NOAA Fisheries issued a technical guidance memo outlining required mitigation. It focuses on habitat restoration for projects in or adjacent to flood prone areas. This could result in requirements that developers mitigate for displaced flood storage areas and tree removal at ratios higher than the actual impact. There may also be a prohibition on adding impervious surfaces within floodplains. NOAA acknowledges that the rules must accommodate water-dependent uses; however, it is unclear as to the extent to which they will be held harmless.

FEMA is consulting with NOAA Fisheries to determine how it will implement the mitigation measures. In the meantime, lawsuits were filed by the Oregon Homebuilders on June 15, 2017 and Coos Bay on October 5, 2017. Both are challenging the validity and enforceability of the mitigation requirements.

Local jurisdictions are looking for guidance on how to proceed. The Oregon Department of Land Conservation and Development will make recommendations to FEMA on steps they believe the state and local jurisdictions can reasonably take on an interim basis. Presumably, FEMA will then issue an advisory outlining the interim measures it believes the Agency can lawfully require state and local governments to implement in order to keep their residents and businesses eligible for federally subsidized flood insurance. It appears that FEMA now views the April 18th date as a deadline for identifying required interim mitigation measures, not the date state and local governments must begin to enforce them. If that is the case, we will have a little more time to prepare and advise affected property owners.

Attachments

FEMA Letter dated June 13, 2016
NOAA Fisheries Guidance Memo, January 2017
DLCDC Update on National Flood Insurance Program ESA Consultation, October 2017
Homebuilder's Lawsuit, filed 6/15/17
Coos Bay Lawsuit, filed 10/5/17



FEMA

June 13, 2016

Honorable Mayor Sandra Roumagoux
169, SW Coast Hwy
Newport, OR 97365

Dear Honorable Mayor Roumagoux,

In 2009, the U.S. Department of Homeland Security's Federal Emergency Management Agency (FEMA) was sued by the Audubon Society of Portland, the National Wildlife Federation, the Northwest Environmental Defense Center, and the Association of Northwest Steelheaders for failure to consult under Section 7 of the Endangered Species Act (ESA) with respect to the effects of the implementation of the National Flood Insurance Program (NFIP) on certain ESA-listed species in the state of Oregon. On July 12, 2010, the United States District Court, District of Oregon at Salem, required FEMA to consult with the National Marine Fisheries Service (NMFS) on impacts the NFIP was having on ESA listed species. FEMA complied by submitting a Biological Assessment in July of 2011 to NMFS, which concluded the NFIP may affect, but does not adversely affect, the ESA-listed species considered in the assessment.

On April 14, 2016, NMFS provided a Biological Opinion in which they concluded that the implementation of the NFIP in Oregon jeopardizes the continued existence of 18 ESA listed species and adversely modifies their critical habitat. Federal agencies are prohibited by the ESA from causing jeopardy to ESA-listed species or adversely modifying the designated critical habitat of such species. Although the NMFS Biological Opinion's determination is written for FEMA, the Endangered Species Act (ESA) applies to everyone, whether a federal agency, state agency, local jurisdiction, or individual. We all have a legal responsibility to ensure our actions do not cause a take (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct) to threatened or endangered species. Under Section 9 of the ESA, actions or decisions enacted by you and your officials are subject to this take prohibition regardless of federal involvement. Additionally, any person can be subject to criminal or civil penalties for causing a take of threatened or endangered species. NMFS considers the issuance of floodplain development permits that do not avoid or compensate for detrimental impacts on ESA-listed species or their critical habitat as noncompliant with the Endangered Species Act. NMFS identifies certain private floodplain development activities as harmful to listed species, including the addition of fill, structures, levees and dikes, the addition of impervious surfaces, removal of vegetation, and bank armoring. NMFS has determined that these activities impair natural floodplain functions and thereby negatively impact the survival and recovery of ESA-listed species.

With a jeopardy determination, NMFS is obligated to provide a Reasonable and Prudent Alternative (RPA), which are program changes to the NFIP that will allow the program to be implemented in a manner that avoids jeopardy to ESA-listed species and adverse modification

June 13, 2016

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of their critical habitat. For details on these program changes, please see the RPA attached to this letter or the complete NMFS Biological Opinion at <http://www.westcoast.fisheries.noaa.gov/habitat/conservation/index.html>.

As envisioned by NMFS, the RPA is intended to be implemented in stages, with two different sets of program changes that will need to be implemented by FEMA and the NFIP participating communities. The first set of program changes are interim measures found in Element 2 of the RPA, which must be implemented within 2 years of the issuance of the Biological Opinion (April 14, 2018). These measures will remain in place until FEMA and the participating communities implement the second set of program changes (Elements 3-6 of the RPA), which are the permanent program changes to the NFIP required by the RPA. NMFS requires the interim measures in Element 2 to be superseded by the permanent floodplain management criteria in RPA Element 4 that do not require regulatory revisions (such as revising the Code of Federal Regulations) by January 1, 2019. All elements of the RPA that do not necessitate regulatory revisions are to be implemented by September 15, 2019 and complete implementation, including regulatory revisions, is required to occur by January 1, 2021.

The NMFS Biological Opinion authorizes a certain amount of jeopardy or adverse modification to ESA-listed species or their habitat during the time necessary for FEMA and participating NFIP communities to implement the complete RPA. During this interim time and until all permanent RPA elements are in place, your community may either choose to voluntarily impose a temporary moratorium on all floodplain development that adversely impacts ESA listed species or their habitat, or voluntarily implement the interim measures found in RPA Element 2. Oregon DLCD and FEMA will develop guidance to help your community implement these interim requirements.

FEMA and Oregon DLCD will be inviting you and other interested stakeholders to participate in workgroups to identify options and methods that communities can implement, with respect to the RPA. These implementation options may include guidance, training, and technical assistance. One example is the development of a model ordinance that would meet FEMA's minimum criteria while also incorporating the requirements of the RPA. Once this model ordinance is finalized, it will be shared with all interested communities.

The RPA comprises six elements or sections, and a full copy of the RPA is provided as an attachment to this letter. Element 1 involves notice, education, and outreach regarding the outcome of FEMA's consultation with NMFS on the implementation of the NFIP in Oregon. This letter is part of that requirement for FEMA to provide Notice of the Biological Opinion and RPA. RPA Element 1 encourages communities to send data or information on locally identified flood-related hazards due to erosion or inundation, including anticipated flooding patterns influenced by build-out, climate change or sea level rise, which are not currently reflected on effective Flood Insurance Rates maps (FIRMs) to the FEMA Region X office by August 12, 2016. In addition, the RPA recommends that substantially improved and new structures (as defined in the RPA) placed in the Special Flood Hazard Area should be elevated by methods other than fill, and that proponents of projects that involve adding fill exceeding 50 cubic yards should pursue CLOMR-Fs prior to LOMR-Fs to ensure ESA compliance is obtained prior to undertaking floodplain development. This element also requires FEMA to

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provide guidance to communities regarding elevating structures in a manner that minimizes the adverse effects to natural floodplain functions. For information on elevating structures, please see the attached Frequently Asked Question document - Elevating Structures Without Fill.

In Element 2 of the RPA, NMFS has laid out a set of Interim Measures expected to be implemented within 2 years and requires that all development in the SFHA be mitigated to achieve no net loss of natural floodplain functions. Element 2 includes requirements for mitigation ratios, impervious surfaces, stormwater, floodplain management standards, riparian buffers, LOMCs and CLOMCs, and floodplain development permit reporting. FEMA will be working to provide you with guidance regarding how to achieve the requirements listed in RPA Element 2.

Additionally, to help minimize the time and effort imposed upon your staff resulting from the floodplain development permit reporting requirement, FEMA intends to use a Microsoft Excel based reporting tool that will be sent to each community to track all new development occurring in floodplains. Once the interim RPA requirements are in place, if communities issue floodplain development permits without reporting said development or without mitigating for adverse effects on ESA listed species or their habitat, FEMA will be required, in coordination with NMFS acting under their own authority, to initiate appropriate enforcement action.

Element 3 requires use of revised mapping protocols and methodologies for the stated purpose of improving the identification of special hazard areas. The RPA also requires several additions to the Flood Insurance Rate Maps, including the future conditions floodplain, erosion zones, and channel migration zones.

Element 4 requires revisions to the floodplain management criteria to, among other things:

- Include a generally applicable ESA performance standard;
- Prohibit almost all development in an area known as the High Hazard Area (floodway, V-Zone, LiMWA, erosion zone);
- Prohibit re-drawing of the floodway to accommodate floodplain development;
- Require a 60 year erosion setback area with very limited uses (agricultural, open space, temporary structures); and
- Significantly restrict subdivisions of lots.

Element 4 also requires extensive compensatory mitigation requirements in the areas where floodplain development is not otherwise prohibited. FEMA will be working to provide you with guidance regarding how to achieve the requirements listed in RPA Element 4.

Element 5 requires data collection and describes reporting requirements needed to accurately track floodplain development impacts and RPA implementation. Element 6 speaks to compliance and enforcement requirements of the RPA and the associated timelines for compliance.

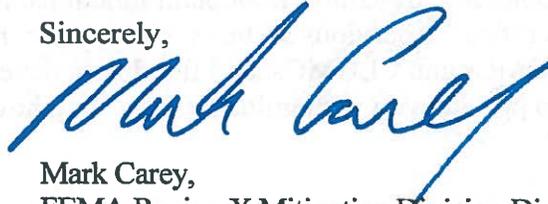
FEMA recognizes that many of you have already been implementing measures that compensate/mitigate floodplain development actions affecting ESA-listed species and their habitat. However, for others, these requirements may pose an additional workload on your

June 13, 2016

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community. We will work diligently with you, State resource agencies, and NMFS to offer guidance and resources that will help facilitate this transition. We will keep you advised and look forward to working with interested stakeholders to develop our strategy for implementation. If you have any questions, please email FEMA-R10-ESAcomments@fema.dhs.gov or contact Scott Van Hoff, Senior NFIP-ESA Specialist at 425-487- 4677.

Sincerely,



Mark Carey,
FEMA Region X Mitigation Division Director

cc: FPA

State NFIP Coordinator

Kim Kratz, NMFS

Attachments: Oregon NFIP Reasonable and Prudent Alternative (RPA)
FAQ- Elevating Without Fill

SVH: jg

January 2017



**NOAA
FISHERIES**

**WEST
COAST
REGION**

Technical Guidance: Oregon RPA for floodplain protection

In response to a 2010 lawsuit, the Federal Emergency Management Agency (FEMA) consulted with NOAA Fisheries on whether the National Flood Insurance Program (NFIP) affects salmon and steelhead protected by the Endangered Species Act (ESA) in Oregon. NOAA Fisheries found that the NFIP jeopardizes protected species. As the ESA requires, NOAA Fisheries provided FEMA with a Reasonable and Prudent Alternative (RPA) that includes recommendations to avoid jeopardizing the species. FEMA may adopt the RPA, or draft a different proposal. This technical guidance explains the intent and details of recommendations in the RPA.

Development in the floodplain:

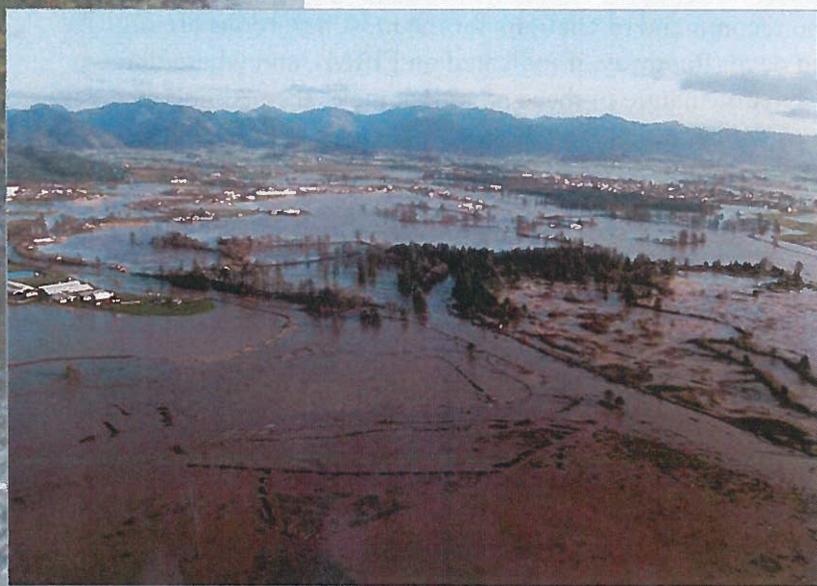
The RPA is intended to apply only in mapped special flood hazard¹ areas. In the future, certain provisions of the RPA will also apply to mapped channel migration zones. The RPA *does not* recommend a prohibition of development in floodplains. It *does* recommend limitations on the types of development that can occur in certain portions of the floodplain, to better protect the natural floodplain functions needed to support threatened and endangered salmon. Coincidentally, these same measures improve safety for people and property by avoiding development in high risk areas.

FEMA's existing rules divide the floodplain in some locations into the floodway,² (the area near the flood source, which is to remain open to convey floodwaters), and the remainder of the floodplain. FEMA's rules already limit some floodway development to avoid increasing flood risk. The RPA follows that framework. The RPA recommends

both a comprehensive long-term strategy for protecting floodplain habitat and interim strategies that apply in the near term.

The RPA long-term provisions recommend that in areas at greatest risk of flooding and flood-related erosion, development should be limited to flood-compatible and water-dependent uses.³

In the near term, the RPA accommodates new development in or near floodways and erosion prone areas if it would not impact natural floodplain functions, or if development impacts are mitigated to achieve an overall conservation of natural floodplain function. Mitigation might include, for example, replacing removed trees, low-impact



Oregon, 2007



Technical Guidance: Oregon RPA for floodplain protection

development methods, and creation of replacement flood storage. The RPA also expressly allows for water-dependent uses.

The RPA recognizes that it would not be practicable to require modification of existing structures and applies to new development only.

