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OPOA Legal Center

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MEMORANDUM

To: Oregon Municipal Governments
From: OPOA Legal Center
Date: November 18, 2024
Re: Revised Memorandum on FEMA BiOp Implementation

This memorandum should not be considered legal advice. Local governments should review this memorandum with county counsel and city counsel prior to taking any action.

The purpose of this memorandum is to explain why local governments should not adopt any of FEMA's Pre-Implementation Compliance Measures (PICMs) and/or seek injunctive or declaratory relief regarding the legal validity of the PICMs prior to adopting any of the PICMs. This memorandum concludes that adopting any of the PICMs could violate state law and FEMA likely does not have authority to enforce the PICMs under federal law. Additionally, this memorandum outlines the process that FEMA would have to take prior to suspending a jurisdiction from the National Flood Insurance Program.

I. FACTUAL BACKGROUND:

In 2009, several non-profit environmental groups filed a lawsuit against the Federal Emergency Management Agency (FEMA) arguing that the implementation of the National Flood Insurance Program (NFIP) jeopardized multiple threatened and endangered species in Oregon. In response, FEMA negotiated a settlement that required initiation of a consultation with the National Marine Fisheries Service (NMFS) under the Endangered Species Act (ESA). In 2016, NMFS issued a Biological Opinion (BiOp) evaluating the implementation of the NFIP and its effect on threatened or endangered species and their habitat in Oregon. The BiOp concluded that the implementation of the NFIP likely jeopardized the continued existence of 16 ESA-listed anadromous fish species (fish that migrate up rivers from the sea to spawn such as salmon) and Southern Resident killer whales.

Accordingly, NMFS issued a reasonable and prudent alternative (RPA) that if implemented, would avoid jeopardy to the listed species and destruction or adverse modification of designated or proposed critical habitat for the anadromous fish. In 2021, FEMA, in cooperation with the Oregon

Department of Land Conservation and Development (DLCD), issued a draft implementation plan to integrate the ESA into the NFIP (Implementation Plan). In 2023, the Implementation Plan began the review process under the National Environmental Policy Act (NEPA), focusing on long-term measures to ensure compliance with the BiOp.

Unhappy with the delays in implementation, several environmental advocacy groups sued FEMA again. In response, in July 2024 FEMA notified Oregon NFIP communities of the need to adopt mandatory Pre-Implementation Compliance Measures (PICMs). FEMA established a December 1, 2024, deadline for communities to notify FEMA of which of the following PICM options they will adopt:

1. Prohibit all development in the Special Flood Hazard Area.

2. Adopt the 2024 Model Ordinance that requires mitigation of any floodplain development to a no net loss standard.

3. Require a special habitat assessment and mitigation plan for development on a permit-by permit basis in the Special Flood Hazard Area to achieve a no net loss standard.

While participation in the NFIP is voluntary, nonparticipating flood-prone communities and communities who have withdrawn or are suspended from the program face the following sanctions:

1. No resident will be able to purchase a flood insurance policy.

2. Existing flood insurance policies will not be renewed.

3. No Federal grants or loans for development may be made in identified flood hazard areas under programs administered by Federal agencies such as HUD, EPA, and SBA;

4. No Federal disaster assistance may be provided to repair insurable buildings located in identified flood hazard areas for damage caused by a flood.

5. No Federal mortgage insurance or loan guarantees may be provided in identified flood hazard areas. This includes policies written by FHA, VA, and others.

6. Federally insured or regulated lending institutions such as banks and credit unions must notify applicants seeking loans for insurable buildings in flood hazard areas that there is a flood hazard and that the property is not eligible for Federal disaster relief.

If a local government does not meet the December 1 deadline they are subject to possible enforcement actions and suspension pursuant to a process set forth in the NFIA and its associated regulations.

II. ANALYSIS:

A. Adopting any of the PICMs could subject a local government to legal liability under state land use law:

While we understand the difficult situation FEMA has placed upon local governments, it must be acknowledged that adopting any of the PICMs likely subjects the county to significant legal liability. Oregon's statewide land use planning system governs development in and out of the floodplain, irrespective of FEMA's criteria for participation in the NFIP. While local governments have the authority to tailor their floodplain ordinances to qualify for federal programs, they cannot ignore state land use law. If they do so, they are subject to legal action by property owners or other entities affected by the local government's decision.

