FLOOD INSURANCE PRESS PACKET

June 28, 2016

SUMMARY: In April 2016, the National Marine Fisheries Services (NMFS) issued a plan that will put in place new, restrictive criteria, standards and regulations that will severely impact— and in some cases prohibit— economic development, and residential development on private property in a floodplain due to purported impacts on threatened or endangered species. The process ignored the concerns of local and state officials and agency experts as well as Oregon's already-strong land use policies. Under this plan tens of thousands of acres of land could be restricted or prohibited from development. For example, the Franklin Boulevard Redevelopment Project in the Glenwood area between downtown Springfield, the University of Oregon and downtown Eugene would fall into a High Hazard Area, which means development could be severely restricted or prohibited.

In a June letter, the Federal Emergency Management Agency (FEMA) told Oregon communities that they need to either stop development in areas at risk of flooding once every 100 years (which includes hundreds of miles of Eugene, Springfield, the Oregon coast, and Portland), or implement yet-to-be-developed interim measures to mitigate potential impacts to species and habitat. FEMA went on to threaten that communities that do not comply with their instructions will face enforcement actions. DeFazio, together with the Oregon delegation, wrote a letter to FEMA requesting clear guidelines and timelines to ensure that Oregon communities are not subject to unnecessary, non-scientifically based restrictive federal mandates that negatively impact local economic and residential development.

The letter points out that NMFS is forcing FEMA to use the NFIP to regulate land use, which is beyond FEMA's legal authority related to floodplain management. DeFazio, together with the Oregon delegation, request that FEMA issue clear guidelines and timelines to ensure that Oregon communities are not subject to restrictive federal mandates that negatively impact economic growth. They urge FEMA to work closely with Oregon's NFIP communities and state partners to establish mitigation and compliance measures that are not overly burdensome and do not exceed FEMA's legal authority.

HISTORY

In 2009, the Federal Emergency Management Agency (FEMA) was sued in U.S. District Court in Oregon for failing to ensure that the National Flood Insurance Program (NFIP) complies with the Endangered Species Act (ESA). The action resulted in a settlement agreement which required FEMA to consult with the National Marine Fisheries Services (NMFS) under Section 7 of the ESA and propose changes to the program through Reasonable and Prudent Alternatives (RPA), or alternative actions needed to avoid jeopardizing an endangered species or adversely modifying critical habitat. FEMA administers the National Flood Insurance Program and NMFS administers the Endangered Species Act.

Contact | Beth Schoenbach, Congressman Peter DeFazio Communications Director · Beth.Schoenbach@mail.house.gov

The final draft of the RPA issued in April 2016, calls for drastic changes to the NFIP which would have an unprecedented impact on economic growth, job creation, opportunities for affordable housing and development in communities across the State of Oregon.

Specifically, the changes to the NFIP that Congressman DeFazio opposes include severe restrictions and in some cases absolute prohibition of future development in floodplains and riparian buffer zones, changes to regulatory definitions that would substantially increase floodways and Special Flood Hazard Areas. This could mean higher insurance premiums for thousands of homes and businesses already covered by NFIP and could add thousands more to the program because of the proposed changes to the mapping of the flood zone. The changes also include moving land use regulation from local authority to federal authority under FEMA and the issuance of new maps for all Oregon communities by 2022 that take into account future shifting rainfall and snowfall patterns due to climate change and future unknown land use changes based on increasing population growth.

Over the last two and a half years, Congressman DeFazio engaged FEMA and NMFS, as well as the Council for Environmental Quality at the White House, to express his concerns with a process that obstructs the input of the impacted communities, oversteps FEMA's statutory authority and applies a draconian one-size-fits-all approach to a state that already has strong land-use policies that, together with federal laws, work to protect endangered species.

Earlier this year, the House passed FEMA reauthorization legislation that included a provision offered by Congressman DeFazio that would address some of these issues. The language in the legislation prohibits FEMA from expanding its authority related to floodplain management unless explicitly authorized and clarifies that FEMA is not responsible for privately-funded development on private lands in flood-prone areas. That bill has stalled in the Senate.

Timeline of Events and DeFazio Action to Prevent Bureaucratic Overreach

- In 2004, the US District Court for the Western District of Washington held in, *National Wildlife Federation vs. FEMA*, that FEMA had a responsibility to consult with the National Marine Fisheries Services (NMFS) about impacts of the National Flood Insurance Program (NFIP) on listed species under Section 7 of the Endangered Species Act (ESA). The plaintiffs (the National Wildlife Federation) believed that the operation of the NFIP resulted in impacts on several species listed under the ESA and their critical habitats within Puget Sound.

- In September 2008, NMFS issued a Biological Opinion (BiOp) under ESA. The BiOp prepared for the NFIP found that some elements "jeopardized" several ESA-listed species in Puget Sound, including Chinook salmon and Orca whales. These elements included FEMA floodplain mapping, the community rating system and the minimum development standards. A jeopardy finding is made when an action is reasonably expected, directly or indirectly, to diminish a species' numbers, reproduction, or distribution so that the likelihood of survival and recovery in the wild is appreciably reduced.