Mitigating floodplain development impacts:

Interim measures: The fundamental component of the RPA interim measures is a mitigation strategy to ensure that, despite development demands, there is no net loss of natural floodplain functions. In the highest risk areas, where floodplains are frequently inundated (10-year flood interval, identified in a flood insurance study [FIS]) and where volumes are likely to be fast and deep (floodway, if indicated on flood insurance rate map [FIRM]), and where flood-related erosion is probable (channel migration zone [CMZ] areas) – the mitigation ratios for floodplain development are higher: 2 to 1 for displaced flood storage; 3 to 1 for removal of trees at or greater than 6-inch



Salem, 1996. Photo: KOIN news

diameter at breast height (dbh). If none of those measures are available, then these mitigation ratios would apply in the area proposed in FEMA's Biological Evaluation—170 feet from the ordinary high water mark.

In floodplain areas further landward of these measures—sometimes called the flood fringe— but still bounded by the mapped special flood hazard area, the mitigation ratios are lower: 1.5 to 1 for displaced flood storage; 2 to 1 for trees of 6 inch dbh or greater.

In both areas, pervious surfaces should be used where practicable. Where new impervious surface is placed, an equal amount of impervious surface affecting the same water body should be removed. If neither method can be achieved, stormwater capture and treatment should be employed.

These measures were designed to be implemented within two years of the biological opinion being issued.

Long-term measures: These measures include a recommendation for FEMA to update maps with methods that predict inundation areas with more accuracy, and which more fully account for changing flood patterns due to land use and climate changes. These measures also recommend restrictions for the most hazardous areas of the floodplain, where volumes are likely to be fast and deep (floodway, if indicated on FIRM), and where flood-related erosion is probable (CMZ areas). It is the dynamic nature of these areas that make them simultaneously dangerous for development and valuable for species habitat needs. The most suitable uses in these areas are water dependent uses, light recreation, open space, habitat restoration, and silviculture and agriculture that does not involve buildings or other structures.

Other long-term standards of the RPA recommend preventing subdivision of lots in a manner that puts new lots completely inside the special flood hazard area, and minimizing building footprints inside the special flood hazard area.

The RPA long-term measures also include a proposal for mitigating development impacts, outlined in an appendix to the biological opinion. FEMA can use the mitigation protocols provided in the RPA until it adopts its own mitigation strategy that provides comparable protection of floodplain functions that species rely on.

The RPA includes provisions allowing local governments to work with FEMA and NOAA Fisheries to develop alternate measures for those circumstances where these criteria may be impossible to comply with due to unique circumstances of geography and jurisdiction.



Technical Guidance: Oregon RPA for floodplain protection

Agricultural and forestry activities:

Under the RPA, timber harvest and agriculture are suitable uses in the floodplain. The RPA won't affect harvest areas where these are established uses. Existing infrastructure or structures associated with agriculture or silviculture are grandfathered. Only new structures or infrastructure would trigger the RPA's mitigation requirements. Finally, tree removal conducted for the purpose of converting the land to new uses would be subject to the RPA's development limitations.

RPA Specificity/flexibility:

The RPA is specific enough to provide clear, comprehensible development standards, yet flexible enough to adapt to local circumstances. It is flexible in several ways.

First - the mitigation requirements vary depending on the actual condition of the landscape.

Example: If five wooded acres adjacent to a stream are turned into a housing development, mitigation would be required for removing the riparian vegetation, adding fill and structures that displace flood waters, and new impervious surfaces that create run-off, such as sidewalks, rooftops, roads, and driveways. But, if five waterfront acres of old warehouses and parking lots are redeveloped, there may be no mitigation required except as needed to create a net conservation benefit, which is a standard already proposed by FEMA. The "net benefit" standard might mean including a planting corridor next to the water, or adding bioswales to treat stormwater.

Second - the RPA allows for the development, in coordination with FEMA and NOAA Fisheries, of alternative mitigation standards for circumstances where the recommended mitigation may be difficult to provide within jurisdictional boundaries, such as in Beaverton.

Third - the RPA allows communities, in coordination with FEMA and NOAA Fisheries, to develop individualized compliance plans where the RPA's recommended measures would be impracticable – for example, in jurisdictions located entirely within the floodplain, such as Enterprise or Tillamook.

RPA implementation process and strategies:

The RPA is an alternative that NOAA Fisheries developed consistent with the ESA's requirements. However, FEMA ultimately determines how to modify their program to provide adequate protections for ESA-listed species and habitat. FEMA may implement the RPA, or may develop an alternative that provides equal protection. During the summer of 2016, FEMA and NOAA Fisheries participated in multiple information and outreach sessions around the state, hosted by the Department of Land Conservation and Development (DLCD). The federal agencies presented information on the RPA, took questions, and listened to concerns from local communities such as Springfield and Enterprise. These helped identify additional information needs, and DLCD has recently created workgroups, with local government participation, to help inform FEMA on implementation strategies, and technical concerns.

There are also other pathways to demonstrate ESA compliance. A community can choose to work with NOAA Fisheries directly to develop an ESA Section 10(a)(1)(B) Habitat Conservation Plan or a 4(d) rule as alternate pathways to ensuring that floodplain development does not jeopardize listed species. These alternate approaches are referenced in RPA element 4(H)(iii).

¹“Area of special flood hazard is the land in the flood plain within a community subject to a 1 percent or greater chance of flooding in any given year. The area may be designated as Zone A on the FHBM. After detailed ratemaking has been completed in preparation for publication of the flood insurance rate map, Zone A usually is refined into Zones A, AO, AH, A1-30, AE, A99, AR, AR/A1-30, AR/AE, AR/AO, AR/AH, AR/A, VO, or V1-30, VE, or V. For purposes of these regulations, the term ‘special flood hazard area’ is synonymous in meaning with the phrase ‘area of special flood hazard.’” 50 CFR 59.1

²“Regulatory Floodway means the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height.” 50 CFR 59.1.

³For example, ports, docks, bridges are water dependent; parks, open space, light recreation, agriculture and silviculture are flood compatible

Update on National Flood Insurance Program ESA Consultation for Oregon

Oregon Coastal Program Network Meeting October 2017

Amanda Punton
Oregon Dept. of Land Conservation and
Development



Biological Opinion (BiOp) and Reasonable and Prudent Alternative

- A BiOp is the product of consultation between two federal agencies under Section 7 of Endangered Species Act.
- April 2016 – NOAA Fisheries BiOp on the NFIP as implemented in Oregon
- A “Jeopardy Opinion” includes a Reasonable and Prudent Alternatives (RPA).
- The RPA directs FEMA to reduce impacts of the NFIP.



FEMA



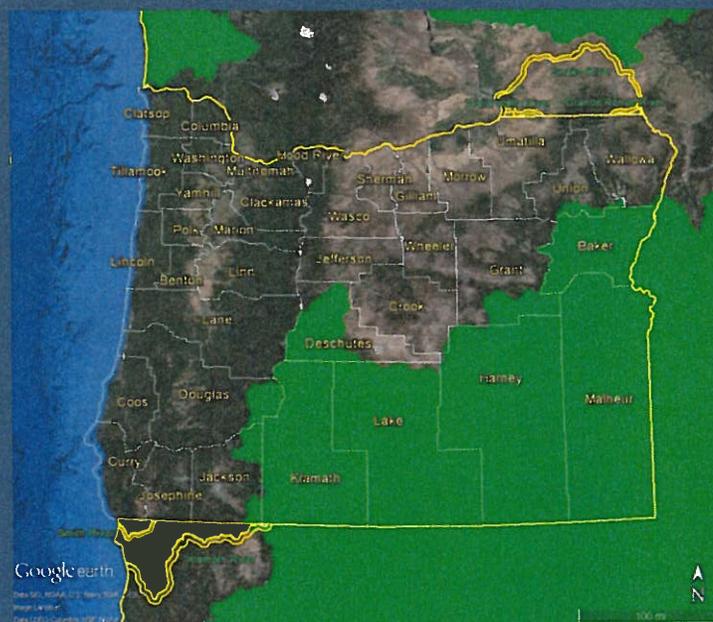
NOAA FISHERIES

Endangered Salmon

- 16 Northwest salmon species were listed as threatened.
- A primary cause of their decline is loss of habitat.
- Development in the floodplain impedes the natural processes that shape salmon habitat and restrict places of refuge during floods.



Area Covered by the Biological Opinion



RPA Elements

Element 1 – Notice, Education, and Outreach

Element 2 – Interim Measures

Element 3 – Mapping Special Hazard Areas

Element 4 – Floodplain Management Criteria

Element 5 – Data Collection and Recording

Element 6 – Compliance and Enforcement



Siletz River

RPA Elements

Element 1 – Notice, Education, and Outreach

Element 2 – Interim Measures

Element 3 – Mapping Special Hazard Areas

Element 4 – Floodplain Management Criteria

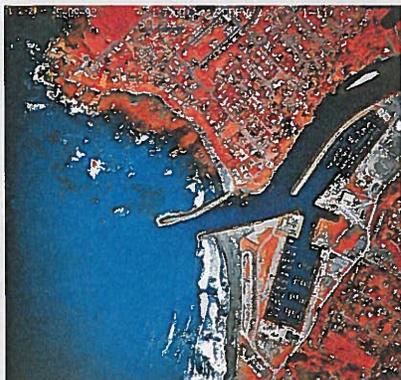
Element 5 – Data Collection and Recording

Element 6 – Compliance and Enforcement



Siletz River

Keep in Mind



Brookings Harbor

- The RPA applies to FEMA. It does not apply directly to local governments or individuals.
- Development in areas below ordinary high-water are subject to USACOE review standards and it is not expected that this consultation will add duplicative processes.

Legal Wrangling

Excerpted from letter from FEMA to NOAA Fisheries, May 4, 2016;

The Biological Opinion is based on the **fundamental misconception that private floodplain development is attributable to, or caused by FEMA** through the implementation of the NFIP - and should be treated as federal action subject to Section 7 consultation requirements under the ESA.

Nevertheless . . . FEMA will work to implement all the RPA requirements that it has the legal authority to implement.

Legal Wrangling continued

Excerpted from US DOJ Motion to Dismiss, September 8, 2017 (Oregonians for Floodplain Protection & Home Builders v. US Depts. of Commerce and Homeland Security)

In response to an RPA, an action agency has a number of **options, including modifying its proposed action to implement the RPA, developing alternative means of achieving the RPA's objectives, and seeking an ESA exemption.**

FEMA has not yet determined how it will implement [the RPA] measures, Plaintiffs cannot allege any concrete or imminent injury with respect to either NMFS's issuance of the biological opinion or FEMA's plans to implement these measures.

FEMA does not expect to implement the provisions of RPA Element 2 until 2018.

DLCD next steps

- Send recommendations to FEMA Region 10
- Wait to learn more about FEMA's implementation plan
- Engage as needed



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FEMA e-mail: FEMA-R10-ESAcumments@fema.dhs.gov

RESOURCES

DLCD Website - <http://www.oregon.gov/lcd/Pages/index.aspx>

First link under current topics

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

OREGONIANS FOR FLOODPLAIN
PROTECTION; OREGON HOME
BUILDERS ASSOCIATION; and
NATIONAL ASSOCIATION OF HOME
BUILDERS;

Plaintiffs;

Case No.

v.

THE U.S. DEPARTMENT OF
COMMERCE, a department of the United
States of America; WILBUR L. ROSS, in
his capacity as the Secretary of Commerce;
THE NATIONAL MARINE FISHERIES
SERVICE, an agency of the United States
of America, SAMUEL D. RAUCH, III, in
his capacity as Acting Assistant
Administrator for National Marine
Fisheries Service, THE FEDERAL
EMERGENCY MANAGEMENT
AGENCY, an agency of the United States
of America, and ROBERT FENTON, in his
capacity as Acting Administrator for the
Federal Emergency Management Agency;

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. This case arises from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration (“NOAA”), National Marine Fisheries Service’s (“NMFS”) issuance of the *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 (the “Biological Opinion”), and the U.S. Department of Homeland Security, Federal Emergency Management Agency’s (“FEMA”) implementation of the Reasonable and Prudent Alternative (“RPA”).

2. The Biological Opinion erroneously concludes, without adequate analysis or support, that FEMA’s implementation of the National Flood Insurance Program (“NFIP”) in Oregon is likely to jeopardize the continued existence of 16 Endangered Species Act (“ESA”)-listed anadromous fish species and Southern Resident killer whales, and is likely to result in the destruction or adverse modification of designated or proposed critical habitat for the 16 anadromous fish species. The Biological Opinion contains an equally erroneously six element RPA to FEMA’s proposed implementation of the NFIP. 16 U.S.C. §§ 1531-1544.

3. FEMA has begun implementing the Biological Opinion’s erroneous RPA, beginning with Element 1 (notice to NFIP participating communities) and Element 2 (“Interim Measures”). There is nothing in the NFIP’s existing statutory authority or regulations, however, that authorize FEMA to implement the RPA as issued. Instead, FEMA is relying on a revised interpretation of a pre-existing NFIP regulation, 44 C.F.R. § 60.3(a)(2). FEMA has revised its interpretation of this regulation to require NFIP participating communities to demonstrate that floodplain development applicants obtain some form of “ESA permit” or otherwise comply with the ESA as a condition of issuing a floodplain development permit (hereinafter the “de facto amendment”). FEMA will permit NFIP participating communities in Oregon to demonstrate compliance with this new requirement by implementing the RPA, beginning with Element 2. This new directive from FEMA to NFIP participating communities relies on a substantive change in position regarding 44 C.F.R. § 60.3(a)(2), which was adopted without following the rulemaking procedures of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-559, 701-

706, 3105, 3344, 5372, 7521, § 553, and without analysis of environmental impacts required by National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370m-12.

4. Plaintiffs seek a declaration that the Biological Opinion, including the RPA, which directs FEMA to change its implementation of the NFIP not only in Oregon, but nationwide, violates the APA because it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). Plaintiffs further seek an injunction directing NMFS to withdraw the Biological Opinion, including the RPA. Such relief is necessary to ensure that changes to the NFIP proposed by NMFS and implemented by FEMA in Oregon and nationwide are not required without a complete and reasoned analysis of the actual impacts of the NFIP on ESA-listed species and their designated critical habitat.

