



MEMORANDUM

**TO:** Deschutes County Board of Commissioners

**FROM:** Peter Gutowsky, AICP, Director  
Will Groves, CFM, Planning Manager  
Audrey Stuart, Associate Planner

**DATE:** August 7, 2024

**SUBJECT:** Oregon National Flood Insurance Program / Endangered Species Act Implementation Plan / Legislative Consideration

---

**I. CONSIDERATION**

Depending on the Board of County Commissioners' (Board) position, lobbying efforts may be necessary in the 2025 Legislative Session to recommend repealing entirely or paring back in designated floodplains, Oregon Revised Statute (ORS) 197A.400.<sup>1</sup> This ORS pertains to clear and objective housing standards for:

- Unincorporated communities designated in a county's acknowledged comprehensive plan after December 5, 1994;
- Nonresource lands; and
- Areas zoned for rural residential use as defined in ORS 215.501.

**II. BACKGROUND**

A National Marine Fisheries Service 2016 Biological Opinion (BiOp) is now part of the National Flood Insurance Program (NFIP) in the State of Oregon.<sup>2</sup> This Oregon BiOp, which was issued in response to a federal lawsuit, concludes that the Federal Emergency Management Agency's (FEMA) implementation of the NFIP in Oregon is causing jeopardy to 17 Endangered Species Act (ESA) listed species and adverse modification of critical habitat for 16 of those species. This is significant because FEMA provides floodplain development standards that cities and counties must follow to be eligible for the NFIP, and this BiOp will overhaul the floodplain development standards for certain areas. A map of potentially impacted, privately-owned, floodplain zoned areas in Deschutes County is included as Attachment A.

On July 16, 2024, FEMA sent information to Oregon cities and counties about how they will implement ESA within the NFIP (Attachment B). FEMA has been working on an environmental impact statement (EIS) for the NFIP implementation plan in response to the BiOp and concerns that the NFIP affects threatened species.

---

<sup>1</sup> HB 3197 (2023). The amendments to 197A.400 (formerly 197.307) by section 2, chapter 533, Oregon Laws 2023, become operative July 1, 2025.

<sup>2</sup> Oregon NFIP BiOp or BiOp. NWR-2011-3197.

FEMA announced new pre-implementation compliance measures (PICM) that will run in parallel with the EIS process.<sup>3</sup> FEMA is directing NFIP participating cities and counties to select one of the following PICM options by December 1, 2024:

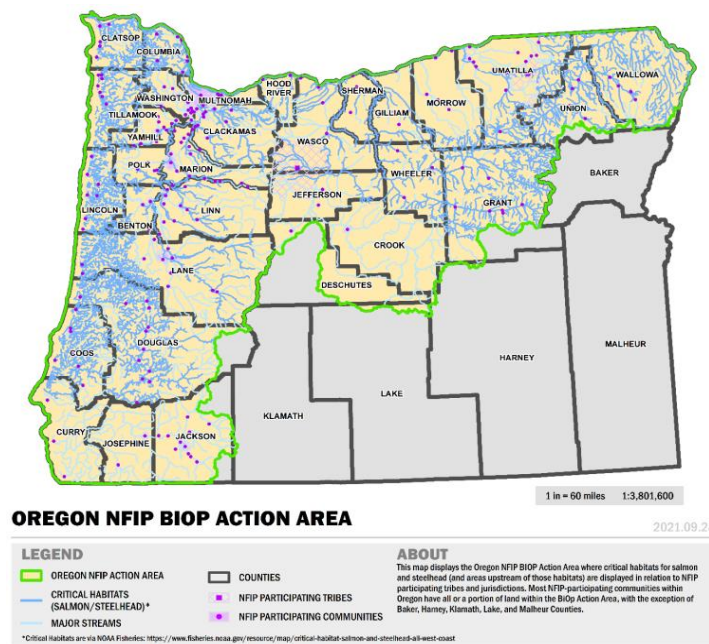
1. Adopt a model ordinance that considers impacts to species and their habitat and requires mitigation to a no net loss standard;
2. Choose to require a habitat assessment and mitigation plan for development on a permit-by-permit basis; or
3. Putting in place a prohibition on floodplain development in the Special Flood Hazard Area (SFHA).<sup>4</sup>

If a community fails to inform FEMA of its selection, they will default to the permit-by-permit PICM pathway. Communities will be required to report their floodplain development activities to FEMA beginning in January of 2025. Failure to report may result in a compliance visit.

### III. PROBLEM

FEMA’s December timeline is unrealistic. These new PICMs will place considerable demands on Oregon counties (and cities) while creating development uncertainty. As the figure below indicates, these measures will be pervasive along the Oregon coast, Willamette Valley, Southern Oregon, and Eastern Oregon. For Deschutes County, the impacts will be felt predominantly along Whychus Creek and the floodplain mapped in association with the irrigation facilities running from Watson Reservoir, through McKenzie Canyon Reservoir and continuing into the Lower Bridge area. Other affected areas include the Crooked River watershed east of Bend, where development activity and land disturbance are infrequent as well as other isolated mapped floodplains.

**Figure 1 – Oregon NFIP BiOp Action Area**



<sup>3</sup> The release of the Final Implementation Plan is anticipated by 2026, following the Record of Decision in the EIS process, then FEMA will fully implement the Plan in 2027.

<sup>4</sup> As of the date of this memorandum, FEMA has not released a model ordinance.

FEMA’s PICMs are inconsistent with Oregon’s land use planning program. They disregard the efforts of local governments to protect endangered species and their habitats while balancing other responsibilities, such as housing, economic development, and mitigating natural hazards. Instead, FEMA is mandating a top-down approach to comply with ESA. Many jurisdictions lack the resources to implement these measures yet will be held responsible for insufficient administration of the NFIP program. Implementing any of the three PICMs listed above will require a text amendment and separate hearings before the Planning Commission and Board. FEMA’s deadline does not afford local jurisdictions the time necessary for a robust, public process nor account for the time required to adopt an amendment into county codes.<sup>5</sup>

Staff will return to the Board at a subsequent meeting in August to seek direction on the chosen PICM and implementation strategies. If counties choose to adopt the model ordinance it must be effective by July 31, 2025, and any applications received between December 1, 2024, and the effective date are subject to the permit-by-permit review. Deschutes County may choose to take an approach that delays the effective date of the model ordinance to see how other cities and counties implement it and respond to legal challenges. The level of technical assistance that FEMA will provide to cities and counties is still uncertain, and the staff resources required to amend the zoning ordinance, review development applications under the new standards, and respond to potential appeals may be significant.

#### **IV. LEGISLATIVE CONSIDERATION**

The consequences of not following the BiOp are extreme and include suspension from NFIP, loss of the availability of NFIP policies, and no consideration for disaster relief funding. In addition, local governments may be faced with issues of property takings and inverse condemnation claims. The expense of defending against these claims will be financially consequential for many local governments and will ultimately undermine participation in the NFIP. Lobbying efforts are likely necessary to recommend repealing entirely or paring back HB 3197 in designated floodplains. It is unlikely that FEMA’s model code will contain clear and objective standards because of surveying, engineering, biological and other assessments that will be required on a case-by-case basis to demonstrate that proposed floodplain activity complies with ESA.

#### Attachments:

- A. Potentially Impacted Floodplain Areas
- B. FEMA Pre-Implementation Compliance Measure Letter

---

<sup>5</sup> The model ordinance developed by FEMA is expected to be released the week of August 5, 2024, providing limited time for cities and counties to review it for compliance with state laws, adopted plans, and consistency with their own zoning ordinances.