



## CITY OF TUALATIN *Staff Report*

**TO:** Honorable Mayor and Members of the City Council

**THROUGH:** Sherilyn Lombos, City Manager

**FROM:** Mike McCarthy, City Engineer  
Steve Koper, Assistant Community Development Director  
Kevin R. McConnell, City Attorney

**DATE:** November 12, 2024

**SUBJECT:**

Selection of Federal Emergency Management Agency (FEMA) Pre-Implementation Compliance Measures to Address Changes to the National Flood Insurance Program (NFIP)- Endangered Species Act (ESA) Integration in Oregon.

**EXECUTIVE SUMMARY:**

The City of Tualatin participates in the NFIP, administered by FEMA. A lawsuit filed by environmental groups over a decade ago required FEMA to consider the impacts of allowing development in the floodplain on species listed in the ESA. FEMA consulted with the National Marine Fisheries Service (NMFS) to prepare a Biological Opinion (BiOp), and in 2016, a "jeopardy" opinion was issued, stating that parts of the NFIP could have a negative impact on the habitat of endangered salmon species. The BiOp concluded that in order for FEMA to obtain interim compliance with the ESA, it must require communities to either prohibit development in the floodplain or mitigate the impacts of development within its designated Special Flood Hazard Area. FEMA has distributed documents explaining these requirements, which are attached hereto as Exhibit A.

In response to the impacts identified by the BiOp, local governments that participate in the NFIP are now being asking to put in place "Pre-Implementation Compliance Measures" (PICMs) by December 1<sup>st</sup>, 2024. FEMA's initial notification to the City informing it of these requirements is attached to this staff report as Exhibit B. According to FEMA, PICMs are interim measures that communities must adopt to comply with ESA requirements under the NFIP. PICM standards and requirements will only apply to areas of the City located within its Special Flood Hazard Area. The City must select one of the following "PICM pathways" laid out by FEMA:

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.
3. Put in place a prohibition on floodplain development in the Special Flood Hazard area.

The City is required to pick a PICM pathway and notify FEMA by December 1, 2024. If the City fails to notify FEMA of its selection, the City will default to the permit-by-permit pathway and may be subject to a compliance visit.

Since receiving the FEMA notification, staff has diligently worked to understand the requirements mandated by FEMA as well as the potential benefits and drawbacks of each PICM pathway. After review, staff is recommending that the City notify FEMA of its intention to adopt the model ordinance.

Since FEMA's notification, City staff have attended multiple workshops and coordination calls regarding FEMA's PICM's- and note that numerous local governments have raised concerns over the necessity of FEMA action, lack of public process, ambiguous requirements and how to effectively implement each respective PICM. In a letter to FEMA, Governor Kotek recently forwarded many of these concerns to FEMA's Administrator, which is attached to this staff report as Exhibit C.

If there is general consensus to select the adoption of model ordinance PICM pathway, staff will notify FEMA of the City's selection by December 1. Afterwards, Staff will ensure it is meeting all mandatory reporting requirements and collaborate with FEMA to implement the model ordinance consistent with state law and City policy.

Selection of a PICM by December 1 and making diligent progress on FEMA compliance measures will forestall a FEMA compliance visit and any additional enforcement measures.

**ATTACHMENTS:**

- PICM Fact Sheet (Exhibit A)
- FEMA PICM Notification to City of Tualatin (Exhibit B)
- Governor Kotek Letter to FEMA (Exhibit C)

## Oregon National Flood Insurance Program Endangered Species Act Integration

## Pre-Implementation Compliance Measures Basics

### What are PICMs?

Pre-Implementation Compliance Measures, also known as PICMS, are short-term measures that communities must adopt to comply with Endangered Species Act (ESA) requirements under the NFIP. FEMA has developed these measures to address Reasonable and Prudent Alternative (RPA) Element 2 (Interim Measures) in the 2016 National Fisheries and Marine Services (NMFS) Biological Opinion (BiOp). These interim measures are intended to occur as the agency undertakes a National Environmental Policy Act (NEPA) review to assess the effects of FEMA's proposed NFIP-ESA integration efforts.

Under PICM, communities may select one of three compliance measures:

1. Prohibit all new development in the floodplain;
2. Incorporate the ESA performance standards into local floodplain ordinances through a model ordinance; or
3. Require permit applications to develop a Floodplain Habitat Assessment documenting that their proposed development in the Special Flood Hazard Area (SFHA) will achieve no net loss.

### Which communities in Oregon are subject to PICM?

PICM, and future Oregon NFIP-ESA integration performance standards, apply to communities that are:

1. Located in the Oregon implementation area, as specified by the 2016 NMFS BiOp;
2. Participating in the NFIP; and
3. Have a mapped SFHA

PICM standards and requirements only apply to areas located within the SFHA.



### What is no net loss?

Any development action resulting in negative impacts to one or more key floodplain functions that are then mitigated or avoided to offset said impacts.

**In other words:** when developing in the SFHA, all development actions must be adequately avoided or mitigated to ensure that floodplain functions can operate at the same capacity as before the development action occurred.