In short, local governments are not absolved of their responsibility to follow state law because of their desire to remain enrolled in the NFIP. The following analysis provides a high-level overview of just some areas of conflict between adopting one of the PICMs and state law:

i. Adopting any of the PICMs requires local governments to mail statutorily required Measure 56 notices, which will likely be infeasible given the December 1, 2024, deadline:

Certain notices must be sent out to landowners and the Department of Land Conservation and Development (DLCD) prior to the first public hearing on adopting any of the PICMs. The two most essential notices are Measure 56 notices under ORS 215.503 and the 35-day notice to DLCD under OAR 660-018-0020(1). If a local government makes a land use decision not in conformance with these requirements, its decision is potentially subject to reversal by LUBA under ORS 197.835(9)(a)(B) or (D), or other provisions of state law.

OAR 660-018-0020(1) requires:

> *Before a local government adopts a change to an acknowledged comprehensive plan or a land use regulation, unless circumstances described in OAR 660-018-0022 (Exemptions to Notice Requirements Under OAR 660-018-0020) apply, the local government shall submit the proposed change to the department, including the information described in section (2) of this rule. The local government must submit the proposed change to the director at the department's Salem office at least 35 days before holding the first evidentiary hearing on adoption of the proposed change*.

If a local government does not send the required 35-day notice and does not qualify for an emergency exemption (which local governments likely will not qualify for in this circumstance), adoption of the ordinance is appealable by the Director of DLCD to LUBA,

Under Measure 56 (codified at ORS 215.503(4)):

> *[A]t least 20 days but not more than 40 days before the date of the first hearing on an ordinance that proposes to rezone property, the governing body of a county shall cause a written individual notice of land use change to be mailed to the owner of each lot or parcel of property that the ordinance proposes to rezone.*

A property is considered "rezoned" if the county either "(a) Changes the base zoning classification of the property" or "(b) Adopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone." See ORS 215.503(9). Measure 56 notices are intended to allow property owners time to submit land use applications before new ordinances are adopted that prohibit or limit previously allowed uses. As recognized by DLCD in their FAQ to local governments on implementing the PICMs, adopting any of the options likely triggers Measure 56 notice because they likely limit and prohibit land uses previously allowed.

To be clear, this is true even upon the adoption of a temporary moratorium prior to other PICMs. Again, Measure 56 notices are intended to allow property owners time to submit land use applications before new ordinances are adopted that prohibit or limit previously allowed uses. It is highly unlikely that local governments will be able to send out proper Measure 56 notices and meet the December 1 deadline at this time.

A local government cannot avoid this issue by adopting a temporary moratorium before taking action to adopt the Model Code or the permit-by-permit Special Habitat Assessment (SHA). If a temporary moratorium is in place prior to the adoption of the Model Code or the SHA, landowners will be unable to submit permits prior to those PICMs coming into effect. As such, a temporary moratorium is nothing more than a de facto extension of either the Model Code or the Special Habitat Assessment. Allowing a local government to bypass the purpose of Measure 56 through the enactment of a moratorium defeats the reason for the measure, and is thus inconsistent with the law's objectives.

Thus, a local government must mail out proper Measure 56 notices at least 20 days prior to the <u>first</u> public hearing on implementing any of the PICMs (including a temporary moratorium), so that landowners have enough time to submit permits before the PICMs come into effect. If they do not, their decision to adopt the ordinance is subject to reversal by LUBA. Again, it is unlikely that most local governments will be able to mail out proper Measure 56 notices and comply with the December 1, 2024, deadline at this juncture.

ii. Incorporating the "no net loss" standard outlined by FEMA and DLCD likely violates the clear and objective requirements of ORS 197A.400:

Oregon law has special considerations and protections for the development of needed housing. One of these protections is known as the "clear and objective" standard, which prevents local

governments from adopting or applying standards that can cause unreasonable costs and delays to housing projects. Because of Oregon's unprecedented housing crisis, the Legislature recently strengthened the clear and objective standard. Under ORS 197A.400, cities and counties:

> *[…] may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing, on land within an urban growth boundary."*

See ORS 197A.400(1) (emphasis added). By July 1, 2025, this standard must apply to unincorporated communities designated in a county's acknowledged comprehensive plan, nonresource lands, and areas zoned for rural residential use as defined in ORS 215.501.