- In February 2011, NMFS provided to FEMA a final description of what was required in the seven parts of the Reasonable and Prudent Alternatives (RPA) for Puget Sound, which included changes to Floodplain Management Criteria.

- On June 25, 2009, the Audubon Society of Portland, The NW Environmental Defense Center and the Association of Northwest Steelheaders filed a lawsuit against FEMA in the US District Court of Oregon, alleging that FEMA violated Section 7 of the ESA by not consulting with NMFS regarding the potential effects of the NFIP on Oregon salmon and steelhead listed as threatened and endangered under the ESA in Oregon.

- On July 9, 2010, FEMA entered into an agreement with the Plaintiffs settling the lawsuit. The Settlement Agreement required FEMA to initiate formal consultation with NMFS on FEMA's implementation of the NFIP, the mapping of floodplains and revisions thereof, and the implementation of the Community Rating System for the 15 salmon and steelhead listed under the ESA in Oregon.

- On July 29, 2010, FEMA initiated formal consultation with NMFS under Section 7 of the ESA on implementation of the NFIP in Oregon. Oregon is home to 13 populations of salmon and steelhead listed as threatened by NMFS. Through the consultation process NMFS and FEMA must identify measures to ensure that implementation of the NFIP will not result in further loss of listed endangered species habitat. To initiate the consultation, FEMA submitted a Program Level Biological Assessment (BA) to NMFS that analyzed the effects of the NFIP on threatened and endangered species in Oregon. FEMA's BA offered to make changes to the implementation of the NFIP in Oregon, based on the results of the Washington consultation. FEMA concluded in its BA that the program as implemented with those changes was "Not Likely to Adversely Affect" (NLAA) endangered and threatened species in Oregon.

- On September 6, 2013, NMFS provided FEMA with a draft jeopardy biological opinion. The draft found that the floodplain management standards implemented by FEMA through the NFIP are not adequate to prevent further degradation of habitat that the listed species need to survive. Therefore, the draft concluded that the NFIP, as implemented, is likely to jeopardize all 15 ESA-listed species of salmon in Oregon, as well as Southern Resident killer whales. Included in the draft BiOp was a draft RPA to avoid jeopardy.

- On May 29, 2014, FEMA responded to the 1st draft RPA expressing concerns about the nature and extent of changes proposed and began meeting with NMFS to talk about elements of the RPA.

- In late 2014, City of Springfield's Mayor Lundberg expressed her concerns about the direction NMFS was heading with the FEMA consultation and potentially drastic implications for rural and urban development in Oregon. Mayor Lundberg specially highlighted concerns about future development in the Glenwood area.

- On September 5, 2014, Representatives DeFazio, Walden, Schrader, and Bonamici, along with Senators Wyden and Merkley, wrote to FEMA Administrator Fugate and NMFS Administrator Sullivan registering concerns about the proposed framework and regulatory structure in the draft RPA that was shared with the State of Oregon. The letter

requested that FEMA and NMFS work with representatives from the State of Oregon and local communities as they develop a final RPA that is statutorily, economically, and technically feasible.

- FEMA Administrator Fugate responded to the delegation on September 26th, 2014, saying that they had provided a copy of the draft BiOp and RPAs to their Oregon state partners, along with a letter FEMA sent to NMFS Regional Administrator on May 29, 2014, expressing FEMA's concerns with the RPA.

- On January 14, 2015, FEMA responded to the second draft RPA from NMFS. In the letter, FEMA stated "…certain elements of the proposed RPA conflict with the statutory purpose and language of the [NFIP], require actions outside of FEMA's legal authority, and/or are not economically feasible. Moreover, elements of the proposed RPA requiring state-specific rulemaking [are] inconsistent with the statutory mandate of the NFIP…"

- On March 9, 2015, NFMS sent FEMA their 3rd draft of the RPA and BiOp for consideration.

- On March 17, 2015, Rep. DeFazio sent a letter to West Coast Regional Administrator Will Stelle requesting that NMFS address concerns raised by FEMA and the State of Oregon about actions proposed in the draft RPA.

- Mr. Stelle responded to Rep. DeFazio in a letter dated April 27, 2015 that did not address Rep. DeFazio's concerns.

- On June 3, 2015, FEMA responded with a formal letter to NMFS' third draft. In the letter, FEMA indicated that the majority of the proposed program changes continue to be outside of FEMA's legal authority and even the program changes within FEMA's legal authority would require multi-year rulemaking.

- In July 22, 2015, Rep. DeFazio called Will Stelle, West Coast Regional Administrator of NMFS. He let Mr. Stelle know that he was hearing from city, county, and state official that what NMFS was proposing through the RPA would severely restrict development in the State. Rep. DeFazio highlighted that Oregon has strong land use laws and that a workable solution came together in Washington State, so it seems that based on that template they could easily develop an RPA that addresses the ESA Section 7 requirement.