No Net Loss focuses on the floodplain functions of:

- Floodplain Storage
- Water Quality
- Vegetation

## The NFIP is a national program, why is only Oregon subject to PICM?

NFIP-ESA integration is occurring in areas where FEMA has consulted with the US Fish and Wildlife Service (USFWS) and NMFS. FEMA consulted with NMFS to address changes needed to the NFIP program within Oregon's Columbia River drainage basin and Coast to better protect ESA-listed species of salmonoids and southern resident killer whales within the area.

Other areas where consultations have occurred are in the Puget Sound of Washington, California, New Mexico, and Florida. Other ESA-listed species may have their needs addressed in the future in other parts of the country.

## What authority allows FEMA to apply additional performance standards for No Net Loss?

Under 44 CFR 60.3(a)(2) a community must ensure that all other Federal, State and Local permits have been obtained when they are permitting a project in the SFHA. As such a local community must ensure that a "take permit" under section 10 of the ESA is not required. The NMFS Biological Opinion on the implementation of the NFIP in Oregon has determined that developing a floodplain may affect the three key floodplain functions and potentially cause take.

Therefore, a community must ensure that any project that has an adverse effect on those three functions mitigates for the effect to a no net loss standard. FEMA has been authorized take under the RPAs in the NMFS BiOp on the implementation of the NFIP in Oregon. A community participating in the NFIP can use the NFIP take authorization for coverage as long as they are abiding by the NFIP-ESA performance standards.

A community also has the option of seeking their own take coverage for a project through another federal nexus. They may also choose to develop a Habitat Conservation Plan for their floodplain development program under section 10 of the ESA and obtain their own take permit.

## How long is PICM supposed to last?

PICM is intended to address ESA compliance as interim measures while the agency undertakes a NEPA review of FEMA's proposed NFIP-ESA integration efforts. PICM will be required for communities through the remainder of the Environmental Impact Statement (EIS) process. Once the Record of Decision (ROD) for the EIS is issued, and thus marking the end of the EIS process, PICM will no longer be required. The ROD is expected to be issued in 2026.

## When will PICM go into effect?

Communities must adopt and implement a PICM by **December 1st, 2024**. If communities do not select a PICM by this deadline, they will be defaulted to the Permit-by-Permit approach. Communities adopting the model ordinance, must ensure the ordinance is adopted by their community by July 31st, 2025. As communities work to adopt the ordinance, they will still be required to implement another PICM option between December 1st, 2024 and July 31st, 2025.

### Learn more and participate

Visit [www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration](http://www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration) to access the model ordinance, habitat assessment guide, and read the latest information about NFIP-ESA Integration in Oregon.

You can also contact us at [FEMA-R10-MIT-PICM@fema.dhs.gov](mailto:FEMA-R10-MIT-PICM@fema.dhs.gov)

# Pre-Implementation Compliance Measure Selection

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Understanding your community's needs is essential to selecting a Pre-Implementation Compliance Measure (PICM) suited to you.

Under PICM, communities may select one of three measures to ensure Endangered Species Act (ESA) compliance:

- Prohibit all new development in the floodplain;
- Incorporate the ESA performance standards into local floodplain ordinances through the PICM Model Ordinance; or
- Require permit applications to develop a Floodplain Habitat Assessment documenting that their proposed development in the Special Flood Hazard Area (SFHA) will achieve no net loss.

PICM, and future Oregon NFIP-ESA integration performance standards apply to the following communities:

- Located within the NFIP-ESA implementation area;
- Participating in the NFIP; and
- Have a mapped Special Flood Hazard Area (SFHA)

Furthermore, portions of the community that do not fit the above criteria are not subject to PICM. **PICM standards and requirements do not extend beyond the SFHA.**

## Understanding the PICM Options

The 2016 National Marine Fisheries Service (NMFS) Biological Opinion (BiOp) identifies that FEMA's interim compliance with the ESA must require communities to:

- Prohibit all NFIP-related actions in the SFHA; **or**
- Determine the presence of fish or critical habitat, assess permit applications for potential impacts to species and habitat, and require that any action with potential adverse effects be fully mitigated with no net loss of floodplain functions.

The PICM Model Ordinance and Permit-by-Permit approaches attempt to mitigate impacts of development and ensure no net loss of floodplain functions.

Adoption of the PICM model floodplain ordinance by a community would ensure that development meets ESA compliance as performance standards are built into the code.

A Permit-by-Permit approach would require development applications to analyze potential loss to floodplain functions and propose mitigation that abides by the mitigation requirements outlined in the habitat assessment guide and ensures no net loss of the impacted functions.

## What is the main difference between the PICM Model Ordinance and Permit-by-Permit approaches?

Both the PICM Model Ordinance and Permit-by-Permit approaches require a community to analyze and determine the potential loss to three key floodplain functions (floodplain storage, water quality, and vegetation) and required mitigation for any loss to those functions by using pre-determined ratios. Mitigation ratios are provided to ensure that permitted development meets the No Net Loss standards without having to do further analysis of mitigation options to comply with the ESA. For instance, the intrinsic habitat value of a single tree at 6" diameter breast height (dbh) in the Riparian Buffer Zone (RBZ) has already been factored into the ratios and requires a minimum of 3 trees to be planted to make up for the loss of habitat value at the development site.

