

Oregon NFIP BiOp Implementation Proposed Approach

FAQ from April 16, 2021 Webinar and Stakeholder Comments

5/14/21

Introduction

FEMA and the interagency team are welcoming feedback on the [draft proposed approach](#) to implementation of the 2016 Biological Opinion. Questions here are collected from a virtual stakeholder workshop on April 16, 2021 and from written comments provided via email and our [virtual flipchart](#) platform through April 30, 2021.

Our team recognizes that the level of detail provided in the draft proposed approach has been frustrating for some partners. Our goal has been to check our intended direction and progress so far with agency, community, and stakeholder partners before developing the next level of detail, with a recognition that the approach may still see substantial changes due to the feedback we receive at this stage.

We ask that partners continue to keep sharing your questions, comments, concerns, and frustrations, because every additional perspective you share helps us continue to refine and build out detail. Even questions we can't answer help us understand where the likely sticking points are. The [virtual flipchart](#) will remain open through May 28. Additional comments after that deadline can be sent to FEMA-R10-ESAccomments@fema.dhs.gov and will be incorporated into the revision process to the degree possible based on timing.

Finally, please note that the answers provided below represent our current best thinking based on the draft proposed approach and ongoing discussions. We welcome feedback on any areas that continue to raise concerns for any of our partners. Nothing about this proposed approach has been finalized yet.

Big Picture

Does FEMA have the authority to implement the proposed approach under existing regulations?

Yes, pursuant to the Code of Federal Regulations (44 CFR § 60.3(a)(2)), a participating NFIP community must obtain and maintain documentation of compliance with Federal and State laws, including the ESA, as a condition of issuing floodplain development permits. The implementation planning approach that results from this process will provide communities with a set of pathways through which they can meet that requirement.

Section 7(a)(2) of the ESA requires FEMA to document that future implementation of the NFIP does not create unacceptable impacts to listed species. As a result of the settlement agreement between FEMA and NOAA Fisheries and the jeopardy determination issued in NOAA Fisheries' Biological Opinion, FEMA is obligated to change the way it implements this program to ensure consistency with ESA Section 7(a)(2). The strategies outlined in this proposed approach are part of that effort.

How does FEMA's implementation plan in Oregon relate to its nationwide ESA approach?

The national consultation is a separate process from FEMA Region 10's responsibilities described above, which resulted from the 2009 NWF vs. FEMA lawsuit regarding NFIP implementation in Oregon. However, FEMA recognizes the need for coordination and shared learning between these two processes.

The floodplain management and mapping policy clarifications from the 2018 Record of Decision are currently on hold while FEMA headquarters conducts coordination meetings with the Services (NOAA Fisheries / US Fish & Wildlife Service) to begin a new ESA Section 7(a)(2) consultation. This consultation will re-examine the influence NFIP has on community floodplain development decisions nationwide and the potential for such actions to adversely affect listed species and critical habitat. FEMA Region 10 must still pursue implementing the Biological Opinion issued by NOAA Fisheries for Oregon.

Does this proposed approach only address the old "interim approach" from RPA 2 or is it intended to meet RPA 4, the more permanent "no jeopardy" solution?

The proposed approach is intended to provide a full one-step solution for NFIP communities to make changes on par with the floodplain management measures presented primarily in RPA Element 4. We heard loud and clear from communities that a two-step process where both steps involve code changes is unreasonably burdensome, so FEMA is pursuing an implementation approach that addresses the portions of the RPA that require community-level action in a single process.

Will there be any capacity to provide local governments with technical assistance grants to aid in implementation?

There are no funds currently committed other than existing staff capacity at FEMA and DLCD. However, FEMA does intend to work with communities and the state as implementation progresses to help them understand and leverage other resources available to them, such as capacity building grants or opportunities for assistance in developing local hazard mitigation plans.

Definitions and Mapping

What does development mean in this context? How is it defined?

The proposed approach uses the definition of "development" as defined in NFIP regulations:

“Any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials” (44 CFR §59.1)

This definition is expanded for the purposes of this proposed approach to include removal of vegetation or other alteration of natural site characteristics (including any remnant natural site characteristics existing in a degraded site). Depending on the details of FEMA’s final implementation approach, communities may need to revise their definition of development accordingly.