- In October 2015, DeFazio staff reached out to CEQ to discuss the NMFS third RPA draft— expressing concerns about the direction NMFS was trying to push FEMA on the RPA and the drastic overreach by NMFS that would impact a considerable amount of development in Oregon. CEQ began informal mediation discussions between the two agencies, in an effort to come an agreement on a BiOp and RPA.

- On October 26, 2015, Rep. DeFazio called Christy Goldfuss, Managing Director, White House Council on Environmental Quality to express his concerns about the stalemate between NMFS and FEMA on the NFIP ESA consultation, and the lack of community

engagement. Rep. DeFazio also called Eileen Sobeck, Assistant Administrator for Fisheries NOAA, to convey similar concerns.

- On February 29, 2016, the House of Representatives passed H.R. 1471, the FEMA Disaster Assistance Reform Act of 2015, which included language prohibiting FEMA from expanding its authority related to floodplain management unless explicitly authorized, and clarifying that FEMA is not responsible for privately-funded development on private lands in flood-prone areas.

- On March 3, 2016, Rep. DeFazio's staff received an update from FEMA on discussions they were having with NMFS on the 4th draft RPA. FEMA felt like they had come to a resolution on a number of the concerns they had over the 3rd RPA, but they are waiting on a response from NMFS.

- On March 9, 2016, DeFazio hosted a roundtable in Eugene, Oregon with key stakeholders to discuss the impacts of the proposed changes on Oregon communities.

- On April 14, 2016, NMFS issued the final BiOp with a Jeopardy Determination and the proposed RPA regarding FEMA's implementation of the NFIP in Oregon.

- Since the release of the RPA, Rep. DeFazio's staff have received briefings from NMFS and FEMA on the implementation of the RPA.

- On June 28, 2016, members of Oregon's congressional delegation sent a letter to the Administrator of FEMA Craig Fugate, strongly urging the agency to work closely with Oregon communities on FEMA's plan to implement changes to the NFIP. They urge FEMA to work closely with Oregon's NFIP communities and state partners to establish mitigation and compliance measures that are not overly burdensome and do not exceed FEMA's legal authority.

DeFazio Letters to NMFS

- In September 2014, DeFazio joined members of the Oregon delegation in a letter to NOAA Administrator Dr. Kathryn Sullivan, and FEMA Administrator Craig Fugate, asking the agencies to work with Oregon communities to develop flood risk reduction strategies that comply with the Endangered Species Act [see attachment 1].

- FEMA responded to the delegation on September 26th, 2014, saying that they had provided a copy of the draft BiOp and RPAs to their Oregon state partners, along with a letter FEMA sent to NMFS Regional Administrator on May 29, 2014, expressing FEMA's concerns with the RPA [see attachment 2].

- In March 2015, DeFazio sent a letter to the Regional Administrator for NMFS, outlining his serious and specific concerns with their draft proposal to severely restrict or prohibit future development in a flood plain. In his letter, DeFazio highlighted the concerns of dozens of locally elected officials in Oregon, including mayors, county commissioners, and local planners [see attachment 3].

- In April 2015, NMFS Regional Administrator Will Stelle responded to DeFazio's letter, defending the agency's actions and their draft proposal [see attachment 4].

- In June 2016, DeFazio drafted a letter, signed by the Oregon Delegation, which demands that FEMA work closely with NFIP communities and state partners to establish compliance measures that aren't over-burdensome. They also requested clear guidelines on how and when to comply with various revised NFIP requirements and suggested that FEMA increase staffing resources in Oregon throughout the entire implementation process in order to better communicate directly and consistently with every NFIP community in the state [see attachment 5].

- In June 2016, DeFazio drafted a letter to Administrator of the West Coast Region for NMFS, arguing the RPA did not meet NMFS's intended purpose and that FEMA has exceeded its legal authority [see attachment 6].

Congress of the United States

Washington, DC 20510

September 5, 2014

Administrator Dr. Kathryn D. Sullivan
National Oceanic and Atmospheric Administration
1401 Constitution Avenue, NW
Room 5128
Washington, DC 20230

Administrator William Craig Fugate
Federal Emergency Management Agency
U.S. Department of Homeland Security
500 C Street SW
Washington, DC 20472

Dear Dr. Sullivan and Mr. Fugate,

We write to express our strong concern about potential impacts to communities throughout Oregon that participate in the National Flood Insurance Program (NFIP) and will need to comply with requirements outlined by your agency's proposed biological opinion for threatened and endangered salmon under Endangered Species Act.

While we support the goals of protecting threatened and endangered salmon, it must be done within a framework and regulatory structure that is workable for Oregon communities to implement. The NFIP is a voluntary program in which local governments agree to follow minimum building and development standards set by FEMA aimed at protecting people and structures from damage during flood events. We understand the proposed biological opinion would expand the areas affected by the NFIP and considerably impact use of those areas.

Counties, cities, and the State of Oregon have not been given the opportunity to provide comments essential for NMFS to prepare a workable and informed range of reasonable and prudent alternatives (RPA). The draft RPA shared with the State of Oregon raises many questions and concerns among Oregon communities about their legal and regulatory authority to implement some of the measures outlined in the RPA; a concern shared by FEMA.