5. Plaintiffs seek a declaration that FEMA’s de facto amendment of 44 C.F.R. § 60.3(a)(2) and implementation of the RPA without completing the pre-requisite rulemaking and NEPA review violates the APA because they are in excess of FEMA’s jurisdiction and authority and have been undertaken without observance of requisite procedure. 5 U.S.C. § 706. Plaintiffs further seek an injunction directing FEMA to suspend any further implementation of its de facto amendment to 44 C.F.R. § 60.3(a)(2) or implementation of the RPA prior to completing the prerequisite APA rulemaking and NEPA environmental review.

II. JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgment), and 28 U.S.C. § 2202 (injunctive relief). The challenged agency actions of NMFS and FEMA are subject to this Court’s review pursuant to the ESA, 16 U.S.C. § 1540(g), and the APA, 5 U.S.C. § 702.

7. On November 23, 2016, pursuant to the ESA, Plaintiff Oregon Home Builders Association (“OHBA”) and several other members of Oregonians for Floodplain Protection sent

separate notices of intent to sue to NMFS and to FEMA, each of which complies with the requirements of the ESA. The notice of intent to sue sent to NMFS is attached hereto as Exhibit 1. The notice of intent to sue sent to FEMA is attached hereto as Exhibit 2. More than 60 days have passed since receipt of such notices. Therefore, Plaintiffs have complied with the 60-day notice requirement for claims under the ESA and this Court has jurisdiction to review Plaintiffs' ESA claims.

8. The APA allows this Court to hold unlawful and set aside agency action that is arbitrary and capricious, an abuse of discretion, or not otherwise in accordance with law, 5 U.S.C. § 706(2)(A); that is in excess of the statutory jurisdiction, authority or limitation, 5 U.S.C. § 706(2)(C); and that is undertaken without observance of procedures required by law, 5 U.S.C. § 706(2)(D). The APA provides a cause of action for parties adversely affected by final agency action when "there is no other adequate remedy in a court." 5 U.S.C. § 704. Plaintiffs challenge final agency actions as defined by the APA, 5 U.S.C. § 704.

9. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(b)(2) and (e) because a substantial part of the events giving rise to the claims occurred in this District, including final decisions by both NMFS and FEMA regarding the Biological Opinion's conclusion and the terms of the RPA; Plaintiff Oregonians for Floodplain Protection is incorporated in this District; Plaintiff National Association of Home Builder's principal place of business is in this District; the U.S Department of Commerce and FEMA, as well as many of the federal officials responsible for the challenged actions reside in this District; and implementation of the RPA will affect the NFIP nationwide, not just in Oregon.

III. PARTIES AND STANDING

10. Plaintiff Oregonians for Floodplain Protection is a non-profit corporation formed in the District of Columbia. Oregonians for Floodplain Protection's purpose is to support and

advocate for sustainable floodplain development policies. Oregonians for Floodplain Protection is an association of national and local industry trade associations, individual property owners in Oregon, and NFIP-participating jurisdictions in Oregon. Members of Oregonians for Floodplain Protection have been and will continue to be directly and adversely affected by the Biological Opinion and FEMA's implementation of the RPA.

11. Several members of Oregonians for Floodplain Protection are NFIP participating communities in Oregon, including, but are not limited to, Tillamook County, Coos County, and the City of Warrenton. The NFIP participating community members are being coerced to limit development within their floodplains by the Biological Opinion and FEMA's current and ongoing implementation of the RPA. Implementation of the RPA will directly and negatively affect development patterns within their jurisdictions, threaten to force revisions to the existing boundaries between urban and rural/resource lands that are fundamental to Oregon's land use system, reduce their tax bases, expose them to financial liability to property owners, and limit development of properties owned by the jurisdictions within the floodplain. These member jurisdictions are concerned that if they do not comply with FEMA's direction to implement the RPA, particularly Element 2, FEMA will suspend or terminate them from the NFIP, forcing their residents to default on the terms and conditions of their federally backed mortgages that require flood insurance. Each of the NFIP participating community members has significant portions of their jurisdictional land in the mapped Special Flood Hazard Area ("SFHA").

12. Similarly, individual members of Oregonians for Floodplain Protection own properties and businesses located within the SFHA, and in some cases within the FEMA-designated floodway, within NFIP participating jurisdictions in Oregon. Those member property owners and businesses are being constrained by their local jurisdictions' imminent implementation of development limitations in order to continue to participate in the NFIP. The

development potential and value of their properties located in the floodplain have already been curtailed by NMFS's issuance of the Biological Opinion, and will be more significantly curtailed, and in some cases entirely eliminated, by FEMA's implementation of the development restrictions set forth in the RPA. Several members have specific and imminent plans to develop their floodplain properties, which will be prohibited or at least substantially curtailed by their local government adopting the development restrictions demanded by FEMA as part of implementing the RPA, particularly the Interim Measures proposed in Element 2.

13. Oregonians for Floodplain Protection and its members are concerned about and dedicated to protecting the environment and the land use system developed in Oregon over the last 40 years. Implementation of the development restrictions set forth in the RPA will undermine that land use system, forcing urban development to expand into areas that have been recognized and preserved as a combination of rural and resource lands, including agricultural lands and forestry lands. This will upset the careful system that the State of Oregon and its local jurisdictions have worked diligently to develop and maintain to balance beneficial use and preservation of Oregon's lands.

14. Further, several members of Oregonians for Floodplain Protection have participated voluntarily in significant projects in the FEMA-designated floodplain aimed at restoring and preserving habitat for ESA-listed anadromous fish species in Oregon. Those projects and the resulting benefits for ESA-listed species and habitat are not, however, acknowledged by NMFS in the Biological Opinion.

15. Plaintiff National Association of Home Builders ("NAHB") is a national trade organization incorporated in the State of Nevada with its principal place of business in Washington, D.C. NAHB has served as the voice of America's housing industry since it was founded in 1942. NAHB is a federation of more than 700 state and local associations, including

those in Oregon, and represents more than 140,000 members, including homebuilders and remodelers, as well as industry members working in sales and marketing, housing finance, and manufacturing and supplying building materials. NAHB's members construct about 80% of the new homes built in the United States, both single-family and multifamily.

16. NAHB's members own and work on real property, including property located in the SFHA, that will be subject to new development restrictions as a result of the implementation of the RPA. NAHB's members also derive revenue from construction on such properties. NAHB's members' ownership and property interests have been and will continue to be impaired by NMFS's jeopardy and adverse modification findings in the Biological Opinion, as well as its issuance of the RPA, and FEMA's unauthorized implementation of the RPA, including Element 2. NAHB's members' ability to use their property and their property values will be impacted because implementation of the RPA will limit development on property located in floodplains.

17. Plaintiff OHBA is a member of Oregonians for Floodplain Protection and a member of NAHB. OHBA and its members suffer injuries as a result of the Biological Opinion and FEMA's implementation of the RPA of the types identified in paragraphs 10-16 above. The above-described interests of Plaintiffs and their members have been, are being, and, unless this Court grants the relief prayed for herein, will continue to be adversely affected by NMFS's disregard of its statutory duties under the ESA and FEMA's failure to meet its statutory duties under the APA and NEPA.

18. FEMA's failure to comply with APA rulemaking procedures prior to implementing its de facto amendment 44 C.F.R. § 60.3(a)(2) has denied the Plaintiffs and their members their right to notice and the opportunity to participate before FEMA makes significant changes to its program that affect the availability of NFIP flood insurance in their jurisdictions. The changes implemented by FEMA without the required APA rulemaking process also subject

Plaintiffs and their members to additional costly obligations before they may receive permits to develop their properties.

19. FEMA's failure to comply with NEPA before implementing and enforcing its de facto amendment of 44 C.F.R. § 60.3(a)(2) and before beginning to implement the RPA undermines and injures the Plaintiffs' and their members' recreational, aesthetic, scientific, cultural, spiritual, and other interests and activities by altering the floodplain management criteria without taking a hard look at environmental impacts of those changes or reasonable alternatives. If FEMA were directed to comply with NEPA, it could adopt alternatives that would lessen, and thus redress, Plaintiffs' and their members' injuries.

20. FEMA's failure to comply with NEPA also causes Plaintiffs' procedural and informational injuries. Plaintiffs have and will continue to advocate for sustainable floodplain development policies and seek to engage relevant decision-makers about the Biological Opinion. If FEMA had complied with NEPA, the process would have generated additional information, and Plaintiffs would have had access to this information, improving their ability to participate in decision-making and to suggest possible alternatives.

21. A court order finding that the Biological Opinion, including the RPA, is in violation of the ESA and is invalid as arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law under the APA would redress Plaintiffs' injuries by ensuring that environmental objectives of the ESA are pursued in light of the actual impacts of the NFIP and with appropriate reference to FEMA's authority and economic consequences.

22. A court order requiring FEMA to comply with its procedural and substantive obligations under the APA and NEPA before amending 44 C.F.R. § 60.3(a)(2) or before implementing the RPA would remedy Plaintiffs' procedural injuries.

23. NMFS is an office of the NOAA within the U.S. Department of Commerce that is charged with administering the ESA with respect to anadromous and marine species, including salmonids and killer whales. NMFS has the responsibility to engage in ESA Section 7 consultation with other agencies to evaluate the effects of a proposed agency action on listed species under its jurisdiction. The authority delegated to NMFS to administer and implement the ESA is subject to, and must be in compliance with, the applicable requirements of the ESA and the APA.

24. Defendant Wilbur Ross is sued in his official capacity as the Secretary of the U.S. Department of Commerce. As the Secretary of the U.S. Department of Commerce, Mr. Ross is the highest ranking official within the U.S. Department of Commerce and has ultimate responsibility for the administration and implementation of the ESA.

25. Defendant Samuel D. Rauch, III, is sued in his official capacity as Acting Assistant Administrator of NMFS. As Acting Assistant Administrator of NMFS, Mr. Rauch is charged with administering the ESA, including consultation with federal agencies under Section 7(a)(2).

26. The U.S. Department of Commerce is a department within the U.S. government with the ultimate responsibility for implementing and enforcing compliance with the relevant provisions of the ESA.

27. Defendant FEMA is an agency of the U.S. Department of Homeland Security. FEMA is responsible for the implementation of the NFIP. The authority delegated to FEMA to administer and implement the NFIP is subject to, and must be in compliance with, the applicable requirements of the APA and NEPA.

28. Defendant Robert Fenton is sued in his official capacity as Acting Administrator of FEMA. As Acting Administrator of FEMA, Robert Fenton is charged with administering the NFIP.

IV. LEGAL BACKGROUND

A. *National Flood Insurance Program Overview*

29. The NFIP is a federal program administered by FEMA. The NFIP was established by the passage of the National Flood Insurance Act of 1968 (“NFIA”), 42 U.S.C. § 4001-4129. The NFIA enables property owners in participating communities to purchase insurance protection against losses from flooding through the federal government, provided that their participating communities adopt certain floodplain management regulations that are designed to reduce future flood damages. 42 U.S.C. § 4001(d). The intent was to reduce future flood damage through community floodplain management ordinances and provide protection for property owners against potential losses through an insurance mechanism. 42 U.S.C. § 4002(b).

30. The scope and purpose of the NFIA is to protect people and property from flood hazards. No provision under the NFIA authorizes FEMA to adopt measures for the benefit of threatened and endangered species that extend beyond the primary purposes of the NFIA, which is avoidance of flood damage and flood losses.

31. FEMA develops, and from time-to-time is required to revise, floodplain management criteria intended to 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.” 42 U.S.C. § 4102(c)(2). FEMA’s floodplain management criteria are codified in federal regulations at 44 C.F.R. §§ 60.1-.26. Among FEMA’s floodplain management criteria is 44 C.F.R. § 60.3(a)(2), which provides in relevant part, that NFIP participating communities shall:

Review proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law, including section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1334.

32. Flood insurance from FEMA is not available in communities that have not adopted floodplain management criteria consistent with FEMA's regulations. 42 U.S.C. § 4022(a)(1); 44 C.F.R. § 60.1(a). If FEMA modifies its floodplain management criteria, all NFIP participating communities must implement those changes to maintain eligibility to participate in the NFIP. Nearly all counties and cities in Oregon with any mapped floodplain within their jurisdictions are enrolled in the NFIP.

33. FEMA oversees communities' participation in and eligibility for the NFIP in an ongoing manner. FEMA conducts community visits and contacts to ensure proper implementation of NFIP requirements. A community's failure to implement and enforce NFIP minimum criteria can result in probation or suspension from the NFIP, which would make federal flood insurance unavailable in that community. 44 C.F.R. § 59.24.

34. The Flood Disaster Protection Act of 1973 and the Flood Insurance Reform Act of 1994, as amended, require those federal agencies that are responsible for overseeing federally-regulated and insured lenders to mandate the purchase of flood insurance for properties located within an area having special flood hazards for the term of the loan. 42 U.S.C. § 4012a.

35. FEMA also implements a Community Rating System ("CRS"), a separate, voluntary program to encourage local jurisdictions to adopt floodplain management regulations that exceed FEMA's minimum development standards. 42 U.S.C. § 4022(b). Under the CRS, insured parties in jurisdictions that have adopted floodplain management regulations that are more restrictive than FEMA's minimum development standards set forth in 44 C.F.R. Parts 59 and 60 are rewarded with lower insurance rates. 42 U.S.C. § 4022(b)(2).

36. FEMA develops and revises maps and other information that identify flood-prone areas as part of its implementation of the NFIP. 42 U.S.C. § 4101. Certain maps, known as Flood Insurance Rate Maps (“FIRMs”), identify various categories of flood hazard areas, including SFHAs and regulatory floodways, in which the NFIP’s minimum development standards apply. *See* 44 C.F.R. pt. 65.

B. *The Endangered Species Act*

37. Congress enacted the ESA “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved ... [and] to provide a program for the conservation of such endangered species and threatened species[.]” 16 U.S.C. § 1531(b).