The BiOp and proposed approach do not apply to agriculture and forestry harvest uses where these are established uses. Timber harvest and agriculture are suitable uses in the floodplain and are not considered development. Existing infrastructure/structures associated with forestry and agriculture are grandfathered, while new or substantially-improved infrastructure or structures to support agriculture or forestry would be included in the proposed approach, based on the local implementation pathway adopted by the participating community. Tree removal on agricultural or forest lands conducted for the purpose of converting land to new uses (ex. residential or commercial) is considered development.

Under the BiOp, mitigation would **not** be required for

- Maintenance, repair, or remodel of existing buildings, facilities, and utilities within their existing footprints (except for substantial repairs and improvements as defined in 44 CFR 59.1)
- Resurfacing of roads (provided the road prism is maintained and not expanded)
- Lawn care, gardening, removal of noxious weeds, replacement of non-native vegetation with native vegetation, removal of hazard trees
- Plowing and similar agricultural practices that do not involve filling, grading, or construction of levees or structures.

However, some of these activities for which mitigation is not required would still be subject to local permitting requirements under the NFIP.

Would the pathways being proposed apply to the entire Special Flood Hazard Area, or just to critical habitat within the SFHA, or to a limited buffer area within the SFHA?

The pathways being proposed apply to the entire SFHA. Development in areas of SFHA that are outside of designated critical habitat have potential to negatively impact the three natural floodplain functions in other areas of the watershed that are designated as critical habitat. However, a requirement for riparian vegetation to be retained, replaced, or mitigated would apply to a defined buffer area around waterways, similar to standards already in place in some Oregon communities.

Floodplain functions (flood storage, water quality, riparian resources), regardless of their location in or out of critical habitat, provide values important to listed fish. However, the severity of the impacts of development actions - and therefore any mitigation requirements - may be

different depending on the location of the project within the floodplain (proximity to the waterway) and whether it occurs in designated critical habitat, as well as by the type and size of impact and baseline conditions (whether functions on the site have already been compromised by previous development).

What about developments that are close to the waterway but not mapped within the SFHA?

FEMA's jurisdiction for enforcing the RPA and related ESA compliance is limited to the SFHA. However, state and local communities have responsibilities under ESA Section 9 to ensure that other activities do not result in take of listed species. Communities are encouraged to adopt floodplain management policies that consider local-level ESA responsibilities as well as flood risk reduction.

Additionally, communities participating in the NFIP do have the option to include areas not mapped within the SFHA but that are known flood hazards based on their experiences. This falls under the requirement to ensure that development is "reasonably safe from flooding" and is a voluntary action on the community's behalf. The CRS program rewards additional points for this action.

Can you provide an update on the 10 year floodplain in terms of potential implementation plan requirements, mapping resources, and expectations for local governments?

The pilot project underway with FEMA and mapping partners will look at the "10-year" flood interval (10% chance flood event) along with other mapping elements identified in the RPA. Modeling and analysis on this project are still underway. FEMA publishes a 10-year water surface elevation profile with each Flood Insurance Study that accompanies the Flood Insurance Rate Maps and could be used to identify a 10-year floodplain along with topographic information (e.g., LIDAR), however it does not currently generate a 10-year flood map.

When considering the "no-development" option, how have urban areas (low habitat value) within AH Zones (shallow flooding) been considered? Clearly it places more structures in the flood hazard area, but seems that the development would pose a minimal impact to habitat.

This is a great example of needing additional information about the functions that a specific floodplain provides. There is always the possibility that a floodplain is completely disconnected and does not contribute the natural functions that are required to be addressed as part of the implementation plan. However, there may also be indirect effects such as changes regarding hyporheic recharge that any new or redevelopment activities may affect that would need to be addressed.

Similarly, areas that are mapped in the SFHA above a fish-passage barrier, such as waterfalls or a dam, may still have indirect effects to downstream floodplain functions such as water quality and quantity that should be addressed with any new or redeveloped project.

Policy Intersections

How will Path A work under House Bill 2001?

House Bill 2001 requires medium- and large-sized cities in Oregon to allow development of duplex units on any property where a single family dwelling would be allowed. A later phase of implementation also requires additional kinds of multi-family dwellings to be included. DLCDC staff engaged with the BiOp interagency team are helping the team develop a set of avoidance options that are consistent with the new statute. For example, Pathway A limits new development in the SFHA but provides options for communities to allow a single unit residential development within the SFHA if there is no buildable area on a lot that is outside the SFHA. The eventual model ordinance developed may need to clearly indicate that a duplex would be an acceptable use of this exemption.