We support the important work of NMFS in providing scientific consultation with Federal agencies such as FEMA in order to assure compliance with the Endangered Species Act. However, we strongly encourage NMFS and FEMA to work with representatives from the State of Oregon and local communities in your process as you develop a final RPA that is statutorily, economically, and technically feasible. We also request that you work with our staff to coordinate site visits with communities across Oregon to see firsthand the potential impacts of

the RPA and to hear directly from community leaders prior to making any final determinations. The biological opinion should include feasible measures to ensure the protection of listed species that can be identified and embraced through a broader more collaborative effort.

We urge you to slow the process to allow for this type of input, and enable FEMA, the State of Oregon, and both communities and stakeholder groups to work together to identify effective, economically sustainable, and environmentally sound flood risk reduction strategies that comply with the Endangered Species Act.

Sincerely,

Jeffrey A. Merkley
United States Senator

Ron Wyden
United States Senator

Peter DeFazio
Member of Congress

Kurt Schrader
Member of Congress

Suzanne Bonamici
Member of Congress

Greg Walden
Member of Congress

cc: Will Stelle, NMFS Region X Administrator
Ken Murphy, FEMA Region X Administrator

U.S. Department of Homeland Security
Washington, DC 20472

FEMA

September 26, 2014

The Honorable Peter DeFazio
United States House of Representatives
Washington, DC 20515

Dear Representative DeFazio:

Thank you for your letter dated September 5, 2014, to Administrator Fugate, Department of Homeland Security, Federal Emergency Management Agency (FEMA), regarding the potential impacts to Oregon communities participating in the National Flood Insurance Program (NFIP) from the National Marine Fisheries Service (NMFS) draft biological opinion. I share your view that the state and local NFIP-participating communities in Oregon should have an opportunity to participate in discussions regarding the draft biological opinion issued by NFMS.

As you are aware, FEMA has been consulting with NMFS on the implementation of the NFIP in Oregon under Section 7(a)(2) of the Endangered Species Act (ESA). Section 7(a)(2) of the ESA requires that any action authorized, funded, or carried out by a federal agency must not jeopardize the continued survival of ESA listed species or adversely modify designated critical habitat. FEMA initiated consultation with NMFS on July 29, 2010. As part of its consultation initiation package, FEMA produced a Biological Assessment (BA) in which FEMA concluded that the implementation of the NFIP in Oregon would not adversely affect ESA listed species and designated critical habitat.

However, in a draft Biological Opinion that NMFS provided to FEMA on September 5, 2013, NMFS indicated that it disagreed with FEMA's conclusion and believed that the implementation of the NFIP in Oregon would jeopardize the continued survival of ESA listed species, and adversely modify designated critical habitat. Once NMFS determines that a federal action causes jeopardy, NMFS must then develop Reasonable and Prudent Alternatives (RPAs) to the proposed action, in this case, the implementation of the NFIP that will not jeopardize ESA listed species. The RPAs were included as part of the draft Biological Opinion that NMFS provided to FEMA referenced above.

Recently, FEMA provided a copy of the draft Biological Opinion and RPAs to its state partners, along with a letter that FEMA sent to NMFS Regional Administrator Will Stelle on May 29, 2014, expressing FEMA's concerns with the proposed RPAs, including that many of the proposed RPAs are outside FEMA's legal authority. That letter has been enclosed for your convenience. Since that time, we understand the State has provided this document to other parties, including your respective offices. The general response that FEMA has received is that the RPAs are also outside state and local legal authorities and the State and the participating communities should have had input into the consultation process.

FEMA supports NMFS working with the State and Oregon communities in order to conclude the consultation process. While FEMA understands from its discussions with NMFS that a Section 7 consultation is typically only between a federal agency and the Services, this is not a typical consultation. Because the minimum floodplain management criteria that NMFS seeks to modify through its Biological Opinion and RPAs are adopted, implemented, and enforced by the participating communities, it is entirely appropriate that the communities have input into the changes that will be made to those criteria. This is especially true in light of the fact that in the previous Biological Opinion and RPAs NMFS issued in Washington on the implementation of the NFIP, NMFS directed certain RPA sub-elements specifically to the communities. If NMFS intends to require the communities to change their ordinances and regulations to address the effects of floodplain development on ESA listed species, then FEMA believes it is critical the communities have input into the nature of those changes.

I hope this information is helpful to you. If you need additional information or assistance please have a member of your staff contact the FEMA Congressional Affairs Division by telephone at (202) 646-4500.