The "clear and objective" standard includes two fundamental parts. In *Roberts v. City of Cannon Beach,* 316 Or App 305, 504 P3d 1249 (2021), the Oregon Court of Appeals summarized the recent case law on this two-part standard:

> *We agree with petitioners that, fundamentally, the standard has two parts: First, a standard, condition, or procedure must be objective. As LUBA has explained, "objective" means "existing independent of mind." […] Standards are not objective "if they impose 'subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community.'" […]*
>
> *Second, as LUBA observed in this case, standards must also be clear. "[T]he term 'clear' means 'easily understood' and 'without obscurity or ambiguity.'" […] This second prong of the analysis is better developed in LUBA's case law than in our own. […] Ultimately, in the context of ORS 197.307(4), the degree of clarity required for standards, conditions, and procedures for housing development represents a balance between the need of applicants for an understandable route to approval of the applied-for development and the need of local governments for code-drafting requirements that are realistically achievable. See, e.g., Video Recording, House Committee on Human Services and Housing, HB 2007, Apr 13, 2017, at 29:55 (statement of Rep. Tina Kotek), available at https://olis.oregonlegislature.gov (accessed Dec 7, 2021) (indicating that it would be achievable for cities to apply only clear and objective standards to all housing).*

See *Roberts v. City of Cannon Beach*, 334 Ore. App. 762, 770; See also *Legacy Dev. Grp., Inc. v. City of The Dalles*,____Or LUBA___, , 2021 Ore. Land Use Bd. App. LEXIS 17, *5 (LUBA No. 2020-099, Feb. 24, 2020); *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998); *Rudell v. City of Bandon*, 249 Ore. App. 309, 319, 275 P.3d 1010 (2012); *Roberts*, Or LUBA at____, 2021 Ore. Land Use Bd. App. LEXIS 75, *20; *Group B, LLC v. City of Corvallis*,___Or LUBA,___, 2015 Ore. Land Use Bd. App. LEXIS 58 (LUBA No. 2015-019, Aug 25, 2015).

In short, a local government may not adopt or apply a standard that regulates housing that is unclear, subjective, value laden, vague, or would otherwise make it unreasonably difficult or expensive for applicants to develop housing. Unfortunately, several aspects of the proposed 2024 Model Ordinance and the SHA are neither clear nor objective, particularly the "no net loss" standard articulated by FEMA. This is acknowledged by DLCD in its FAQ to local governments.[1]

While we take issue with numerous parts of the 2024 Model Code, we are most concerned about the definition of "no net loss" in the Code and its application is Section 6 of the Code which state respectively:

> *No Net Loss: A standard where adverse impacts must be avoided or offset through adherence to certain requirements so that there is no net change in the function from the existing condition when a development application is submitted to the state, tribal, or local jurisdiction. The floodplain functions of the floodplain storage, water quality, and vegetation must be maintained.*
>
> *No net loss can be achieved by first avoiding negative effects on floodplain functions to the degree possible/ then minimizing remaining effects/ then replacing and/or otherwise compensating for/ offsetting/ or rectifying the residual adverse effects to the three floodplain functions.*

According to FEMA's directive, local governments must ensure, through adopting the PICMs, that any development in the SFHA (including housing) only occurs if it achieves this no net loss of standard. This language is inherently unclear, subjective, and a prime example of a value laden analysis designed to balance or mitigate impacts of housing development on other properties including the floodplain itself. It is unclear what several of these terms mean, and is unclear how an applicant would truly meet this standard.

We share similar concerns with the exceptions to the "no net loss" standard. According to the Model Code and FEMA's guidance on the SHA, the following activities, among other things, are exempted from having to comply with the "no net loss" standard:

> *Normal maintenance of structures, such as re-roofing and replacing siding, provided there is no change in the footprint or expansion of the roof of the structure.*

The term "normal" is unclear and subjective. What is considered "normal" maintenance or modifications in the context of a structure like a house? What would "abnormal" modifications be? This language is neither clear nor objective, and makes it extremely confusing for homebuilders and property owners to understand what housing-related permits would be exempted from the no net loss standard.