38. Section 7(a)(2) of the ESA mandates an interagency consultation process to evaluate potential impacts to listed species and designated critical habitat before a federal agency may authorize, fund, or take any discretionary action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.03. The consultation process begins when a federal “action agency” (here FEMA) requests that NMFS or the U.S. Fish and Wildlife Service (“FWS”) (each, a “Service” and collectively, the “Services”), or both, review a proposed action that may affect a listed species or destroy or adversely modify critical habitat. *Id.* The Services have promulgated regulations regarding their implementation of Section 7. 50 C.F.R. pt. 402. The Services also have published various guidance documents on the ESA Section 7 consultation process, including the U.S. Fish & Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook* (1998).

39. The consultation process usually begins as informal consultation. If the action agency, after discussions with the Service(s), determines that the proposed action is not likely to affect any listed species or destroy or adversely modify designated critical habitat, and if the

Service(s) concur(s), the informal consultation is complete and the proposed project moves ahead. If it appears that the agency's action may affect a listed species or destroy or adversely modify critical habitat, that agency may then prepare a biological assessment to assist in its determination of the project's effect on a species or critical habitat.

40. Based on its review of the biological assessment and other data and information, if the action agency determines that the proposed action is not likely to affect any listed species or destroy or adversely modify critical habitat, and if the Service(s) concur(s), initiation of formal consultation is not required. If it appears that the agency's action may affect a listed species or destroy or adversely modify critical habitat, the Service will prepare a biological opinion regarding whether the proposed activity will jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat. To "*Jeopardize the continued existence of* 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." 50 C.F.R. § 402.02. The biological opinion must, among other things, be based upon "the best scientific and commercial data available" and must "give appropriate consideration to any beneficial actions taken by the federal agency or applicant, including any actions taken prior to the initiation of consultation." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

41. To fulfill their ESA Section 7 duties for an action that an action agency proposes to implement, fund or authorize, the Services must evaluate "the effects of the action and cumulative effects on the listed species or critical habitat." 50 C.F.R. § 402.14(g)(3). "Effects of the action" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action that will be added to the environmental baseline. 50 C.F.R. § 402.02. "Indirect effects are those

that are caused by the proposed action and are later in time, but still are reasonably certain to occur.” 50 C.F.R. § 402.02. Cumulative effects are “are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” 50 C.F.R. § 402.02.

42. In making a determination on whether an action will result in jeopardy, the Service begins by looking at the current status of the species, or “baseline.” The Services’ joint consultation regulations require that the “environmental baseline” for analysis include “the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.” *See* 50 C.F.R. § 402.02.

43. The biological opinion must include a summary of the information upon which the opinion is based, a “detailed discussion of the effects of the action on listed species or critical habitat,” and an opinion as to “whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat . . .” 50 C.F.R. § 402.14(h)(2-3).

44. If a proposed agency action is likely to jeopardize a listed species or adversely modify designated critical habitat, the Services must propose an RPA that will avoid those outcomes. 16 U.S.C. § 1536(b)(3)(A). An RPA is one way—but not the only way—that an action agency may avoid jeopardy or adverse modification or destruction of critical habitat.

45. An RPA must: (1) be capable of being implemented in a manner consistent with the intended purpose of the action; (2) be consistent with the scope of the action agency’s legal authority and jurisdiction; (3) be economically and technologically feasible; and (4) avoid the likelihood of jeopardy to a species or the adverse modification or destruction of critical habitat.

50 C.F.R. § 402.02. Further, as with the rest of the biological opinion, the RPA must be based upon “the best scientific and commercial data available” and must “give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

C. *The National Environmental Policy Act*

46. NEPA was enacted in 1970. NEPA directs all federal agencies to assess the environmental impacts of proposed federal actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(C)(ii). NEPA’s disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) to insure that the public is informed and involved in decisions that affect the quality of the human environment. 40 C.F.R. § 1500.2.

47. The Council on Environmental Quality (“CEQ”) promulgated uniform regulations to implement NEPA that are binding on all federal agencies. 42 U.S.C. § 4342; 40 C.F.R. §§ 1500.1-1508.08. In addition, each federal agency is required to develop NEPA procedures that supplement the CEQ regulations. 40 C.F.R. § 1507.3.

48. NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C).

49. An EIS is a “detailed statement” that describes (1) the “environmental impact of the proposed action,” (2) any “adverse environmental effects which cannot be avoided should the proposal be implemented,” (3) “alternatives to the proposed action,” (4) “the relationship between local short term uses of man’s environment and the maintenance and enhancement of long-term productivity,” and (5) any “irreversible or ir retrievable commitment of resources

which would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332(C).

50. When it is not clear whether an action requires the preparation of an EIS, the regulations direct agencies to prepare a document known as an environmental assessment (“EA”) to determine whether an EIS is required. 40 C.F.R. § 1501.4. An EA is a “concise public document” that must “briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 C.F.R. § 1508.9(a).

51. If, based on an EA, an agency determines that an action may have a significant environmental impact, the agency must prepare an EIS. 40 C.F.R. § 1501.4(c). If the agency determines that the impacts will not be significant, the agency must prepare a Finding of No Significant Impact. 40 C.F.R. § 1501.4(e); 40 C.F.R. § 1508.13.

52. Whether the agency prepares an EA or an EIS, or both, NEPA requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(e). Alternatives must be given full and meaningful consideration. 40 C.F.R. §§ 1502.14, 1508.9(b).

D. *The Administrative Procedure Act*

53. Congress enacted the APA in 1946, prescribing the process by which federal agencies develop and issue regulations and other agency actions such as policy statements, licenses and permits.

54. Before adopting a rule, the APA requires federal agencies to publish notice of the proposed rule in the Federal Register, and after such notice, give interested persons an opportunity to participate in the rulemaking. 5 U.S.C. § 553.

55. The APA defines “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency” 5 U.S.C. § 551(4).

56. An agency must follow the procedures of the APA before implementing a substantive amendment to an existing regulation. An agency may not avoid the procedures of the APA by making a substantive amendment and calling that amendment mere “guidance” that interprets the existing regulation.

57. The APA also authorizes courts to review final agency actions and grants a right of judicial review to “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action” 5 U.S.C. § 702. The APA mandates that a court hold unlawful and set aside such actions, findings, and conclusions when they are: (a) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A); (b) in excess of statutory jurisdiction, authority or limitation, 5 U.S.C. § 706(2)(C); or (c) without observance of procedures required by law, 5 U.S.C. § 706(2)(D).

58. Biological opinions issued pursuant to Section 7 of the ESA, including the Biological Opinion regarding FEMA’s implementation of the Oregon NFIP, are subject to judicial review under the APA.

59. Failures to abide by the requirements of NEPA and the APA are subject to judicial review under the APA. 5 U.S.C. §§ 702, 706.

V. FACTS GIVING RISE TO PLAINTIFFS’ CAUSE OF ACTION

A. The Prior Litigation and the Oregon NFIP Consultation

60. On June 25, 2009, Audubon Society of Portland, Northwest Environmental Defense Center, the National Wildlife Federation, and the Association of Northwest Steelheaders

filed suit against FEMA for failing to consult on the effects of the NFIP on threatened and endangered species in Oregon. In July 2010, FEMA reached a settlement with the plaintiffs under which FEMA agreed to initiate ESA consultation regarding the effects of the implementation of the NFIP in Oregon on certain ESA-listed species.

61. On July 18, 2011, FEMA provided a letter to NMFS requesting formal consultation under the ESA regarding the implementation of the NFIP in the State of Oregon. FEMA initiated formal consultation with NMFS on August 15, 2012. As part of its consultation request, FEMA provided to NMFS its *Program Level Biological Assessment for the National Floodplain Insurance Program Oregon State* (“Biological Assessment”) in February 2013, which relied upon FEMA’s de facto amendment to 44 C.F.R. § 60.3(a)(2).

62. Almost four years later, on April 14, 2016, NMFS issued a Biological Opinion on the impacts of the NFIP in Oregon on 17 ESA-listed anadromous fish species and Southern Resident killer whales. In the Biological Opinion, NMFS determined that the implementation of the NFIP in Oregon as proposed by FEMA would jeopardize the survival and recovery of 16 of the 17 ESA-listed anadromous fish species considered in the Biological Opinion and Southern Resident killer whales, and would destroy or adversely modify the designated or proposed critical habitat for the 16 anadromous fish species.

63. NMFS issued a six element RPA to FEMA’s proposed implementation of the NFIP for the 16 anadromous listed species and Southern Resident killer whales for which it found jeopardy. Element 1 directs FEMA to give notice of NMFS’s conclusions in the Biological Opinion and the terms of the RPA to the Oregon NFIP participating communities. Element 2 directs FEMA to implement “Interim Measures” pending full RPA implementation. Element 3 directs FEMA to revise its mapping protocols nationwide and to map erosion prone areas under the NFIP. Element 4 directs FEMA to modify the NFIP floodplain management

criteria nationwide, including to adopt an “ESA performance standard.” Element 5 directs FEMA to collect data from NFIP participating communities and to document and report impacts of floodplain development. Element 6 directs FEMA to enforce the amended floodplain management criteria.

64. NMFS set a series of deadlines in the Biological Opinion for each element of the RPA. For example, the Biological Opinion sets March 15, 2018, as the deadline for implementation of the Interim Measures set forth in Element 2, and January 1, 2021, as the deadline for implementation of any components of the RPA that FEMA determines require regulatory revisions. Biological Opinion at 277.

65. The Biological Opinion contains numerous deficiencies that render the jeopardy and adverse modification or destruction determinations, as well as the RPA, in violation of the ESA and arbitrary and capricious or otherwise not in accordance with the law.

66. The Biological Opinion misconstrues the scope of the agency action. The NFIP is a flood insurance program. It does not authorize floodplain development. FEMA has repeatedly explained that private floodplain development, not the NFIP, causes changes to the pre-existing condition of the floodplain (if any).

67. The Biological Opinion fails to consider the correct environmental baseline. In particular, in contravention of its own regulations, NMFS failed to incorporate required factors into the environmental baseline, including “the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.” 50 C.F.R. § 402.02.

68. The Biological Opinion fails to demonstrate or document how the NFIP causes floodplain development, or to identify which floodplain development NMFS believes is caused by the NFIP. Instead, the Biological Opinion's effects analysis wrongly attributes *all* development within the floodplain, and the impacts thereof, to the NFIP, including wholly private development that is not insured through the NFIP and development that predated the NFIP.

69. The Biological Opinion fails to take into consideration the existing conditions in Oregon's floodplains, including existing developed and degraded conditions; fails to differentiate between the effects of development of unaltered areas as compared to the effects of redevelopment of previously developed areas; and fails identify areas of development that occurred prior to the implementation of the NFIP and prior to the initiation of the subject ESA consultation.

70. The Biological Opinion fails to differentiate between alleged direct and indirect effects of the NFIP on any listed species or designated critical habitat. To the extent private floodplain development is an indirect effect of the NFIP, the Biological Opinion fails to limit its effects analysis to indirect effects that are reasonably certain to occur.

71. The Biological Opinion both attributes the effects of private floodplain development to the NFIP and also considers those effects as "cumulative effects." As a result, NMFS "double counts" the effects of floodplain development on listed species or designated critical habitat in conducting its analysis. Further, in considering private floodplain development as a "cumulative effect," the Biological Opinion fails to limit its analysis of cumulative effects to those that are reasonably certain to occur.

72. The Biological Opinion fails to include any reasonable basis for the conclusion that FEMA's implementation of the NFIP in Oregon is likely to cause particular impacts to the

listed species or designated critical habitat. Further, the Biological Opinion fails to consider the probability of any given impact. The Biological Opinion assumes that any and all *possible* impacts of floodplain development will occur with every development project and will be 100% attributable to the NFIP, regardless of the actual or probable impacts of any given development and the unique circumstances of such development.

73. In the Biological Opinion, NMFS failed to provide a reasonable evidentiary basis for the Biological Opinion's jeopardy conclusion. In particular, the Biological Opinion fails to identify the magnitude of any loss or degradation of aquatic systems, the species populations' ability to tolerate any such impacts, or how any impacts will considerably or materially reduce the likelihood of survival or recovery.

74. The Biological Opinion fails to provide a reasonable basis for the conclusion that FEMA's implementation of the NFIP destroys or adversely modifies critical habitat because the evidence does not demonstrate that any adverse effects will "considerably reduce" the value of critical habitat.

75. NMFS adopted an RPA that is in violation of the ESA and its implementing regulations. The RPA it is not within the scope of FEMA's statutory authority under the NFIA. FEMA has repeatedly explained to NMFS that implementation of the RPA is not within its authority. *See* Letter from Roy E. Wright, FEMA Deputy Associate Administrator for Mitigation, to William Stelle, NMFS Regional Administrator (May 29, 2014); Letter from Mark Carey, FEMA Mitigation Division Director, to Kim Kratz, Ph.D., NMFS Assistant Regional Administrator (Jan. 14, 2015); Letter from Mark Carey, FEMA Mitigation Division Director, to Kim Kratz, Ph.D. (June 3, 2015); Letter from Michael M. Grimm, FEMA Assistant Administrator for Mitigation, to Kim Kratz, Ph.D, NMFS Assistant Regional Administrator.

(May 4, 2016). NMFS disregarded FEMA's contrary interpretation of the limits on its authority and misapplied tenants of statutory construction in construing the NFIA.

76. RPA Elements 2, 4 and 5 are not within FEMA's legal authority because their implementation depends on actions by third parties. Elements 2 and 4 depend on NFIP participating communities taking separate actions to amend their flood hazard development regulations to implement the changes set forth in those RPA Elements. Element 5 depends on NFIP participating communities providing information regarding issued floodplain permits that is not otherwise required by the NFIP.

77. The RPA is not economically and technologically feasible. The Biological Opinion did not analyze the actual costs to FEMA of implementing the RPA or FEMA's ability to bear those costs.

78. The Biological Opinion also fails to consider the ability of NFIP participating communities to bear the costs of implementing the RPA. RPA Elements 2 and 4 will require NFIP participating communities to complete separate public administrative processes to amend their existing flood hazard development regulations. These processes are typically expensive and time consuming, requiring public notice, staff analysis, and one or more public hearings. RPA Element 5 will require NFIP participating communities to collect and report data regarding permits for development in the floodplain.

79. The Biological Opinion fails to adequately explain how the RPA will avoid jeopardy to the species or destruction or adverse modification of critical habitat.