Sincerely,

Roy E. Wright
Deputy Associate Administration for Mitigation
Federal Insurance and Mitigation Administration

cc: Will Stelle, Regional Administrator, NMFS

PETER A. DEFAZIO
4TH DISTRICT, OREGON

NATURAL RESOURCES
RANKING MEMBER

TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEES:
AVIATION
HIGHWAYS AND TRANSIT
RAILROADS

Congress of the United States
House of Representatives

PLEASE RESPOND TO:
☐ 2134 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-3704
(202) 225-6416
☐ 405 EAST 8TH AVENUE, #2030
EUGENE, OR 97401
(541) 465-6732
1-800-944-9603
☐ 125 CENTRAL AVENUE, #350
COOS BAY, OR 97420
(541) 269-2609
☐ 612 SE JACKSON STREET, #9
ROSEBURG, OR 97470
(541) 440-3523
☐ defazio.house.gov

March 17, 2015

Will Stelle
Administrator, West Coast Region
National Marine Fisheries Service
7600 Sand Point Way, NE, Bldg 1
Seattle, WA 98115-0070

Dear Mr. Stelle:

I am writing with urgent concern about the National Marine Fisheries Service's (NMFS) development of a Reasonable and Prudent Alternative (RPA) to address the effects of the National Flood Insurance Program (NFIP) on species listed as endangered or threatened under the Endangered Species Act in Oregon.

On May 29, 2014, and then again on January 14, 2015, the Federal Emergency Management Agency (FEMA) – the implementing agency of the NFIP – sent letters to NMFS Assistant Regional Administrator of the West Coast Region, Kim Kratz. These letters detail FEMA's specific concerns about the development of the RPA and raise serious questions about the agency's authority to implement the RPA and the impacts of the RPA on local planning and development decisions in Oregon.

In the January 14, 2015 letter, FEMA states: "... certain elements of the proposed RPA conflict with the statutory purpose and language of the [NFIP], require actions outside of FEMA's legal authority, and/or are not economically feasible. Moreover, elements of the proposed RPA requiring state-specific rulemaking [are] inconsistent with the statutory mandate of the NFIP...."

As the federal representative of the Fourth Congressional District, a district that relies heavily on the NFIP, I find this statement extremely alarming. That sense of alarm is shared by the dozens of locally elected officials in Oregon, including mayors, county commissioners, and local planners, who have shared with me their fear that implementation of the proposed RPA in Oregon could severely restrict – and in some cases completely prohibit – future development in a flood plain.

In briefly reviewing some of the actions proposed by the RPA, those fears do not seem farfetched. The RPA would: require very limited development in a high hazard area; require all new structures to be located landward of the reach of extreme high tide to avoid development in flood-prone lands adjacent to marine waters (likely a significant portion of the Oregon coast); restrict subdivision of certain lots; adopt new standards for

THIS STATIONERY PRINTED ON PAPER MADE WITH RECYCLED FIBERS

grandfathered structures; and implement setbacks and open space requirements for redevelopment.

The RPA would also force FEMA to require participating communities to report on each permit for development in a high hazard area with onerous details, such as "the mount of fill (loss of flood storage/refugia), and the amount of compensatory storage measured by volume and area (both storage area and cross-sectional area)" and "the amount of impervious surface (loss of hyporheic function) the type(s) of LID and green infrastructure required, and any project change in the timing, velocity, or peak of flows of stormwater runoff." These requirements would be extraordinarly time consuming, an expensive burden on local communities, and would likely push some developers into private insurance markets where no reasonable and prudent alternative would be in place to help mitigate potential impacts to endangered and listed species.

Moreover, the proposed RPA would require FEMA to place a community on probation that does not achieve and maintain compliance with certain benchmarks. None of these actions, reporting requirements, or enforcement mechanisms appears to be consistent with FEMA's statutory authorization.

I respectfully request that NMFS share its responses to FEMA's May 2014 and January 2015 letters, as well as the agency's response to concerns expressed by the State of Oregon and shared with NMFS in January 2015. If NMFS has not yet formally responded to FEMA's letters or the State of Oregon's concerns, please provide my office with an estimated timeline for when those responses will be complete and when copies of those responses will be provided to my office.

Finally, it is my understanding that a RPA was recently completed for endangered and threatened species listed under the Endangered Species Act in Washington State and that the RPA was upheld in court. Given Oregon's geographic, hydrological, topological, and biological similarities to the state of Washington, please explain why the successful development and legal defense of the RPA for Washington cannot provide a template for the RPA being developed for Oregon.

Thank you in advance for your timely reply. If you have any questions or require follow up, please do not hesitate to contact Travis Joseph (travis.joseph@mail.house.gov) in my office.

Sincerely,

Peter DeFazio
Member of Congress

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
7600 Sand Point Way N.E.
Seattle, Washington 98115

April 27, 2015

The Honorable Peter DeFazio
U.S. House of Representatives
Washington, DC 20515

Congressman DeFazio

Dear Representative DeFazio:

Thank you for your recent letter pertaining to our ongoing consultation under the Endangered Species Act (ESA) with the Federal Emergency Management Agency (FEMA). As you know, this consultation addresses FEMA's National Flood Insurance Program (NFIP) and its effects on endangered and threatened species and their habitats in Oregon. We appreciate your concerns and would like to share the following context and information regarding the development of the reasonable and prudent alternative (RPA) in the biological opinion.

In Oregon, 15 species of salmon and steelhead are listed under the ESA, and functional floodplains are vital to their growth and survival. The loss of floodplain habitats is widely understood to be a principal factor limiting the recovery of these listed species.