[1] DLCD_PICM_FAQ.pdf

These are just two examples of where the proposed Model Code and the SHA impose neither clear nor objective standards. Despite being the architect of the Code, DLCD has already acknowledged that several aspects of the Model Code are neither clear nor objective. As such, local governments should not move forward with its adoption, and should not move forward with adopting the "no net loss" standard as outlined by FEMA, as it in itself would not pass the clear and objective test.

iii. The PICMs restrict farm activities and farm structures in violation of ORS 215.253:

ORS 215.253 is a simple statute first enacted in 1973 as part of Senate Bill 101, the companion bill to Senate Bill 100. Under the statute:

> *(1) No state agency, city, county or political subdivision of this state may exercise any of its powers to enact local laws or ordinances or impose restrictions or regulations affecting any farm use land situated within an exclusive farm use zone established under ORS 215.203 or within an area designated as marginal land under ORS 197.247 (1991 Edition) in a manner that would restrict or regulate farm structures or that would restrict or regulate farming practices if conditions from such practices do not extend into an adopted urban growth boundary in such manner as to interfere with the lands within the urban growth boundary. "Farming practice" as used in this subsection shall have the meaning set out in ORS 30.930.*
>
> *(2) Nothing in this section is intended to limit or restrict the lawful exercise by any state agency, city, county or political subdivision of its power to protect the health, safety and welfare of the citizens of this state.*

The purpose of the statute is obvious – on land zoned for exclusive farm use, a local government may not restrict or regulate farm structures or farm uses except for situations in which the structure or farm uses extend into urban growth boundaries and interfere with uses on property within the boundary or the local regulation is necessary for the protection of public health, safety and welfare.

As acknowledged by FEMA in the Implementation Plan, the intent of the Plan and the accompanying PICMs is habitat and species protection, not the protection of public health, safety or welfare. This would normally not create a conflict with ORS 215.253, but the definition of "development" in FEMA rule (44 CFR 59.1) and the PICMs Model Ordinance is so broad that it would include certain accepted farm practices. FEMA defines development as:

> *Any man-made change to improved or unimproved real estate, including but not limited to building or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials.*

This definition will undoubtedly include the construction or maintenance of any type of farm structures. Additionally, it could include the storage of farm products. Both actions are considered

"farm use" under ORS 215.203 and/or "farm practices" under ORS 30.930. Thus, enacting a no net loss provision that limits or prohibits these uses violates ORS 215.253. A county choosing to adopt the model ordinance PICM and applying that ordinance to its Goal 3 zoned land would thus be creating an automatic conflict with ORS 215.253. FEMA does not have Congressional authority to require a County to violate Oregon state law as a condition of obtaining coverage under the NFIP.

B. Local governments should take immediate legal action against FEMA as enforcing the PICMs like violates several provisions of state and federal law, and its outside of the scope of FEMA's authority to enforce:

Before acquiescing to any of the PICMs, local governments should seek legal clarification as to whether the PICMs are legally sound and within FEMA's authority to impose. If not, local governments should seek either injunctive or declaratory relief instead of adopting any of the PICMs. For the following reasons, we believe FEMA may not have the legal authority to enforce the PICMs as criteria for eligibility in the NFIP:

i. Enforcing the PICMs prior to completing NEPA review likely violates federal regulation:

It is unclear whether FEMA has the authority to impose the "no net loss" standard while the Implementation Plan is being reviewed under the National Environmental Policy Act (NEPA) and before completing an Environmental Impact Statement (EIS) of the PICMs themselves.

Generally, NEPA establishes a national environmental policy and provides a framework for environmental planning and decision making by Federal agencies. NEPA directs Federal agencies, when planning projects or issuing permits, to conduct environmental reviews to consider the potential impacts on the environment by their proposed actions. As such, through NEPA review federal agencies are required to take a "hard look" as to whether any major federal action might significantly affect the quality of the human environment. As a United States District Court held in a similar case in Northern California (quoting the United States Ninth Circuit Court of Appeals):

> *NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.*

See *Delta Smelt Consol. Cases v. Salazar*, 686 F Supp 2d (E.D. Calif. 2009).