B. FEMA's De Facto Amendment to 44 C.F.R. § 60.3(a)(2)

80. The NFIP's minimum floodplain development criteria were originally promulgated in 1976. 41 Fed. Reg. 46,975 (Oct. 26, 1976). 44 C.F.R. § 60.3(a)(2) states that NFIP participating communities must "review proposed development to assure that all necessary

permits have been received from those governmental agencies from which approval is required by Federal or State law, including section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1334.” 44 C.F.R. § 60.3(a)(2).

81. FEMA provided its Biological Assessment of the Oregon NFIP to NMFS as part of its request to initiate formal consultation. In the Biological Assessment, FEMA set forth its new statement of the requirements of 44 C.F.R. § 60.3(a)(2). Specifically, FEMA states: “NFIP communities must ensure that permit applicants have demonstrated compliance with the ESA before issuing a floodplain development permit per the NFIP regulations (44 C.F.R. 60.3(a)(2)).” Biological Assessment at 2-37. FEMA further explains this new requirement as follows: “if the potential of a ‘take’ exists for a proposed development permit within the SFHA, the community has a requirement under Part 60.3.a.2 to ensure the ESA ‘permit for take’ has been obtained from NMFS.” Biological Assessment at 2-40. FEMA identified a “permit for take” as either an ESA Section 10 permit or “any Incidental Take Statement issued to federal agencies under Section 7 of the ESA” Biological Assessment at 2-40-2-41.

82. Prior to the Biological Assessment, FEMA had not interpreted 44 C.F.R. § 60.3(a)(2) as requiring an NFIP participating community to require a floodplain development permit applicant to obtain an ESA “permit for take” (Section 10), or otherwise to demonstrate compliance with the ESA prior to issuing a floodplain development permit.

83. NMFS referred to FEMA’s effort to revise its interpretation of 44 C.F.R. § 60.3(a)(2) as requiring NFIP participating communities to require floodplain permit applicants to obtain an “ESA permit” or otherwise comply with the ESA as “a significant flaw,” explaining that 44 C.F.R. § 60.3(a)(2) refers to “necessary permits . . . required by Federal or State law.” Biological Opinion at 40. NMFS explained in the Biological Opinion that ESA Section 10 permits are elective, not required, and consequently do not fall within the purview of 44 C.F.R. §

60.3(a)(2). *Id.* Further, Incidental Take Statements (“ITSs”) are available only as a part of an ESA Section 7 consultation. Private floodplain development projects that do not require or depend on either any federal authorization or federal funding, however, do not require a Section 7 consultation. As a result, an ITS is not a “required permit” for private floodplain development projects that do not require or depend on either any federal authorization or federal funding.

C. FEMA’s Implementation of the RPA

84. FEMA has begun implementing the RPA.

85. Consistent with RPA Element 1, on June 13, 2016, FEMA Region X sent a notice letter to NFIP participating jurisdictions in Oregon notifying those communities of the Biological Opinion, alleging their responsibilities under the Biological Opinion and RPA, and explaining FEMA’s intent to implement the RPA. Biological Opinion at 277-278. The notice letter characterizes the RPA’s implementation, beginning with the Interim Measures in Element 2, as a definite and imminent matter that will be implemented according to the terms of the RPA. *See* Letter from Mark Carey, FEMA Region X Mitigation Division Director, to NFIP participating communities in the State of Oregon (June 13, 2016).

86. Element 2 of the RPA directs FEMA to require NFIP participating communities to adopt “Interim Measures” intended to protect floodplain habitat and listed species. Biological Opinion at 278-280. First, Element 2(A) directs FEMA to require that all development in the SFHA be mitigated to achieve no net loss of natural floodplain function, and sets forth several mitigation ratios for compensatory storage, vegetation removal, and placement of impervious surface applicable to development within the floodplain irrespective of the actual effects of the development. Second, Element 2(B) directs FEMA to require local jurisdictions to adopt a “riparian buffer zone” (“RBZ”) and to prohibit all development in the RBZ other than open space, habitat restoration, activities that result in a beneficial gain for the species or habitat, and

activities that will have no adverse effects on listed species or habitat. Further, Element 2 directs FEMA to revise its map revision procedures to decline all floodplain map amendments for which the applicants fail to demonstrate that all impacts of development to natural floodplain functions have been avoided or mitigated, or where the proposed development may adversely affect natural floodplain functions.

87. In its notice letter, as well as during several presentations to NFIP participating communities in Oregon in 2016, FEMA has represented that NFIP participating communities are responsible for complying with the RPA, beginning with Element 2. In making this assertion, FEMA is relying on its de facto amendment to 44 C.F.R. 60.3(a)(2), and determining that NFIP participating communities may demonstrate compliance with 44 C.F.R. § 60.3(a)(2) by applying the development regulations set forth in the RPA, beginning with Element 2, to floodplain development permits.

88. FEMA is implementing RPA Element 2 through a coordinated process with the Oregon Department of Land Conservation and Development (“DLCD”), the state agency charged with regulating land use in Oregon. In June and July of 2016, FEMA and the DLCD held workshops with local governments to identify the methods by which communities can implement the RPA. FEMA and the DLCD are developing a model ordinance that incorporates the requirements of the RPA.

89. To date, FEMA has not initiated or completed review under NEPA despite taking actions to implement the RPA. Further, to date, FEMA has not initiated or completed APA rulemaking despite the fact that the NFIP’s existing regulations do not authorize FEMA to require NFIP participating communities to comply with the RPA to maintain their participation in the NFIP.

90. Development in floodplains and in surrounding areas will be restricted as a result of the implementation of the RPA. Limitations on development within floodplains may redirect development to other areas, namely on lands outside of the mapped floodplain, which will have impacts on the natural and human environment.

91. FEMA has repeatedly stated that it is not a permitting or land use authority. FEMA interprets its own authority under the NFIA as limited, and has explained that the NFIA does not give FEMA the authority to regulate privately funded development on private land, nor does it give FEMA the authority to adopt measures to protect listed species or their habitat. Nevertheless, by implementing the RPA, particularly RPA Element 2, which prohibits or severely restricts development in the floodplain, FEMA is dictating to NFIP participating communities – and through the communities to property owners – how their land may be used and developed.

VI. CAUSES OF ACTION

COUNT 1: NMFS's ESA and APA Violations – Incorrect Scope of FEMA's Action

92. Plaintiffs incorporate by reference all preceding paragraphs.

93. In determining that FEMA's implementation of the NFIP in Oregon results in jeopardy to 16 anadromous fish species and Southern Resident killer whales and destroys or adversely modifies critical habitat of 16 anadromous fish species, NMFS mischaracterizes the scope of FEMA's action under the NFIP subject to ESA Section 7 consultation.

94. This error, as further described in paragraph 66 above, is not in accordance with and violates 16 U.S.C. § 1536(a)(2) and 50 CFR § 402.14(g)-(h). This error constitutes a violation of the APA because it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

COUNT 2: NMFS's ESA and APA Violations – Incorrect Baseline

95. Plaintiffs incorporate by reference all preceding paragraphs.

96. In determining that FEMA's implementation of the NFIP in Oregon results in jeopardy to 16 anadromous fish species and Southern Resident killer whales and destroys or adversely modifies critical habitat of 16 anadromous fish species, NMFS did not consider all relevant factors in the environmental baseline. 50 C.F.R. § 402.02.

97. This error, as further described in paragraph 67 above, is not in accordance with and violates 16 U.S.C. § 1536(a)(2) and 50 CFR 402.14(g)-(h). This error constitutes a violation of the APA because it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

COUNT 3: NMFS's ESA and APA Violations – Flawed Effects Analysis

98. Plaintiffs incorporate by reference all preceding paragraphs.

99. In determining that FEMA's implementation of the NFIP in Oregon results in jeopardy to 16 anadromous fish species and Southern Resident killer whales and destroys or adversely modifies critical habitat of 16 anadromous fish species, NMFS relied on an incorrect environmental baseline in its effects analysis.

100. In determining that FEMA's implementation of the NFIP in Oregon results in jeopardy to 16 anadromous fish species and Southern Resident killer whales and destroys or adversely modifies critical habitat of 16 anadromous fish species, NMFS failed to isolate the impacts of the NFIP from pre-existing impacts or improbable future impacts.

101. In determining that FEMA's implementation of the NFIP in Oregon results in jeopardy to 16 anadromous fish species and Southern Resident killer whales and destroys or adversely modifies critical habitat of 16 anadromous fish species, NMFS failed to differentiate

between the direct and indirect effects of the NFIP, and consequently included in its analysis indirect effects that are not reasonably certain to occur.

102. In determining that FEMA's implementation of the NFIP in Oregon results in jeopardy to 16 anadromous fish species and Southern Resident killer whales and destroys or adversely modifies critical habitat of 16 anadromous fish species, NMFS included the effects of private floodplain development both as an effect of the NFIP and as "cumulative effects," thereby "double counting" the effects of private floodplain development in its effects analysis. Further, in considering private floodplain development as a "cumulative effect," NMFS failed to limit its analysis of cumulative effects to those that are reasonably certain to occur.

103. In determining that FEMA's implementation of the NFIP in Oregon results in jeopardy to 16 anadromous fish species and Southern Resident killer whales and destroys or adversely modifies critical habitat of 16 anadromous fish species, NMFS failed to provide any reasonable basis for the Biological Opinion's conclusion that FEMA's implementation of the NFIP in Oregon is likely to cause particular impacts to the listed species or designated critical habitat.

104. In determining that FEMA's implementation of the NFIP in Oregon results in jeopardy to 16 anadromous fish species and Southern Resident killer whales and destroys or adversely modifies critical habitat of 16 anadromous fish species, NMFS failed to include a reasonable evidentiary basis for the jeopardy conclusion. In particular, it failed to identify the magnitude of any loss or degradation of aquatic systems, the species populations' ability to tolerate any such impacts, or how any impacts will considerably or materially reduce the likelihood of survival or recovery.

105. In determining that FEMA's implementation of the NFIP in Oregon results in jeopardy to 16 anadromous fish species and Southern Resident killer whales and destroys or

adversely modifies critical habitat of 16 anadromous fish species, NMFS failed to provide a reasonable basis for the Biological Opinion's conclusion that FEMA's implementation of the NFIP destroys or adversely modifies critical habitat because the evidence does not demonstrate that any adverse effects will "considerably reduce" the value of critical habitat.

106. These errors, as further described in paragraphs 67-74 above, violate 16 U.S.C. § 1536(a)(2) and 50 CFR 402.14(g)-(h). These errors constitute violations of the APA because they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

COUNT 4: NMFS's ESA and APA Violations – The RPA is Arbitrary and Capricious and Otherwise Not in Accordance with the Law

107. Plaintiffs incorporate by reference all preceding paragraphs.

108. NMFS's regulations require that RPAs must be implemented in a manner consistent with the intended purpose of the action, be within the scope of the action agency's legal authority and jurisdiction, be economically and technologically feasible, and must avoid the jeopardy to the ESA-listed species or destruction or adverse modification of critical habitat. 50 C.F.R. § 402.02. NMFS' RPA as set forth in the Biological Opinion is arbitrary and capricious and not in accordance with 50 C.F.R. § 402.02.

109. In developing and describing the RPA, NMFS sought to impose on FEMA requirements that exceed FEMA's legal authority and jurisdiction.

110. In developing and describing the RPA, NMFS failed to analyze whether the RPA was in fact economically or technologically feasible based on the actual costs to FEMA of implementing the RPA or FEMA's ability to bear those costs.

111. In developing and describing the RPA, NMFS failed to conduct any analysis regarding whether the RPA was in fact economically or technologically feasible for the NFIP participating communities burdened with implementing it.

112. In developing and describing the RPA, NMFS failed to use the best scientific and commercial data available and without giving appropriate consideration to beneficial actions taken by FEMA, NFIP participating communities or others.

113. In developing and describing the RPA, NMFS failed to provide reasonable support demonstrating that the RPA would avoid jeopardy of the species or destruction or adverse modification of critical habitat.

114. These errors, as further described in paragraphs 75-79 above, violate 16 U.S.C. § 1536(a)(2) and 50 C.F.R. §§ 402.02 and 402.14(g)(8). These errors constitute violations of the APA because they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

COUNT 5: FEMA'S APA Violation - The RPA and De Facto Amendment to 44 C.F.R. § 60.3(a)(2) are Arbitrary and Capricious, in Excess of Statutory Authority, and Otherwise Not in Accordance with the Law

115. Plaintiffs incorporate by reference all preceding paragraphs.

116. The APA defines rulemaking as the “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551. The APA requires agencies to provide notice and comment opportunities before promulgating rules. 5 U.S.C. § 553(b), (c).

117. As explained in the Biological Assessment, and in an effort to provide itself with authority to implement the RPA, FEMA has adopted a de facto amendment to 44 C.F.R. § 60.3(a)(2). Through this adoption and application of a de facto amendment of 44 C.F.R. § 60.3(a)(2), FEMA imposed new legal obligations on NFIP participating communities and floodplain development applicants.

118. The de facto amendment of 44 C.F.R. § 60.3(a)(2) is a legislative rule because it amends an existing legislative rule, alters the NFIP's requirements, and imposes new legal obligations with substantial future effects on local jurisdictions and floodplain development

applicants. As a legislative rule, the de facto amendment of 44 C.F.R. § 60.3(a)(2) was subject to APA section 553. Contrary to the APA, FEMA has not provided notice or opportunity to comment on the proposed rule.

119. FEMA's imposition of ESA-based requirements on NFIP participating communities and floodplain development applicants exceeds its authority.

120. FEMA's failure to provide for notice and comment prior to adopting the de facto amendment to 44 C.F.R. § 60.3(a)(2) deprived Plaintiffs of their right to comment on and inform the outcome of the rulemaking.

121. FEMA's failure to follow notice and comment rulemaking procedures as required by 5 U.S.C. § 553 constitutes unlawful agency action without observance of required procedures under 5 U.S.C. § 706(2)(A), (D) and under its own rulemaking regulations at 44 CFR pt. 1.