In August 2010, pursuant to a settlement agreement with the Portland Audubon Society and others, FEMA requested formal ESA consultation with NOAA's National Marine Fisheries Service (NMFS) to determine whether changes to its program were necessary in order to meet its ESA obligations. FEMA initiated consultation in September 2012, and in September 2013 NMFS provided FEMA with a draft jeopardy biological opinion. The September 2013 draft found that the floodplain management standards implemented by FEMA through the NFIP are not adequate to prevent further degradation of habitat that the listed species need to survive. Therefore, the draft concluded that the NFIP, as implemented, is likely to jeopardize all 15 ESA-listed species of salmon in Oregon, as well as Southern Resident killer whales. Included in the draft opinion was a draft RPA, which, if implemented, would avoid such jeopardy.

We fully appreciate the issues you have enumerated in your letter and concur with a number of your observations. As you note, the draft of our RPA indeed sought to limit new development in high-risk flood-prone areas while allowing for development in the outer zones of the floodplain with mitigation in order to protect floodplain habitats. Between 1980 and 2013, the United States suffered more than $260 billion in flood-related damages. On average, more people die annually from flooding than any other natural hazard. Further, the costs borne by the Federal government are more than any other hazard. Flooding accounts for approximately 85% of all disaster declarations. Further, all indications are that flood patterns are shifting in the Pacific Northwest, with floods increasing in frequency, depth, and velocity. For this reason, it is the long-standing policy of the United States, reiterated in January 2015, to "avoid, to the extent

possible, the long- and short-term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development wherever there is a practicable alternative." Executive Order 13690 (January 2015).

Our draft RPA sought to foster development that was compatible with salmon, was consistent with the ESA, and also helped communities avoid the build-damage-rebuild cycles, providing them greater security, and allowing them (and the governments) to avoid costly disaster repairs. Our recommendations reflected three points of emphasis: 1) use better maps of floodplains that reflect good science and changing coastal and riverine hydrology, 2) encourage building and development patterns that avoid high-risk areas, and 3) improve accountability. We have been endeavoring to shape our recommendations to ensure that they reflect the broader national policy.

NMFS is deeply engaged with this consultation, and we recognize that it is both complex and important. We also recognize that there are substantial ongoing open issues between NMFS and FEMA, some of which are enumerated in its correspondence to us, and we are in active discussions with FEMA on them. We have also committed to meet and confer with the State of Oregon, Tribal governments, and others as we work to develop a final RPA that aligns ESA requirements with these broader national policy objectives.

Thank you for inquiring about this matter. Please feel free to contact me directly or Amanda Hallberg Greenwell, Director of NOAA's Office of Legislative and Intergovernmental Affairs, at (202) 482-4981 should you or your staff have further questions. We, in turn, will stay in close touch with your office and others in the Oregon delegation as this work proceeds.

Sincerely,

William W. Stelle, Jr.
Regional Administrator

June 28, 2016

W. Craig Fugate
Administrator
Federal Emergency Management Agency
500 C Street S.W.
Washington, D.C. 20472

Dear Administrator Fugate:

In Oregon, 271 communities depend on the National Flood Insurance Program (NFIP) to provide flood insurance. The many waterways that contribute to Oregon's natural beauty and robust economy also make our state prone to flooding. Given the reach and importance of the NFIP in Oregon, it is essential that it is administered with the utmost transparency and clarity. We are deeply concerned about recent steps FEMA has taken to implement the Reasonable and Prudent Alternative (RPA) in the National Marine Fisheries Service (NMFS) Biological Opinion on changes to NFIP.

On June 13, 2016 FEMA Region X sent letters to National Flood Insurance Program (NFIP) communities in Oregon addressing changes to Oregon's NFIP structure that would be occurring over the next four and half years. Although we understand this letter may have served to fulfill a requirement to provide notice of NMFS April 14, 2016 Biological Opinion and Reasonable and Prudent Alternative (RPA), the letter was confusing and alarming to many who received it.

We understand that FEMA is responding to NMFS's Biological Opinion and RPA, which assumes FEMA will exceed its congressionally authorized authorities by requiring communities to prohibit private development in order to participate in the NFIP. This is all the more reason for FEMA to work closely with Oregon's NFIP communities and state partners to establish mitigation and compliance measures that are not overly burdensome and do not exceed FEMA's legal authority.

The letter explains that there are two stages of implementation— interim measures over the next two years and permanent program changes to the NFIP. It also suggests that NFIP communities have the following options: "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." Voluntarily imposing a temporary moratorium on all floodplain development that could adversely impact Endangered Species Act (ESA) listed species or their habitat is not an option for Oregon NFIP communities. Communities cannot be expected to implement these or any other measures without thorough guidance and consultation with FEMA.

The letter is particularly disappointing because it threatens enforcement action against communities but does not offer a timeline for when that reporting requirement is expected to take

effect or guidance on how communities can fulfill reporting requirements. Requirements to mitigate potential impacts to species and habitat, per the RPA, will be necessary, but responsibility for providing acceptable mitigation options falls to FEMA. FEMA needs to provide clear guidelines on how and when communities must comply with revised NFIP requirements.

