



Tillamook County Board of Commissioners

201 Laurel Avenue, Tillamook, OR 97141

Phone: 503-842-3403

Mary Faith Bell, Chair
Doug Olson, Vice-Chair
Erin D. Skaar, Commissioner

November 27, 2024

Federal Emergency Management Agency
500 C Street SW
Washington, DC 20024

RE: National Flood Insurance Program-Endangered Species Act Integration in Oregon

Dear Federal Emergency Management Agency:

On July 15, 2024, Tillamook County received a letter from FEMA changing course regarding National Flood Insurance Program (NFIP)-Endangered Species Act (ESA) integration in Oregon and directing Tillamook County to select a Pre-Implementation Compliance Measure (PICM) by December 1, 2024.

As an initial matter, we would like to express our dismay at FEMA's approach to NFIP-ESA integration. As FEMA knows from years working with Tillamook County on this issue, the County takes seriously its role and responsibility related to protecting threatened and endangered species and their habitat in the County. As you have heard from numerous corners at this point, however, the PICMs are an unreasonable and unnecessary step to achieve that objective.

The County is resistant to being forced to select a PICM at this point. First, any action to implement any of the PICM options is premature and violates FEMA's obligations under the National Environmental Policy Act (NEPA). Tillamook County previously participated in an appeal challenging NOAA's Oregon NFIP Biological Opinion (Oregon BiOp)¹ and FEMA's authority to implement any of the measures set forth in the Reasonable and Prudent Alternative (RPA) in that BiOp.² FEMA convinced the D.C. District Court to dismiss that appeal on the grounds that FEMA had not taken any action to implement any measures from the Oregon NFIP BiOp and that FEMA would not take any action until it had completed NEPA review and issued a Record of Decision setting forth its decision regarding how it would respond to the BiOp and RPAs. FEMA has now abruptly changed course and is asserting that NFIP-participating communities in Oregon must select a PICM when FEMA has not even issued a Draft Environmental Impact Statement (DEIS) evaluating the environmental impacts of its proposed PICMs. Unless and until FEMA completes that NEPA process, FEMA is not in a position to demand compliance with any of the PICMs.

Further, even if FEMA had completed the NEPA process (which it has not), Tillamook does not believe that FEMA has the authority under the NFIP and its implementing regulations to require Oregon NFIP-participating communities to select or implement a PICM. First, no provision of the National Flood Insurance Act (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. In fact, the only provision in the NFIA that references protecting beneficial floodplain functions is Section 42 USC 4022(b)(1)(B), which is part of the *voluntary* Community Rating System program. Thus, requiring implementation of the PICMs is beyond FEMA's statutory authority under the NFIA.

Second, to participate in the NFIP, local communities must adopt floodplain development regulations at least as restrictive as those set forth in 44 CFR 60.3.³ FEMA points to 44 CFR 60.3(a)(2) as providing the regulatory basis for requiring Oregon NFIP-participating communities to implement the PICMs. As you know, however, 44 CFR 60.3(a)(2) requires only that a community "[r]eview proposed development to assure that all necessary permits have been received from those governmental agencies

¹ *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*, 2016.

² *Oregonians for Floodplain Protection v. U.S. Dept of Commerce, et al.*, U.S. District Court D.C. 17-cv-01179-RJL (2017).

³ 44 CFR 59.2.

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.” (Emphasis added.) As you also know, the only “permit” required under the ESA is an Incidental Take Permit (ITP) pursuant to ESA Section 10(a)(1)(B).⁴ ITPs “may be sought when a non-federal entity believes that their otherwise lawful activities may result in take of endangered or threatened species.”⁵ Nothing in 44 CFR 60.3(a)(2) references the PICMs or anything like them. They are not a required permit, but rather FEMA’s response to the outcome of the Section 7 ESA consultation between FEMA and NOAA-NMFS. While FEMA may try to assert that the PICMs are just “guidance”, FEMA has not followed the requisite process to issue any such guidance. FEMA may not unilaterally reinterpret 44 CFR 60.3(a)(2) without going through the requisite notice and comment rulemaking processes for such action.

Further, as you have heard from the Governor and many others within Oregon, it is not feasible for Tillamook County to implement the PICMs on the schedule that FEMA has directed. None of the PICMs currently exist in the County’s floodplain development code. Before the County could implement any of the PICMs, it would need to amend its floodplain development code. Tillamook County must provide Measure 56 notice to approximately 7,000 landowners before adopting changes to its development regulations. That process takes approximately 6 months and costs upwards of \$20,000 in staff time and material costs without consideration of costs for appeals and subsequent litigation. Consequently, even if the County was interested in implementing any of the PICMs, doing so on FEMA’s schedule would require the County to violate state law.

Based on the concerns identified above, Tillamook County declines to adopt any of the three PICM options offered by FEMA at this time. The County has, however, reviewed the requirements of the NFIP, the ESA, its existing floodplain development regulations, and other applicable law, and identified an alternative option that meets the County’s obligations under these statutes/regulations. Beginning December 1, 2024, the County will begin asking applicants for local floodplain development permits to provide documentation that their proposed developments do not result in a “take” of ESA-listed species.⁶ Tillamook County Code Section 3.510(13)(b) requires the Community Development Director to assure that “all other necessary permits have been obtained from those federal, state or local governmental agencies from which prior approval is required.” This provision implements the language from FEMA’s regulations at 44 CFR 60.3(a)(2). By requesting documentation that a proposed floodplain development will not result in “take” from the applicant, the County will take steps to ensure that an IPT is not required for the proposed development, and thus satisfy the requirements of 44 CFR 60.3(a)(2).

This approach is consistent with the approach adopted by FEMA in its 2018 Final Nationwide Programmatic Environmental Impact Statement (FPEIS) and Record of Decision addressing how to integrate ESA considerations into the NFIP nationwide. There, FEMA adopted as part of its preferred alternatives “clarify[ing] that pursuant to 44 CFR 60.3(a)(2), a community must obtain and maintain documentation of compliance with the appropriate Federal or State laws, including the ESA, as a condition of issuing floodplain development permits.” 83 FR 24328 (May 25, 2018). The FPEIS explains that a “no take” statement from the applicant is sufficient to meet this documentation standard. FPEIS (Sept 2017), p. 2-12 through 2-13.

We look forward to continuing to work with FEMA as a cooperating agency on its EIS evaluating the environmental impacts of its proposed Draft Implementation Plan (2018). At the end of that process, if FEMA wants to change the minimum standards for participation in the NFIP in Oregon, FEMA will need to undergo the requisite rule-making process before attempting to enforce any change to the NFIP participation requirements.

Sincerely,

BOARD OF COMMISSIONERS FOR TILLAMOOK COUNTY, OREGON


Mary Faith Bell, Chair


Doug Olson, Vice-Chair


Erin D. Skaar, Commissioner

⁴ 16 USC 1539(a); <https://www.fisheries.noaa.gov/permit/permits-incidental-taking-endangered-and-threatened-species>.

⁵ <https://www.fws.gov/library/collections/permits-native-endangered-and-threatened-species>.

⁶ The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct; may include significant habitat modification or degradation if it kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering. 16 USC §1532(19).