Will there be an analysis done to show how much developable land would be impacted or taken off the table as a result of this implementation and how that will impact other policy priorities including Oregon's land use goals and the recently passed housing supply policies including HB 2001 and HB 2003?

The intent of this approach is to provide communities with several ways to meet the no net loss goal while minimizing impacts on housing availability and other community priorities. We recognize that there is no “one size fits all” approach to planning for growth. However, this approach makes it difficult or impossible to determine which communities might experience a reduction in land available for development, or how much. The results depend on a number of intersecting factors, including the pathway chosen, past zoning decisions, existing local development code, and development potential outside the SFHA.

The interagency team is performing a very high-level analysis of the total area of land zoned for development within the SFHA at the community level, with the intent of helping communities understand potential impacts to developable land and choose among the potential pathways and strategies. However, this process is not able to achieve the full detailed analysis necessary for most communities due to each community's unique combination of planning, policy, and physical factors.

How are communities expected to meet jobs and buildable lands requirements and also minimize development in the SFHA. For instance, how will this work in places like the Columbia Slough Watershed that are highly industrial to meet job requirements under goal 9?

As described above, the interagency team recognizes that communities face many competing goals and priorities when making land management decisions. The intent of providing multiple pathways and a range of strategies is to provide as much flexibility as possible to communities in finding an approach to meeting the no net loss standard given their unique set of local conditions. For areas that are already highly developed, it is likely that relatively little natural floodplain function remains that would need to be avoided or mitigated. The discussion of redevelopment in the “Details” section below may be relevant to areas like the Columbia Slough Watershed that have already seen significant impacts to natural floodplain functions.

Communities that have limited development potential for either housing or industrial uses outside of the SFHA may also wish to take a pathway that relies more on mitigation than avoidance.

How does FEMA’s recent rescindment of the regional Fish Enhancement Structures policy relate to the implementation of the Oregon NFIP BiOp?

The decision to remove this regional policy was unrelated to the implementation planning work simultaneously underway within the state of Oregon. The regional policy was rescinded because, while it was written with the intention of making the permitting process for habitat restoration projects in the region less burdensome in light of the listing of several salmonid species, it was inconsistent with the mandatory NFIP standards for permitting development in the floodway. It also came to FEMA’s attention that a number of communities throughout Region 10 misread the policy as a waiver of the hydraulic and hydrologic (H&H) analyses required for permitting floodway projects that included habitat benefits or protections in their designs.

FEMA recognizes that habitat restoration projects promote the natural and beneficial functions of floodplains that this implementation planning process also aims to promote. However, the changes to a river system as a result of such restoration work can significantly alter the behavior of the river, the base flood elevation, and the boundaries of the mapped floodway and SFHA. These changes must be documented through the appropriate permitting process to ensure that potential impacts are anticipated through H&H analysis and that any changes to local flood risk are known and reflected in map changes. The final implementation plan can flag this issue in a section dedicated to identifying state or federal policy actions that could help support effective implementation of the BiOp.

Details of Proposed Pathways

Would subdivision limitations include partitions as well or would limited land division through partition process still be allowed?

We believe that including partitions in limitations to subdivision in the SFHA would be needed to make it effective, but welcome feedback. Land divisions are not included in the definition of development under the NFIP, and we recognize that many communities do not consider land divisions “development.” We will explore whether communities will need to add land divisions to their list of regulated activities in the floodplain to make this requirement work, or whether there is another route to the desired outcome: That communities avoid allowing land divisions that create lots that are entirely within the SFHA. Such lots may be “unusable” because of development limitations, or could lead to unacceptable development impacts in the SFHA.

How will redevelopment be treated under this approach? Many NFIP communities have areas that were developed long ago and didn’t manage impacts to water quality and other values at all well. Redevelopment of these properties under current regulations actually have an opportunity to improve habitat, streams, etc.

For areas that are already impacted by development, the goal is to ensure that the three natural floodplain functions (water quality, flood storage, and riparian vegetation/habitat) are not further

degraded. In essence, any analysis should take into account what the current condition is and what can be done to improve that condition when the property is redeveloped.

Redevelopment in many highly developed areas is likely to have limited impacts, or may even create beneficial gain, in the three natural floodplain functions since new development practices often incorporate low impact methods. This distinction can be flagged in the final implementation plan, and we can note that future development of model ordinance language should be careful not to disincentivize careful redevelopment of areas that are already heavily impacted.

Is it possible that a given action might be both (1) required under one Path or another for BiOp compliance, and (2) eligible for CRS credit?