Oregon is one of the first states affected by significant changes to the NFIP based on ESA, Section 7 consultations, but NFIP communities across the nation will also be subject to program changes in the future. Because Oregon is at the forefront of nationwide NFIP changes, it is in the best interest of FEMA to get implementation in the state right. Therefore, we suggest that FEMA increase staffing resources in Oregon throughout the implementation process in order to better communicate with every NFIP community in the state. We also ask that community input and concerns be considered and responded to at every step of the implementation process.

With some of the strongest land use laws in the country, Oregonians deserve a collaborative process with FEMA on NFIP RPA implementation— one that addresses protection of salmon and steelhead habitat, but is also economically and socially feasible. Thank you for your attention to our concerns and taking leadership on establishing a clear, transparent, and collaborative process. We look forward to a response to this letter that includes an update on how FEMA plans to increase staffing resources, communicate more clearly, and seriously consider community input throughout this process.

Sincerely,

PETER DeFAZIO
Member of Congress

RON WYDEN
United States Senator

JEFF MERKLEY
United States Senator

EARL BLUMENAUER
Member of Congress

KURT SCHRADER
Member of Congress

SUZANNE BONAMICI
Member of Congress

PETER A. DEFAZIO
4TH DISTRICT, OREGON

TRANSPORTATION AND
INFRASTRUCTURE
RANKING MEMBER

PLEASE RESPOND TO:

☐ 2134 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–3704
(202) 225–6416

☐ 405 EAST 8TH AVENUE, #2030
EUGENE, OR 97401
(541) 465–6732
1–800–944–9603

☐ 125 CENTRAL AVENUE, #350
COOS BAY, OR 97420
(541) 269–2609

☐ 612 SE JACKSON STREET, #9
ROSEBURG, OR 97470
(541) 440–3523

☐ defazio.house.gov

Congress of the United States
House of Representatives

June 28, 2016

Mr. Will Stelle
Administrator, West Coast Region
National Marine Fisheries Service
7600 Sand Point Way NE, Bldg 1
Seattle, WA 98115-0070

Dear Mr. Stelle:

I am writing to convey my objections to the Reasonable and Prudent Alternative (RPA) issued by the National Marine Fisheries Service (NMFS) as part of its April 2016 Biological Opinion (BiOp) regarding the Federal Emergency Management Agency's (FEMA) implementation of the National Flood Insurance Program (NFIP) in Oregon. The RPA demonstrates a fundamental misunderstanding of the purpose of the NFIP and its impact on private floodplain development. Private floodplain development is not attributable to, or caused by, FEMA's implementation of the NFIP and, as such, it should not be treated as federal action subject to Section 7 consultation requirement under the Endangered Species Act (ESA).

The NFIP was first created because Congress found that it was uneconomical for the private insurance industry alone to make flood insurance reasonably available to those in need of flood insurance protection. The intent of the program was to reduce future flood damage to structures through community developed floodplain management ordinances (guided by FEMA floodplain mapping) and provide protection for property owners against potential losses through an insurance mechanism that requires a premium to be paid for the protection. Community participation in the NFIP is voluntary. It is based on an agreement by a community to adopt a floodplain map identifying flood-prone areas, and to subsequently institute floodplain regulations for those flood-prone areas. In return, the federal government agrees to provide primary flood insurance to individuals and businesses within the community. In order for an individual to participate in the NFIP, the community must have opted into the NFIP, meaning the community must have adopted maps and floodplain ordinances for the area in which the individual resides.

This process is consistent with a State's authority to determine land use. A State may delegate its land use jurisdiction to a local government or other political authority, as it has done in Oregon. In Oregon, the State and local communities have public notice and comment procedures that must be followed when proposing land use ordinances or regulations. Nothing in the NFIP pre-empts a state's, or local government's, authority to determine how lands within its jurisdiction

THIS STATIONERY PRINTED ON PAPER MADE WITH RECYCLED FIBERS

should be used. Nothing in the NFIP grants FEMA regulatory authority over land use, and NMFS cannot use the guise of the ESA to expand FEMA's jurisdiction under the NFIP into federal land use regulation.

In addition to my overall disagreement with NMFS regarding whether Section 7 of the ESA should even apply to private development, I have a number of specific concerns about the RPA NMFS developed to achieve ESA compliance. Specifically, RPA Element 2 sets forth interim measures FEMA must impose on local communities to substantially limit the types of development allowed in the Riparian Buffer Zone (RBZ) to specified activities (e.g., water dependent activities, habitat restoration activities, activities that benefit species or habitat). The RPA prescribes a RBZ measured 170 feet horizontally from the ordinary high water mark of certain streams and does not explicitly limit the RBZ to the floodplain, meaning that land outside the actual floodplain could be impacted.