As noted in *Delta Smelt*, because the risk of taking incorrect action is so high, the CEQ has imposed limitations on federal action taken during the NEPA process. Specifically, 40 CFR § 1506.1(c) states:

(c) While work on a required environmental review for a program is in progress and an action is not covered by an existing environmental document, agencies shall not undertake in the interim any major Federal action covered by the program that may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental review; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

Here, FEMA is currently in the process of completing its Environmental Impact Statement (EIS) under NEPA for the 2021 Implementation Plan, which includes the promulgation of the "no net loss" standard. This process was set to be completed by 2025, when a final Record of Decision (ROD) would be issued. Until FEMA completes its EIS, it is premature to attempt to enforce Plan requirements like the "no net loss" standard that may or may not satisfy federal law. The whole point of NEPA is to ensure that an agency evaluates its proposed actions for compliance with federal environmental law. *Cf. Wetlands Water Dist. v. United States DOI, 376 F3d 85*3 (9th Cir. 2004).

Implementing the "no net loss" standard prior to the NEPA process being complete raises several questions. First, FEMA's attempt to implement the BiOp RPA's through PICM's likely constitutes "major federal action" as the PICMs are different than the actions contemplated in the Implementation Plan. This may trigger an independent NEPA review itself. If not, then the PICMs are at least considered interim measures, those making them subject to the criteria outlined in 40 CFR § 1506.1(c) (Limitations on actions during NEPA process).

As it stands, it is unclear if the PICMs could pass § 1506.1(c) muster as it is: (1) unclear whether FEMA has the authority to impose a "no net loss" standard under the NFIP irrespective of how the Implementation Plan moves forward; (2) unclear whether the PICMs have undergone any environmental review themselves; and (3) enforcing a "no net loss" standard as contemplated by the PICMs likely prejudices programmatic development of the NFIP and future decisions by jurisdictions and FEMA in implementing the program, as they require local governments to violate state law. For these reasons, FEMA's ability to implement the PICMs during the NEPA review process is legally suspect.

ii. FEMA may not have the authority to utilize the PICMs to determine community eligibility because they are not legally enforceable land management criteria required by 44 CFR Part 60:

FEMA's jurisdictional and regulatory authority stems from the National Flood Insurance Act, 42 USC § 4000-4131 (NFIA). Under the NFIA, the FEMA Administrator must make available to flood insurance in only those States or areas (or subdivisions thereof) which have:

> *(1) evidenced a positive interest in securing flood insurance coverage under the flood insurance program, and*
>
> *(2) given satisfactory assurance that by December 31, 1971, adequate land use and control measures will have been adopted for the State or area (or subdivision) which are consistent with the comprehensive criteria for land management and use developed under section 1361 [42 USCS § 4102], and that the application and enforcement of such measures will commence as soon as technical information on floodways and on controlling flood elevations is available.*

See 42 USC § 4012(c). These are the two statutorily outlined criteria for eligibility in the NFIP.

Congress gave the Administrator the authority to create "comprehensive criteria for land management" deigned to:

> *[…] encourage, where necessary, the adoption of adequate State and local measures which, to the maximum extent feasible, will—*
>
> *(1) constrict the development of land, which is exposed to flood damage where appropriate,*
>
> *(2) guide the development of proposed construction away from locations which are threatened by flood hazards,*
>
> *(3) assist in reducing damage caused by floods, and*
>
> *(4) otherwise improve the long-range land management and use of flood-prone areas,*

See 42 USC § 4102(c). These are the four (and only four) purposes contemplated by Congress for the criteria for land management that local governments are expected to adopt to be eligible for the NFIP. Note, there is no mention of the endangered species act, habitat preservation, or species conservation in these criteria. This is because Congress did not draft the NFIA with the intention of requiring the Administrator to consider these types of issues when creating the management criteria.

Nonetheless, FEMA has promulgated regulations outlining the management criteria at 44 CFR Part 60. Under these regulations, to be eligible for the program, local governments must adopt "adequate flood plain management criteria" consistent with these federal criteria. In adopting these regulations FEMA made clear:

> *(b) This subpart sets forth the criteria developed in accordance with the Act by which the Federal Insurance Administrator will determine the adequacy of a community's flood plain management regulations. These regulations must be legally-enforceable, applied uniformly throughout the community to all privately and publicly owned land within flood-prone, mudslide (i.e., mudflow) or flood-related erosion areas, and the community must provide that the regulations take precedence over any less restrictive conflicting local laws, ordinances or codes.*