COUNT 6: FEMA'S NEPA Violation – Failure to Analyze Environmental Impacts and Consider All Reasonable Alternatives

122. Plaintiffs incorporate by reference all preceding paragraphs.

123. FEMA is a federal agency subject to NEPA, 42 U.S.C. §§ 4321-4370m-12.

124. FEMA's implementation of the RPA constitutes a major federal action significantly affecting the quality of the human environment.

125. FEMA's implementation of its de facto amendment to 44 C.F.R. § 60.3(a)(2) constitutes a major federal action significantly affecting the quality of the human environment.

126. FEMA is required to complete review under NEPA prior to implementing any portion of the RPA or its de facto amendment to 44 C.F.R. § 60.3(a)(2). In violation of NEPA, FEMA did not prepare an environmental impact statement, finding of no significant impact, environmental assessment or exemption prior to either action. This constitutes unlawful agency action without observing required procedures under 5 U.S.C. § 706(2)(A), (D).

127. In addition, in failing to complete the required environmental review, FEMA failed to consider a reasonable range of alternatives other than the RPA or the de facto amendment to 44 C.F.R. § 60.3(a)(2). That error was arbitrary, capricious, and contrary to NEPA and its implementing regulations, 42 U.S.C. § 4332(2); 40 C.F.R. §§ 1502.14, 1508.9(b).

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court to enter judgment providing the following relief:

1. Order and declare that NMFS is in violation of the ESA and the APA because the Biological Opinion issued by NMFS relating to FEMA's implementation of the NFIP in Oregon violates the ESA and is arbitrary, capricious, and not in accordance with law, and that the RPAs are not binding or otherwise effective;
2. Order and declare that FEMA is in violation of the APA because FEMA issued a legislative rule without abiding by the notice and comment requirements of the APA Section 553;
3. Order and declare that FEMA is in violation of NEPA because FEMA is implementing the RPA and the de facto amendment to 44 C.F.R. § 60.3(a)(2), each of which constitute a major federal action that will significantly impact the environment, without complying with NEPA;
4. Order NMFS to withdraw the Biological Opinion and the RPA;
5. Enjoin implementation of the Biological Opinion, the RPA, and FEMA's de facto amendment to 44 C.F.R. § 60.3(a)(2) until Defendants have demonstrated compliance with NEPA, the ESA, and the APA;
6. Award Plaintiffs their costs of litigation, including reasonable costs, expenses, disbursements, and reasonable attorneys' fees; and

7. Grant Plaintiffs such further and other relief as this court deems just and proper.

Dated this 15th day of June, 2017.

/s/ Michael D. Farber
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**Pro Hac Vice* Pending

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

CITY OF COOS BAY, OREGON,)	No. _____
500 Central Avenue)	
Coos Bay, Oregon 97420)	
)	
Plaintiff,)	
)	
v.)	
)	
WILBUR J. ROSS, JR., in his official)	
capacity as Secretary of the United States)	
Department of Commerce)	
1401 Constitution Avenue N.W.)	
Washington, DC 20230)	
)	
UNITED STATES DEPARTMENT OF)	
COMMERCE)	
1401 Constitution Avenue N.W.)	
Washington, DC 20230)	

NATIONAL MARINE FISHERIES)
 SERVICE)
 1315 East-West Highway)
 Silver Spring, Maryland 20910)
)
 Defendants.)
 _____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. In the spring of 2016, Defendant National Marine Fisheries Service issued a biological opinion, under the apparent authority of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, to govern the Federal Emergency Management Agency’s implementation of the national flood insurance program for Oregon communities. *See* 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 (Apr. 14, 2016) [hereinafter Or. NFIP BiOp].
2. The opinion contends that FEMA’s flood insurance program produces a slew of harmful impacts to various populations of fish and wildlife protected under the Endangered Species Act. All of these impacts the opinion traces to the non-federal development that FEMA flood insurance is expected to cover. To mitigate the environmental effects of this development, the opinion requires that FEMA condition flood insurance on local communities’ adoption of onerous

land-use ordinances that will severely restrict productive activity in government-drawn floodplains.

3. The biological opinion exceeds the Service's authority. The Service may issue such an opinion only if the relevant federal action "may affect" protected species or their critical habitat. *See* 50 C.F.R. § 402.14(a). FEMA's flood insurance program, however, legally affects nothing in the physical environment. Rather, it is the development that may be covered by FEMA's program which is responsible for any impacts. Because FEMA has no legal authority to control that development, its effects cannot be attributed to the federal program. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004) ("[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."). The necessary predicate for a biological opinion is absent.
4. Although the Endangered Species Act is designed to prevent the extinction, and to promote the recovery, of endangered and threatened populations, *see* 16 U.S.C. § 1531(b), that is not its only goal. Just as important, the statute aims "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997). This case is about an agency's failure to heed this latter purpose.

Jurisdiction and Venue

5. Jurisdiction is founded upon 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (judicial review of agency action), 28 U.S.C. § 2201 (authorizing declaratory judgments), and *id.* § 2202 (authorizing relief in addition to declaratory judgments).
6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1), because at least one Defendant resides in this District. *See also* 5 U.S.C. § 703 (venue for actions under the Administrative Procedure Act generally proper in “a court of competent jurisdiction”).

Parties

Plaintiff

7. Plaintiff City of Coos Bay, Oregon, is a city formed under the constitution and laws of the State of Oregon. Since 1984, the City has participated in FEMA’s national flood insurance program for Oregon. To that end, the City has enacted and administers a Flood Damage Prevention Ordinance. *See* Coos Bay Mun. Code ch. 17.347. The City wishes to make flood insurance available to landowners within its jurisdiction, both to protect against damage or loss of property due to flooding, as well as to support development in the mapped floodplain areas—FEMA-designated “special flood hazard areas”—within the City’s jurisdiction, including parcels owned by the City and its Urban Renewal Agency.

8. The City objects to the biological opinion's stringent land-use restrictions, which are conditions on the City's continued eligibility for flood insurance and which conflict with the City's land-use policies. *See* FEMA, Program Level Biological Assessment for the National Floodplain Insurance Program, Oregon State 4-19 (Feb. 2013) ("To meet the standards under the Proposed Action, the City of Coos Bay will be required to institute multiple changes to their implementation of the [national flood insurance program] and related regulatory programs."). In the City's view, questions about whether and how development should proceed generally should be reserved for local decision, not federal control.

Defendants

9. Defendant Wilbur Ross is the Secretary of the United States Department of Commerce. Congress has delegated to the Secretary the authority to administer the Endangered Species Act with respect to the species that fall within the jurisdiction of the Department of Commerce. *See* 16 U.S.C. §§ 1532(15), 1533(a)(2). Secretary Ross is sued in his official capacity only.
10. Defendant United States Department of Commerce is a department within the Executive Branch.
11. Defendant National Marine Fisheries Service is an agency within the Department of Commerce. The Secretary of Commerce has delegated to the Service the authority to administer the Endangered Species Act. *See* 50 C.F.R.

§ 402.01(b). The Service is the agency responsible for the biological opinion that this action challenges.

Legal Background

The National Flood Insurance Program

12. The National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-4131, authorizes FEMA to issue flood insurance to local communities. FEMA provides such insurance once a community has adopted “comprehensive criteria for land management and use,” *id.* § 4012(c)(2), as well as “adequate land use and control measures,” *id.* § 4022(a).
13. To guide the local regulatory process, FEMA produces floodplain management criteria, which are intended to restrict development in flood-prone areas, as well as to direct new development away from and to improve the long-range management of such areas. *See id.* § 4102(c).
14. FEMA also runs a Community Rating System, which offers lower insurance premiums to communities that have adopted criteria stronger than those that FEMA has promulgated. *See id.* § 4022(b).
15. A third component of FEMA’s flood insurance program is the agency’s publication of Flood Insurance Rate Maps, which depict among other things special flood hazard areas. *See id.* § 4101; 44 C.F.R. §§ 59.1, 65.1.
16. Communities that fail to adopt and manage their land-use plans and ordinances in a manner consistent with FEMA’s criteria are ineligible for FEMA flood insurance. 42 U.S.C. § 4022(a)(1). Moreover, federally regulated

and insured mortgage lenders are forbidden to offer loans for uninsured development occurring within special flood hazard areas. *Id.* § 4012a(b).

17. Nevertheless, no part of FEMA's program regulates floodplain development *independent of* a community's participation in the program. In other words, the only FEMA-imposed consequence of a community's decision to regulate its land-use in a manner contrary to FEMA's management criteria is ineligibility for FEMA flood insurance and related financial assistance programs.

The Endangered Species Act

18. The Endangered Species Act establishes a program for the conservation of flora and fauna faced with the threat of extinction. The Service by delegation administers the Act with respect to marine and anadromous populations of wildlife and plants.
19. The Act requires the Service to determine whether a "species" is in danger of extinction, or will be in danger of extinction in the foreseeable future. *See* 16 U.S.C. § 1533(a)(1). Once a species has been determined to be "endangered" or "threatened," *id.* § 1532(6), (20), *i.e.*, "listed," the Service designates the species' "critical habitat," *see id.* § 1533(a)(3). Such habitat comprises those occupied areas containing the physical or biological features essential to the species' conservation, or any unoccupied area that itself is essential to the species' conservation, *see id.* § 1532(5).
20. The unauthorized "take" of any listed species subjects a "person" (which includes any federal, state, or local government entity, or legal or natural

person, *see id.* § 1532(13)) to significant civil and potentially criminal liability. *See id.* § 1540(a), (b); 50 C.F.R. § 17.31(a). “Take” is defined broadly to include essentially any activity that produces measurable harm to a species. *See* 16 U.S.C. § 1532(19).

21. In addition to the foregoing generally applicable proscriptions, the Act prohibits federal agencies from undertaking any action that would be likely to jeopardize the continued existence of any listed species, or destroy or adversely modify its critical habitat. *Id.* § 1536(a)(2). To help prevent such jeopardy or adverse modification, the Act requires that federal agencies consult with the Service. *See id.* This consultation obligation arises whenever the proposed agency action “may affect” listed species or their critical habitat. *See* 50 C.F.R. § 402.14(a).

22. During consultation, if the Service determines that the proposed action is likely to adversely affect a listed species or its critical habitat, the Service must produce a “biological opinion.” *See* 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(b)(1), (g)(4). The biological opinion provides the Service’s view as to how the proposed action will affect the species and its critical habitat. 16 U.S.C. § 1536(b)(3).

23. If the Service determines that the proposed action will produce jeopardy or adverse modification, the Service must formulate a “reasonable and prudent alternative” that will avoid those consequences. *See id.* The Service generally also will include with the alternative an “incidental take statement,” which

immunizes the federal agency from any liability otherwise arising from the incidental take of a listed species during the course of the action's implementation. *See id.* § 1536(b)(4)(C), (o).

24. A federal agency is not required to follow a biological opinion, *see* 50 C.F.R. § 402.15, but the opinion exerts “a powerful coercive effect” nonetheless. *Bennett*, 520 U.S. at 169. That is because the agency, although “technically free to disregard the [b]iological [o]pinion and proceed with its proposed action,” does so “at its own peril (and that of its employees),” given the Act’s “substantial civil and criminal penalties, including imprisonment” for take that is not authorized by a take statement or permit. *See id.* at 170.

Allegations of Fact

25. In 2009, a coalition of environmental groups sued FEMA for its failure to consult over the national flood insurance program's implementation in Oregon. The agency quickly settled, agreeing to request consultation from the Service on the program.
26. In 2011, FEMA formally requested consultation from the Service over the impact of the national flood insurance program's implementation in Oregon on protected species and their critical habitat. *See Or. NFIP BiOp* at 2.
27. In 2016, the Service produced a biological opinion. *See id.* at 4.
28. The biological opinion determines that the Oregon program—which the opinion defines as FEMA's land-use management criteria, community rating system, and floodplain mapping, *id.* at 11—would jeopardize a number of

aquatic species and destroy or adversely modify their critical habitat, *id.* at 272-74.

29. The Service produced the biological opinion based on the agency's determination that the effects of floodplain development that will be covered by the national flood insurance program in Oregon are properly attributed to the program itself. *See id.* at 163-66.

30. The biological opinion contains a reasonable and prudent alternative comprised of six elements. *See id.* at 274-97.

31. Element 2 conditions the availability of flood insurance on the local government's adoption of a number of draconian land-use restrictions. *See, e.g., id.* at 279 (no net loss of floodplain functions); *id.* at 288 (no new development in special flood hazard areas and substantial set-backs); *id.* at 290 (so-called "cluster development" zoning restricting new development landward of the 50-year flood interval).

32. After the biological opinion's issuance, FEMA provided notice to local governments that participate in FEMA's Oregon flood insurance program—including the City—that FEMA intends to implement the reasonable and prudent alternative, to the extent that it has legal authority to do so.

33. The biological opinion requires that Element 2 be fully implemented by March, 2018. *Id.* at 277.

34. Recently, FEMA has stated that it is still attempting to determine whether there "may be certain sub-elements of the RPA that are, as written, outside its

legal authority to implement.” Declaration of Michael Grimm ¶ 10, Doc. 18-1, *Oregonians for Floodplain Protection v. U.S. Dep’t of Commerce*, 1:17-cv-01179 (D.D.C. filed Sept. 8, 2017). But the City is unaware of any FEMA statement or decision rejecting the reasonable and prudent alternative in its entirety.

Declaratory and Injunctive Relief Allegations

35. The biological opinion is the subject of a live controversy. The City contends that the Service is without authority to issue the biological opinion, including its reasonable and prudent alternative, because the national flood insurance program does not as a matter of law affect any species listed under the Endangered Species Act, or any critical habitat. In contrast, the Service contends that the flood insurance program does affect listed species and their critical habitat.
36. The dispute between the City and the Service requires no further factual development, because the City contends that FEMA’s implementation of the flood insurance program cannot, as a matter of law, trigger the obligation to consult with the Service, or the Service’s obligation to produce a biological opinion. *See Ctr. for Biological Diversity v. U.S. Dep’t of Housing & Urban Dev.*, 541 F. Supp. 2d 1091, 1100-02 (D. Ariz. 2008) (holding that consultation is not required for various federal “financial assistance programs” because they “are too attenuated to affect the listed species”), *aff’d*, 359 F. Appx. 781, 783 (9th Cir. 2009) (holding that consultation is not required because the federal

agencies “do not approve or undertake any of the development projects at issue”).