I have already heard that the RBZ provision will have a severe impact on the timber and agricultural industries in Oregon because the BiOp explicitly expands the definition of "development" to include "removal of vegetation or other alteration of natural site characteristics (including any remnant natural characteristics existing in a degraded site)". The Federal government owns about 60% of Oregon's forestland, yet it is the 35% of Oregon's privately owned forests that accounts for 76% of the state's timber harvest. Meanwhile, Oregon forestland owners must adhere to some of the strictest environmental standards in the country through compliance with the Oregon Forest Practices Act. NMFS's overreach to restrict forest practices further through an irrational RBZ will hurt an industry that is vital to the livelihood of thousands of Oregonians.

All RPA requirements should be based on the best available science, and that science should be incorporated as part of the Biological Opinion. As the 170-foot RBZ illustrates, Element 2 imposes arbitrary and prescriptive mitigation requirements of natural floodplain functions. There is little, if any, scientific/factual justification for the specific mitigation measures required by NMFS.

The interim measures in Element 2 also require FEMA to recommend that the State prioritize floodplain development buyouts based on the presence of high priority salmonid populations, rather than prioritizing buyouts that reduce the risk of losses to life and property, which is the mission and purpose of the NFIP.

RPA Element 3 requires FEMA to use best available science when mapping. However, NMFS also requires FEMA to use specific mapping requirements and protocols, regardless of the appropriateness of the required mapping methods for the areas being mapped or whether use of these costly measures would result in a significantly more accurate map.

Under Element 3, FEMA is effectively being required to expand the Special Flood Hazard Area on flood maps to include future conditions, which means that additional property owners of buildings in these areas will be required to meet NFIP requirements and purchase flood insurance. Furthermore, as discussed below, Element 4 will substantially reduce or restrict the amount and type of development that may occur in a High Hazard Area.

RPA Element 3 requires FEMA to anticipate climate change and land use changes caused by increased population growth and depict these areas on flood maps as Area of Future Conditions Flood Hazard. The Biggert-Waters Flood Insurance Reform Act of 2012 authorized the Technical Mapping Advisory Committee (TMAC) to make recommendations to FEMA with respect to mapping or revising maps to accommodate for these activities. This effort is already underway. Requiring FEMA to map future conditions, and providing specific details about how this should be done, is contrary to, and undermines, Congress' explicit direction under Biggert-Waters to establish a process for how mapping standards and procedures will be developed for future FEMA flood maps. It is completely inappropriate for NMFS to dictate to FEMA incorporation of specific climate and population changes where the science may be inconclusive. Furthermore, NOAA can utilize its seat on the TMAC to make sound scientific recommendations that address these potential future conditions.

RPA Element 4 requires FEMA to revise its regulations to incorporate an ESA performance standard into the regulatory floodplain management criteria. By requiring FEMA to impose these RPA requirements through regulation, instead of through guidance as they did in Washington State, NMFS is taking a one size fits all approach that will have nationwide application. Additionally, any other RPA-required changes that require rulemaking will also be applied to all NFIP participating communities, not just Oregon communities.

Element 4 also imposes restrictive land use and development standards once flood risks are mapped by prohibiting almost all new development and substantial improvements in high hazard areas. Similarly, RPA Element 4B (ii)'s prohibition on redrawing the floodway to accommodate new development is effectively a prohibition on development in the floodway without regard to its effects on species or habitat. Such blanket prohibitions are not only outside FEMA's authority, but they are imposed arbitrarily, without any assessment of whether the specific prohibited floodplain development would actually cause adverse effects to ESA-listed species or habitat.

Along the Oregon Coast, most of the areas that are desirable for economic opportunities due to access to transportation corridors also tend to be areas that fall within the 100-year floodplain. These historic working waterfronts are the lifeline for communities that routinely lag behind the economic growth of the rest of the state. Stripping away development opportunities, through a one-size-fits-all approach, will destroy coastal economies.

Furthermore, requiring FEMA to develop standards governing the creation of new development parcels, disallowing partitioning of land to create new parcels, developing standards governing the minimum permissible size of new development parcels, and limiting the footprint of new structures to 10% or less of total lot size, and other stringent requirements, exceeds FEMA's authority. FEMA is not a land use regulatory agency and has no authority over privately funded development on private lands by private developers. FEMA has no authority to issue or deny floodplain development permits, nor does it have authority to establish the terms and conditions attached to such permits.

NMFS indicates that the intent of the RPA is "to provide an alternative to the proposed action that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that will avoid jeopardy and adverse modification." The RPA does not meet NMFS's intended purpose. As described above, FEMA does not have the legal authority to carry out several of the proposed actions. Many of the recommendations are not economically or technologically feasible in Oregon. In fact, the RPA will have severe detrimental economic effects in Oregon by restricting development as well as agricultural and timber industry activities. There are workable ways to protect endangered species and their habitat without cutting off Oregonian's livelihood. Had NMFS reached out to the State, local communities, and interested stakeholders to develop the RPA, recommendations that accomplish the intention of the RPA could have been developed. Instead, NMFS developed the RPA in a vacuum, and, as a result, I do not believe it will accomplish the intended purpose.

Sincerely,

PETER DeFAZIO
Member of Congress