Yes! We encourage CRS communities to also pursue CRS credit for actions that would be required under BiOp implementation.

Would a “no fill” ordinance just require elevation rather than fill for new structures in the SFHA, or do we also need to avoid or mitigate any development in the SFHA that would displace flood storage? Would balanced cut-fill mitigation require an analysis showing not only cut-fill balance but also equivalent hydraulic function?

We are looking for feedback and examples of effective local code to help answer this question, both for the avoidance and the mitigation approach (e.g., communities that have a “no fill” requirement or a cut-fill mitigation approach that has been effective in maintaining floodplain connectivity and hydraulic function. The intent of the requirement is to avoid impacts to habitat via a loss of flood storage and attenuation capacity in the floodplain.

Language in the BiOp suggests that any balanced cut-fill mitigation strategy would need to effectively offset development impacts and be located either onsite or within the same hydraulic reach where it is feasible to do so. Generally, any mitigative storage site would also need to be vegetated to allow for maximum habitat potential and restoration of beneficial floodplain functionality. It would also need to be designed such that fish entrapment is avoided following the subsidence of flood flows.

Structure elevation requirements already in place under the NFIP minimum standards would still apply, as would any higher standards established by the local community.

How do water dependent uses fit within this structure? Thinking of ports here and whether/how something like the avoidance pathway might apply to water dependent uses.

Water-dependent uses will require floodplain development permits for new development. These uses are inclusive of many activities performed by ports and fall under the category of activities that are suitable within the riparian buffer zone as defined in the RPA. New water dependent uses will likely trigger the need for mitigation if they are impacting existing floodplain functions. In areas that are already heavily impacted, the mitigation will be based on any degradation to the functions given the existing conditions. For structures that are designated as a water-dependent use, the risk from flooding should also be considered and minimized.

Is there anything on stormwater between MS4 (Municipal Separate Storm Sewer System) permits and "no net discharge" of stormwater? Oregon's Department of Environmental Quality is promoting many of the construction and post-construction treatment requirements on larger total maximum daily load (TMDL) designated management agencies. Also, there is a need to bound "no net discharge" with some form of a storm size - just as the MS4 does.

We are looking for feedback and examples from communities to help imagine what an approach like this would look like. The interagency team and DEQ have started discussing ideas for a pragmatic approach to meeting the "no net loss" bar for water quality function through stormwater in the SFHA in non-MS4 communities.

For compliance with the MS4, does it distinguish between Phase 1 and Phase 2 communities? In the early DLCD process, there was a crosswalk done that showed a difference in compliance but it could/should be updated with the new Phase 2 and forthcoming Phase 1 permits to see how much closer (or not) they are and what additional measures may be needed.

The interagency team is working on a crosswalk of MS4 Phase 1 and Phase 2 requirements with the original RPA, to allow for a more detailed discussion of whether these achieve the stated intent outlined in the BiOp.

Does this also take into consideration the new TMDL for Mercury that DEQ just released (and requirements for stormwater management for non-MS4 communities)?

The mercury TMDL is just for Willamette Valley communities, but the interagency team is reviewing it to look for opportunities for consistency or potential overlap.

Process

When will the agencies prepare the model development regulations? What opportunities will be available for public engagement? Will there be four separate model ordinances?

The agencies are currently working to identify samples of local code already in use by Oregon NFIP communities that achieve different parts of the proposed pathways. Examples of this language will be included in the final implementation plan prior to the NEPA process, but a full, final model ordinance will likely not be available.

Prior to any implementation deadlines, FEMA will work with DLCD to develop draft model ordinance materials and provide for stakeholder review and comment on those resources.

These may include:

- An alternative "ESA compliance" version of the state's model flood hazard ordinance for communities in the BiOp's action area that choose to take Pathway A
- A collection of model ordinance language resources and existing community ordinances that can be used to implement Pathways B-D

Who will decide which pathway is available or appropriate for a given jurisdiction? Is that up to the jurisdiction? Or will someone else (E.g., FEMA or State) have a role in making the decision re pathway for each jurisdiction?

The intent is for the communities to pick their pathway, although Pathway D is limited to communities that can demonstrate very limited potential for new development within the SFHA. Depending on feedback provided in this stakeholder process and interagency conversations, Pathway C may also be limited to communities that meet some threshold for limited development potential within the SFHA. If so, FEMA and/or the State will provide an analysis or template to help communities determine whether they meet these quantitative thresholds.

DRAFT