37. The City has been, is, and will continued to be injured by the biological opinion.

The City wants to make flood insurance available to property owners within its jurisdiction, as well as to maximize their financing opportunities. But the City strongly objects to the reasonable and prudent alternative in its entirety, especially its onerous land-use restrictions, the adoption of which is a condition to continued flood insurance eligibility and maximization of financing opportunities. The biological opinion produces a powerful coercive effect on FEMA to comply with the reasonable and prudent alternative. As a consequence of that coercive effect, it is extremely likely that FEMA will implement each element and “sub-element” of the RPA that it believes it has the legal authority to put into effect. But for the opinion, it is unlikely that FEMA would continue to implement the reasonable and prudent alternative. Instead, the agency likely would continue to administer the Oregon flood insurance program as it has done in the recent past, prior to the biological opinion’s issuance.

38. Therefore, an actual and substantial controversy exists between the City and the Service over the legality of the latter’s biological opinion. A judicial determination of the parties’ rights and responsibilities arising from this actual controversy is necessary and appropriate at this time.

39. Further, the City has no plain, speedy, and adequate remedy at law. Judicial review of the biological opinion can be had only through the Administrative Procedure Act, which does not allow for damages or other remedies at law. Without judicial relief, the City and its residents and property owners will suffer irreparable injury. The City either will have to comply with the reasonable and prudent alternative's burdensome land-use proscriptions, or lose eligibility for flood insurance.

Claim for Relief

(Violation of the Administrative Procedure Act, 5 U.S.C. § 706)

40. All of the preceding paragraphs are incorporated fully herein.
41. A necessary predicate to the Service's authority to issue a biological opinion is a finding that the proposed agency action may affect listed species or their critical habitat. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).
42. The biological opinion asserts that this predicate is satisfied by FEMA's proposed implementation of the flood insurance program in Oregon, because the program financially enables or otherwise encourages development that in turn may affect listed species or their critical habitat. *See* Or. NFIP BiOp at 163-66.
43. An agency action can have no legal effect on the physical environment if the agency has no legal authority to prevent the effect. *Dep't of Transp.*, 541 U.S. at 770. Put another way, if other entities retain the power, subsequent to the agency action, to allow or prevent an activity that produces environmental

effects, then the causal chain between the agency action and those effects is broken. *See Sierra Club v. FERC*, 827 F.3d 36, 47-48 (D.C. Cir. 2016).

44. FEMA has no authority to regulate, much less to prevent, development or other land-use activities within a floodplain. *See* 42 U.S.C. § 4011(a) (authorizing FEMA only “to establish and carry out a national flood insurance program”); FEMA Biological Assessment at 4-1 (“FEMA does not make local land use decisions . . .”). Necessarily, then, FEMA lacks authority to regulate so as to vindicate the environmental values of the Endangered Species Act. *See* 42 U.S.C. § 4102(c)(1)-(4) (authorizing development of land-use criteria based on concerns pertaining to “flood damage,” “flood hazards,” and “flood-prone areas” without reference to the “environment” or related concerns). *Cf. Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-64 (2007) (rejecting an interpretation of the Endangered Species Act’s consultation provisions that would impliedly augment agencies’ underlying authorities with a species-protection power).
45. In contrast, local governments like the City have near plenary authority to control floodplain development in Oregon, for environmental as well as other purposes. *See, e.g.,* Or. Rev. Stat. § 197.175(2)(a), (b) (requiring each city and county to adopt comprehensive land-use plans and to enact regulations to implement them). *See also* FEMA Biological Assessment at 4-19 to 4-23.
46. Thus, FEMA’s implementation of the flood insurance program in Oregon will not, as a matter of law, affect any listed species or its critical habitat.

47. For that reason, the necessary predicate for the issuance of a biological opinion is absent, and the Service's issuance of a biological opinion for FEMA's implementation of the national flood insurance program in Oregon is thus not in accordance with law and is in excess of statutory authority, 5 U.S.C. § 706(2)(A), (C).
48. The biological opinion is a final agency action, ripe for judicial review. *See Bennett*, 520 U.S. at 177-79.
49. This action is timely because it has been brought within six years of the biological opinion's issuance. *Cf.* 28 U.S.C. § 2401(a).

Prayer for Relief

Wherefore, the City prays for judgment from this Court as follows:

1. A declaratory judgment that the Service's biological opinion, including its reasonable and prudent alternative, is not in accordance with law and is in excess of statutory authority;
2. A preliminary and permanent prohibitory injunction setting aside the Service's biological opinion, including its reasonable and prudent alternative, and prohibiting the Service from enforcing it or giving effect to it in any manner;
3. An award of the City's reasonable attorney fees and costs, pursuant to 28 U.S.C. § 2412, or any other authority, including the Court's inherent authority, as appropriate; and

4. An award of any other such further relief as the Court may deem proper.

DATED: October 5, 2017.

Respectfully submitted,

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**Pro Hac Vice Pending*

Attorneys for Plaintiff

Planning Commission Work Session Agenda Item Report

Agenda Item No. 2016-1740

Submitted by: Sherri Marineau

Submitting Department: Community Development

Meeting Date: October 23, 2017

SUBJECT

Draft Recommendation to City Council on Vacation Rental/B&B Next Steps

Recommendation:

ATTACHMENTS

- [VRD Recommendation to CC.pdf](#)

Memorandum

To: Planning Commission/Commission Advisory Committee
From: Derrick I. Tokos, AICP, Community Development Director 
Date: October 19, 2017
Re: Recommendation to City Council on 5-Year Review of VRD/B&B Code

The purpose of this work session is to identify key points that the Planning Commission wants to include in its recommendation to the City Council. This should include observations regarding the effectiveness of the 2012 code revisions in achieving desired outcomes, and whether or not revisions are needed to better achieve desired outcomes. If there is general consensus that legislative amendments are needed, then the recommendation should identify topic areas that should be evaluated.

Please come prepared to talk through these issues and if there are particular concepts that you want to have captured, now is the time to bring them to the table. I am planning to have a laptop setup so that we can develop a topic area list interactively, and will pre-populate it with points outlined in the "Observations" slide from the October 9th meeting to help facilitate the conversation.

The Newport Police Department reviewed the list of licensed vacation rental and bed and breakfast establishments against their call records and attached is a list of the units that generated nuisance complaints over the last two years. Also, enclosed is an email from Chief Malloy with his observations about the impact vacation rentals have on their call volume. This is relevant background information that wasn't available for the last work session.

I hope that at the end of our October 23rd work session we will have general agreement on a list of concepts and topic areas that I can mold into a recommendation letter for the Commission to consider at its November 13th meeting.

Attachments

5-Year Review of Bed and Breakfast/Vacation Rental Code, PowerPoint Presentation dated 10/9/17
Email from Newport Police Chief Jason Malloy, dated 10/16/17
List of Police Department Vacation Rental Complaints, October 2015 to October 2017

Derrick Tokos

From: Sherri Marineau
Sent: Monday, October 16, 2017 8:20 AM
To: Derrick Tokos
Subject: FW: Call volume of vacation rental complaints

Derrick,

Please see Jason Malloy's email below concerning the percentage of call volume that the Police Department receives for vacation rental complaints.

Sherri

From: Jason Malloy
Sent: Monday, October 16, 2017 8:17 AM
To: Jessica Steenkolk <J.Steenkolk@NewportPolice.net>; Sherri Marineau <S.Marineau@NewportOregon.gov>
Subject: RE: Call volume of vacation rental complaints

We are not able to determine this number. I would guess that the percentage is minimal. Based upon the calls at VRD locations and our total amount of calls, the number would be a small fraction of 1% annually.

Jason Malloy, Chief of Police
FBINA Session 261
Newport Police Department
541.574.3348
www.newportpolice.net

From: Jessica Steenkolk
Sent: Monday, October 16, 2017 7:47 AM
To: Sherri Marineau <S.Marineau@NewportOregon.gov>
Cc: Jason Malloy <J.Malloy@newportpolice.net>
Subject: RE: Call volume of vacation rental complaints

I don't think we have any numbers to report. However I am including Jason in this email so he can confirm. My only guess is very minimal based on those reports.

Jessica Steenkolk
Executive Assistant to the Chief
Newport Police Department
169 SW Coast Highway
Newport, Oregon 97365
541-574-0631

From: Sherri Marineau
Sent: Friday, October 13, 2017 4:24 PM

To: Jessica Steenkolk <J.Steenkolk@NewportPolice.net>

Subject: Call volume of vacation rental complaints

Jessica,

Thanks again for getting Derrick all the data on the complaints pertaining to the vacation rentals. He asked me to check in with you to see if you could give us an estimate of what the percentage of call volumes the Police Department receives that are about vacation rental complaints. He was hoping to have a number to include with his report to the Planning Commission and City Council. Let me know your thoughts.

Thanks!

Sherri Marineau

City of Newport

Community Development Department

169 SW Coast Highway

Newport, OR 97365

ph: 541.574.0629 fax: 541.574.0644

s.marineau@newportoregon.gov

Police Department Vacation Rental Complaints October 2015-October 2017

Street Address & Business Name	Type of Disturbance	Complaint Date
129 SW Dolphin St Unit 129 "Nye Beach Townhomes"	Noise complaint	2/26/2016
129 SW Dolphin St Unit 133 "Nye Beach Townhomes"	Noise complaint	2/26/2016
129 SW Dolphin St Unit 137 "Nye Beach Townhomes"	Noise complaint	2/26/2016
129 SW Dolphin St Unit 139 "Nye Beach Townhomes"	Noise complaint	2/26/2016
135 SW Coast St	Parking issue. Vehicle parked the wrong way	8/15/2017
171 NW 73rd Ct	Illegal parking, ordinance violation	10/19/15, 6/11/17, & 7/6/17
258 NW Coast St "The Overlook"	Illegal parking	11/28/15 & 4/14/16
33 SW Elizabeth St	Parking issue. Parked at yellow curb.	5/10/2017
39 SW Elizabeth St	Parking issue	5/24/2017
416 NW 58th St "John Ross Vacation Rental"	Parking complaint but legally parked	1/26/2016
435 NW 58th St "The Beach House at Yaquina Head"	Noise complaint. Nothing found. Parking complaint.	4/11/16 & 12/25/16
457 NW 56th St "Lightkeepers LLC"	Excessive parking. 7 vehicles using rental property. 5 vehicles used for camping.	11/10/16 & 10/7/17
4920 NW Woody Way	Noise complaint	8/5/2016
507 NW Alpine St Unit 207 "Surf & Sand Condo"	Noise complaints.	1/23/2016
626 NW 3rd St "Nye Beach Getaway"	Loud music in parking garage.	3/17/2016
688 NE 20th Pl "The Agate House"	Parking issue	7/18/2017
701 NW Coast St #101 "Haven by the Sea"	Suspect Vehicle	5/21/2017
732 NW 2nd Ct "The Little Mermaid"	Parking issue	5/28/16 & 11/11/16
890 SE Bay Blvd #205 "OR Bayfront Condo @"	Parking issue	10/7/2015
890 SE Bay Blvd #314 "The Landing at Newport"	Parking issue	10/21/2017
927 SW 11th St "Dreamy Day Stay"	Noise complaint	3/29/2017

City Council Request

5-Year Review

Newport Vacation Rental and Bed & Breakfast Regulations

PLANNING COMMISSION

OCTOBER 9, 2017 WORK SESSION



City Council Request

“That the Planning Commission review the current rules for establishing vacation rental dwellings in the city, including the desired outcomes identified by the Commission in 2011 and recent public testimony, and provide a report to the Council.”



Planning Commission Schedule For Preparing Report

- October 9th Work Session – Review existing Vacation Rental Dwelling (VRD) and Bed & Breakfast (B&B) regulations, why they were established, and implementation of the rules over the last 5 years.
- October 23rd Work Session – Determine if the regulations need to be revised and, if so, identify the topic areas that should be further explored.
- November 13th Regular Session – Finalize a recommendation to the City Council.



City's Pre-2012 Regulations

- VRDs allowed in all of the City of Newport's residential zone districts as "weekly rentals"
- Weekly rentals limited to 10 occurrences per year, with no clear constraint on the duration of each visit
- Vacation Rentals allowed more frequently through conditional use process in R-4 zone and allowed outright in commercial zones, with limits on street level residential use
- B&Bs allowed conditionally in R-3 and R-4 zones and outright in commercial zones

Problems with the Pre-2012 VRD and B&B Regulations

- “Weekly Rentals” were effectively unregulated, with the City having no idea how many there were or where they were located
- Weekly rental limit of 10 occurrences in a year was extremely difficult to enforce
- Conditional use criteria were not tailored to vacation rental use and discretionary standards were inconsistently applied
- B&Bs and VRDs were not subject to the types of safety standards for guests that apply to conventional hotels/motels
- No uniform, clear and objective approval criteria