44 CFR § 60.1 (emphasis added). As such, the FEMA Administrator is limited to using only legally enforceable regulations that are uniformly applied when determining the adequacy of a community's floodplain ordinances. Additionally, the minimum eligibility criteria for the NFIP exist in 44 CFR § 60.3. These regulations include no mention of the endangered species act, habitat loss, or any requirements that a local government adopt a "no net loss" standard of floodplain function to preserve endangered species. This is because Congress did not authorize or direct FEMA to do so under 42 USC 4102(c). See discussion in *Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d 1151, 59 Env't Rep. Cas. (BNA) 1973, 2004 U.S. Dist. LEXIS 23583 (W.D. Wash. 2004).[2]

The specific FEMA regulations for suspension of community NFIP eligibility are found in 44 CFR 59.24. Under this rule, FEMA must first determine that a community has violated the eligibility criteria set forth in 44 CFR 60.3. Those requirements include, among other things, a requirement that a community:

> *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 USC 1334.*

See 44 CFR 60.3(a)(2).

The language cited above, which NMFS and FEMA rely upon to support the PICMs, does not obligate communities to change their existing floodplain ordinances or enact the PICMs. 44 CFR 60.3 obligates a community to ensure that an applicant for a development permit within a SHFA obtains all necessary permits, both state and federal. By its terms, that language can only be enforced on a permit-by-permit basis, as the required permits will change depending upon the facts

[2] Assuming for the sake of argument that the ESA (16 USC §1536(a)(2)) apply to FEMA's actions under the NFIP, and that NMFS has the authority to require FEMA to consider the RPA's suggested in the BiOp in the land management criteria, there is simply nothing in the NFIA authorizing FEMA to do so and FEMA's regulations are clear. In other words, FEMA cannot rely on its consultation obligations under the ESA to bootstrap extreme conservation standards into its land management criteria under the NFIP, without at least following the proper procedures to amend its regulations. The PICMs are a step too far.

of each individual development. If a community believes that a development application will result in an incidental take under the ESA, then the community can require the applicant to address that take as part of the land use permit process. But nothing in the above cited language requires a community to enact any of the PICMs. It simply requires an applicant to prove that they do not need an incidental take permit.

Here, it is unclear whether the PICMs can be considered legally enforceable "comprehensive criteria for land management" under 42 USC § 40012(c) and 4102(c), because the PICMs require a local jurisdiction to violate provisions of state land use law and they extend outside of the scope of the minimum eligibility criteria in 44 CFR § 60.3. Therefore, it is unclear and doubtful that FEMA has the authority to use the PICMs as criteria to assess whether local governments are eligible for the NFIP under 42 USC § 4012(c). To decide otherwise would be arbitrary, capricious, and outside of the scope of FEMA's lawfully delegated authority to administer the NFIP.

iii. The PICMs were not adopted following normal procedures under the Administrative Procedures Act:

If it is determined that FEMA must adopt habitat conservation measures into their criteria 44 CFR § 60.3, then it must do so following the procedures outlined in the Administrative Procedures Act (APA). Congress enacted the APA to outline the process by which federal agencies develop and issue regulations and other agency actions such as policy statements, licenses, and permits. As such, before adopting or amending a rule or regulation, the APA requires federal agencies to publish notice of the properties rule in the Federal Register and give interested persons an opportunity to participate in the rulemaking and provide comments on the rules. 5 USC § 553. If an agency adopts or amends a rule in violation of the APA, that rule can be appealed, and a court must hold unlawful and set aside such actions when they are deemed "arbitrary and capricious, and abuse of discretion, or otherwise not in accordance with law." 5 USC § 706(2)(C).

Here, FEMA did not go through the normal APA procedures before "adopting" and enforcing the PICMs. FEMA created the PICMs entirely out of whole cloth. There was no opportunity for local governments or the public to comment on them, and they were not published in the Federal Register in accordance with the APA. Therefore, any application or enforcement of them can be appealed under the APA and 5 USC § 706(2)(C).