Planning Commission Desired Outcomes

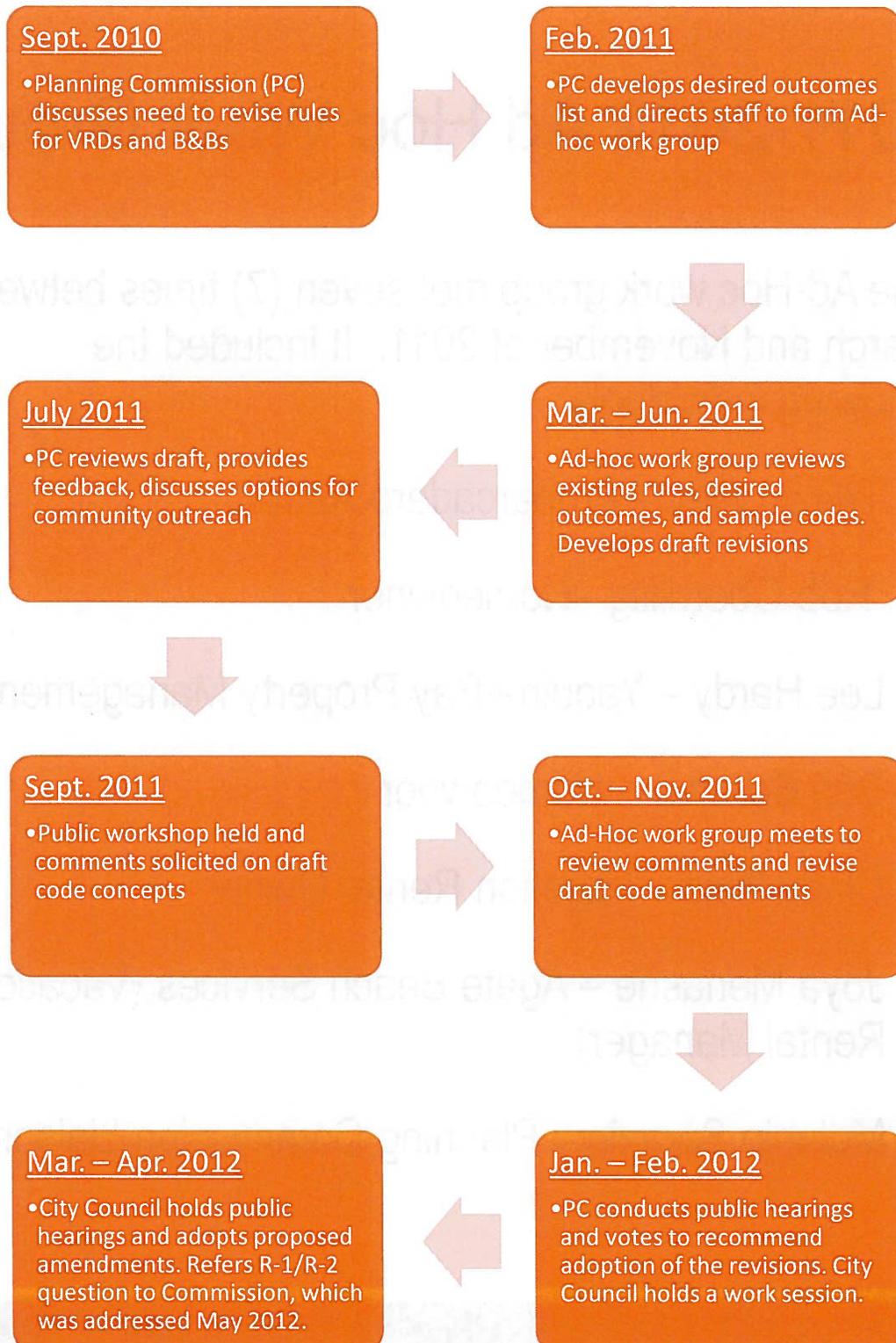
- Open to taking a fresh look at where vacation rentals should be allowed
- Maximum occupancy should be explored
- Standards should address how vacation rental use is different than single-family dwelling use
- Criteria should consider parking & sanitation
- Focus on developing clear and objective standards
- Keep the process simple
- Need more precise definitions
- Complaint-driven approach to enforcement is appropriate
- There should be a fee to offset administrative costs

2011-2012 Ad Hoc Work Group

The Ad-Hoc work group met seven (7) times between March and November of 2011. It included the following individuals:

- Tracy Wiley – Embarcadero Resort
- Rob Oberbillig –Homeowner
- Lee Hardy – Yaquina Bay Property Management
- Bob Berman – Homeowner
- Cindy Reid – Vacation Rental Owner
- Joya Menashe – Agate Beach Services (Vacation Rental Manager)
- Melanie Sarazin – Planning Commission Liaison

Process for Adopting 2012 VRD and B&B Amendments



Purpose of VRD and B&B Rules

- Ensure the safety and convenience of renters, owners, and neighboring property owners
- Protect the character of residential neighborhoods
- Address potential negative effects such as excessive noise, overcrowding, illegal parking, and accumulation of refuse

Summary of 2012 VRD and B&B Amendments

- Allow vacation rentals and B&Bs in all zones
- Subject to a license with clear and objective criteria regarding:
 - Occupancy
 - Parking
 - Waste Management
 - Landscaping
 - Safety of renters
 - Issue resolution
- Provides an over-the-counter approval process
- Conditional use is an option if clear and objective standards cannot be met
- Existing rentals were not grandfathered

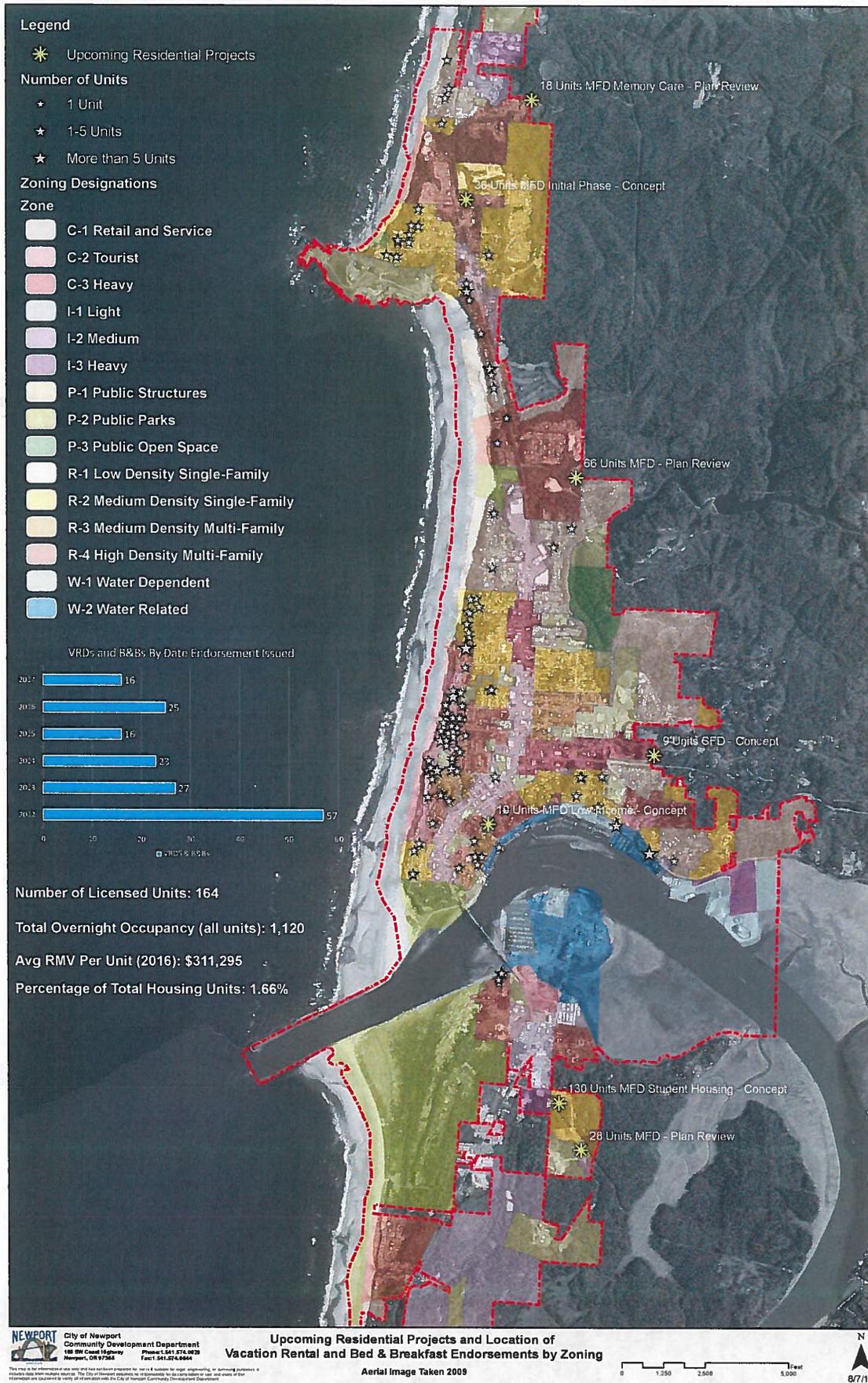
Recent Public Comments Expressing Concerns about VRDs and B&Bs

- Perception that vacation rentals lead to increased traffic, noise, and trash in established neighborhoods
 - Claim that there is no enforcement
 - Discomfort with not knowing neighbors
 - Desire to see notice area extended and designated contacts posted to City website
 - Concern that vacation rentals may be driving up housing costs and tying up units that would otherwise be available to full time workers
 - Interest in seeing caps imposed on the maximum number of vacation rentals and tenancy limits
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Comments in Support of VRDs and B&Bs (Including Current Code)

- Short term rentals unfairly blamed for nuisance issues that are just as prevalent with units under longer term tenancy
- Avoid sudden changes that impact people financially
- Can't afford to buy into Newport without option of renting unit for vacation rental purposes
- Be cognizant of the fact that Newport is a tourist destination. Don't hurt our tourist economy
- Newport's current rules are well balanced and reasonable. Don't change them

VRDs/B&B Licensed Since 2012



Distribution of VRDs & B&Bs in the City of Newport

- Scenic views, beach access, proximity to tourist oriented retail appear to drive demand, with highest concentration in Nye Beach
- Blend of condominiums and dwellings
- Distribution by Zone District

- C-1	1
- C-2	53
- R-1	13
- R-2	32
- R-3	11
- R-4	43
- W-2	15
- Total number represents less than 2% of the City's housing units
- Average RMV Per Unit (2016): \$311,295

VRDs in Nye Beach District

- Units within the Nye Beach Overlay: 69
- Percentage of Total Nye Beach Units: 13-14%
- Proportion of the Units that are in the C-2/"Tourist-Commercial" zone: 67%

Definitions

- No significant issues identified with 2012 definition changes
- Hotel/Motel versus VRD distinction clarified in the business license code (Ord. #2073, 2015).
 - Condominiums where owners are contractually obligated to rent through common rental pool are a hotel/motel
 - Embarcadero owners association is currently debating this question
- Timeshares continue to be an issue, where individual owners out of the group choose to rent the unit. May be more of an enforcement than a definition issue

Locational Issues

- In 2012 policy makers correctly determined that desirability of a site for VRD or B&B use correlates to amenities, not zoning
 - A few units have materialized in areas that lack these amenities (e.g. residential zones east of US 101 and north of US 20). Restrictions may be warranted for these areas
 - 2012 effort assessed tenancy limits (i.e. frequency of use) and ruled them out, in part, due to enforcement challenges
 - Density restrictions (e.g. limits on number of units per block) and caps were assessed in 2012. Could be reassessed citywide or in targeted areas.
 - Any caps should consider VRD and B&B use in relation to overall housing stock
- 

Maximum Overnight and Building Occupancy

- Overnight occupancy limited to two persons per bedroom, plus two. Building occupancy is subject to Fire Code limitations
- Overnight occupancy is stricter than some would like, which is generally due to lack of off-street parking
- Homes that have more bedrooms than rooms permitted for vacation rental use can be an enforcement issue
- Overnight occupancy limits can be reasonably enforced since it is typically depicted on advertisements

Parking Requirements

- One off-street space required per bedroom dedicated to VRD and B&B use
 - Guests may use available on-street spaces, just like other members of the public
- Parking congestion has been a particular issue in neighborhoods with substandard (narrow streets) and/or poorly defined on-street parking areas
- Relief from off-street parking requirements has been the subject of all four Conditional Use applications to the Commission (3 approved, one denied)
- Code is unclear regarding whether or not off-street mean out of the travelled street or out of the right-of-way. It is a provision that could be clarified

Landscaping

- At least 50% of the front yard and 40% of the entire yard must be landscaped for units in residential zones
- Intended to prohibit over-parking in residential areas and destruction of residential “appearance” of the streetscape
- Hasn't been a significant enforcement issue

Waste Management

- Owner required to provide for regular garbage removal and receptacles must be screened from view
- Occasionally an enforcement issue
- May want to explore requiring VRDs to use Thompson Sanitary Service's valet option if waste isn't managed effectively

Noise Abatement

- Not addressed in the VRD and B&B code. Noise issues fall under City nuisance abatement standards
- Enforced by the City of Newport Police Department
- Police Chief has indicated that nuisance issues with VRDs and B&B are not a significant part of their call volume
- Police Department is comparing licensed VRD lists against their complaint logs, a task that should be completed by the end of October

Safety Provisions

- Units passing first inspection: +/- 50%
- Most common issues:
 - Faulty or missing smoke and/or carbon monoxide detectors
 - GFCI receptacles
 - Egress windows
 - Handrails and guardrails
- Fire Department initiated annual inspections after the City Center fire, focusing on fire suppression measures and emergency egress
- 2012 Standards have improved the safety of rental units; however, minor revisions to safety provisions are warranted to clarify requirements and address building code changes

Enforcement

- City has documented 22 complaints since 2012 with most common issues being:
 - Advertising in excess of occupancy
 - Excessive number of vehicles or insufficient off-street parking
 - Most trespass
 - Barking dogs
- Language added to code in 2012 equating advertising to use has been effective
- Requirement that designated contact be the first point of contact has been effective. Suggestions that the contact list be added to the website and notification area expanded could be helpful
- Few issues with most VRDs. Stricter rules may be warranted for repeat offenders
- Many recent complaints to Council anecdotal, and not tied to specific properties or verifiable occurrences
- Existing code does not address change in designated contact. Currently re-noticed via administrative process

Process

- Clear and objective land use standards administered over the counter
- Business licensing program is used as a conduit for ensuring compliance
- Feedback has been generally positive regarding the clarity of the standards and ease of navigating the approval process
- Some standards could be moved from the land use code to the business license code, if further amendments are made (e.g. rules that relate to designated contacts, required safety information for guests, etc.). This would make them easier to revise in the future

Observations

- Rules are working more or less as envisioned
- Code is easily understood, and can be reasonably administered
- City knowledge about the nature and extent of VRDs and B&Bs has been greatly improved
- Units are much safer than they were under pre-2012 rules
- Designated contact information could be made more available to members of the public
- Some code provisions should be updated to reflect current standards (e.g. safety requirements)
- Minor adjustments may be needed to parking, waste management and enforcement provisions to improve functionality
- Room exists for a conversation about whether or not the number of VRDs and B&Bs should be capped in certain areas