Assuming (for the sake of argument only) that FEMA has the authority under the NFIA to require communities to comply with the PICMs as a condition of eligibility under the NFIP, nothing in 44 CFR 60.3 authorizes FEMA to ignore the requirements of the APA when amending its flood plain management regulations. In other words, even if FEMA has the authority to enact the PICMs or implement a no net loss standard, they still must follow the APA in doing so. There is nothing in statute or regulation that enables them to bypass their federal procedural requirement to short-circuit the rule adoption process to force communities to immediately implement the PICMs.

iv. Adopting the PICMs may trigger claims under both the 5th Amendment Takings Clause and ORS 195.305 (Measure 49):

Both Oregon statute and the United States Constitution contain provisions requiring the payment of compensation for new regulations which limit or prohibit the ability of property owners to use their property. The PICMs may subject local governments to significant takings liability. Specially, the moratorium under consideration is remarkably similar to the temporary moratorium on development in a floodplain that was enacted by the County of Los Angeles in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 US 304 (1987). As the Supreme Court noted in that case, a temporary moratorium on all development will create a total taking of the property, triggering the just compensation requirements of the Taking Clause.

C. Local government have time to review the legality of the PICMs prior to adoption, because they are entitled to due process under the law before being put on probation or suspended from the NFIP:

While FEMA may ultimately be able to take enforcement action against a local government for not adopting the PICMs, it cannot do so without significant due process, notice to the local jurisdiction, and opportunity by the local jurisdiction to correct any deficiency (including enactment of a PICM option). To be clear, the failure of a local jurisdiction to comply with the PICM's on or before FEMA's self-imposed December 1 deadline does not authorize FEMA to immediately suspend the local jurisdiction from coverage under the NFIP.

Should a community fail to enact the PICMs, FEMA may argue that the community has failed to "adequately enforce" FEMA's floodplain management regulations under 44 CFR 59.24(b). When FEMA believes a community has violated this rule, FEMA is authorized to place the community on probation. However, before placing a community on probation, FEMA is first obligated to provide 90 days written notice of the intent to place the community on probation and specify the alleged violations. At least 60 days before placing the community on probation, FEMA must issue a press release to the local media informing them of the possible probation. At the same time, FEMA is required to notify all policy holders in the community of the possible probation at the same time it initially notifies the community government. To date, FEMA has taken none of these steps.

Assuming a community does not comply with the items listed by FEMA in the notice of possible probation (i.e. it doesn't choose a PICM) within the 90-day notice period, the probation period (at least one-year in length) will go into effect. During that period, flood insurance may still be purchased or renewed, and the community can resolve its probation by acting in compliance with the FEMA regulations cited in the letter of possible probation.

If a community does not comply with FEMA requirements before the end of the probation period, FEMA may suspend NFIP coverage for that community. Before suspending coverage, however,

FEMA must notify the community and the public at least 30 days prior to the suspension, and a community can be reinstated for NFIP coverage by complying with the identified FEMA requirements and reaffirming the community's intent to comply in the future.

In short, a community that fails to enact the PICMs on or before FEMA's imaginary December 1 deadline is not going to lose NFIP coverage. At worst, failure to comply will trigger action by FEMA to place a community on probation, at which point the community can either enact a PICM or choose to assert that FEMA lacks the authority to enforce the PICMs for the myriad of reasons set forth above.

II. CONCLUSION:

For the aforementioned reasons, local governments should not move forward with adopting any of the PICMs before December 1, and should question FEMA's enforcement of the PICMs. https://www.dropbox.com/scl/fi/xtuswkgkqc2072zshni6w/OPOALC_WhoWeAre.pdf?rlkey=k2bzcenx6u8msip5xtbjbpph2&st=d4p8da47&dl=0

We understand that local governments have been placed in a difficult spot because of these lawsuits and FEMA's failure to complete their EIS in a timely manner. We also appreciate that that many of them have been active in informing property owners of the pending PICMs, and that many of the people who have contacted us have submitted development applications in advance of the deadline. However, the choice of adopting a PICM would simply pass the cost and burden suffered by the local governments directly onto their constituents. This isn't fair, especially when the PICMs are legally questionable.

We fully understand the concern that ignoring FEMA's self-imposed deadline could possibly jeopardize the ability to obtain coverage under the NFIP. No one wants that, least of all property owners. However, there is a long and substantial process that FEMA must follow, including a probation period, with multiple opportunities for the local government to course correct and come into compliance (see 44 CFR §59.24). Therefore, taking a slow, measured, and legally responsible response to FEMA's PICMs will not result in any immediate threat to a jurisdiction's enrollment in the NFIP. Local governments have the time to analyze and question FEMA's ability to enforce the PICMs as eligibility criteria under the NFIP.

Respectfully,

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