Under the PICM Model Ordinance approach, compliance with NFIP-ESA integration standards for PICM are built into the code and therefore, no separate process is needed to ensure compliance. The Permit-by-Permit approach requires all new floodplain development analyze any negative impact to the floodplain functions and identify and implement appropriate mitigation measures to ensure NFIP-ESA compliance.

### **Is it possible to adopt the PICM Model Ordinance but also allow for a Permit-by-Permit approach for more complicated projects that do not necessarily fit into typical site development type of processes?**

Both approaches require new development to analyze and determine the potential loss to the floodplain functions and mitigate for any loss to those functions at the required ratios specified in the PICM Model Ordinance and Habitat Assessment Guide. As development would require the same mitigation, a Permit-by-Permit approach and habitat assessment for a project would not be needed if a community has already adopted the Model Ordinance.

### **Would prohibiting all new development in the SFHA prevent habitat or floodplain restoration projects from being implemented?**

The 2016 NMFS BiOp did not carve out exceptions under Element 2 of the RPA when proposing to prohibit all NFIP-related actions in the SFHA. However, FEMA would agree that restoration projects and a few other activities could be exempt from this PICM option if the community is careful in how they word the prohibition and exceptions.

### **How are communities expected to adopt a PICM?**

Communities must use their locally adopted and required processes to ensure that they are able to legally implement the chosen PICM option.

### **What is the Habitat Assessment Guide and when is it used?**

The Habitat Assessment Guide is used under the Permit-by-Permit approach. The guide provides a methodology to review and analyze potential loss to floodplain functions that a development might incur as well as guidance surrounding mitigation required to ensure NFIP-ESA requirements under PICM. A community may use this guide to review a submitted assessment for new development to ensure that the methodology for evaluating impacts and proper mitigation to achieve no net loss is being met.

### **Can a community change PICMs during this process?**

Communities can change PICMs throughout the process but are required to implement their current PICM until their new measure is ready to be fully implemented.

### **How do communities make their selection known to FEMA?**

Communities can notify FEMA of their PICM selection through an email to the FEMA-R10-MIT-PICM inbox.

#### **Learn more and participate**

Visit [www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration](http://www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration) to access the model ordinance, habitat assessment guide, and read the latest information about NFIP-ESA Integration in Oregon.

You can also contact us at [FEMA-R10-MIT-PICM@fema.dhs.gov](mailto:FEMA-R10-MIT-PICM@fema.dhs.gov)

# Pre-Implementation Compliance Measure Timeline

## What is the timeline for implementing PICM?

Under PICM, communities may select one of three measures to ensure ESA compliance:

1. Prohibit all new development in the floodplain;
2. Incorporate the ESA performance standards into local floodplain ordinances through the PICM Model Ordinance; or
3. Require permit applications to develop a Floodplain Habitat Assessment documenting that their proposed development in the Special Flood Hazard Area (SFHA) will achieve no net loss.

**Communities must adopt and implement a PICM by December 1<sup>st</sup>, 2024**, ensuring any changes needed to implement this option have already been made.

Communities that do not select a PICM by December 1<sup>st</sup>, 2024, will be defaulted to the Permit-by-Permit approach.

Communities seeking to adopt performance standards into local floodplain ordinances through the PICM Model Ordinance will have until July 31<sup>st</sup>, 2025, to adopt ordinances and make necessary changes. However, the community must still implement another PICM between December 1<sup>st</sup> and July 31<sup>st</sup> to ensure ESA compliance in the interim.

## Can communities request extensions?

No, communities must meet the established December 1<sup>st</sup>, 2024 deadline or default to a Permit-by-Permit approach. FEMA will work with communities to assess the status of the adoption and implementation of PICMs leading up to the deadline.

## Are projects that obtained a development permit before December 1<sup>st</sup> required to meet PICM?

Existing projects with permits obtained before December 1<sup>st</sup> will not be subject to PICM.



## PICM Reporting Requirements

Beginning January 31<sup>st</sup>, 2025, communities will be required to collect data elements related to the Reasonable and Prudent Alternative (RPA) 5 in the National Marine Fisheries Service (NMFS) 2016 Biological Opinion (BiOp). Collection of these data elements is required on all new floodplain development permits.

### Required data elements for reporting include, but are not limited to:

- Applicant, project title, project description;
- Project location and size of project in SFHA, Riparian Buffer Zone (RBZ), and Floodway;
- Amount of fill added and compensatory storage created;
- Area of clearing and grading that occurred;
- Acres disconnected and reconnected to/from the floodplain;
- Amount of new impervious surface added;
- Type and amount of water quality mitigation provided;
- Number of trees removed and their size;
- Number of trees planted.

Communities will report this data back to FEMA via reporting toolkit on an annual basis, beginning January 31, 2026.

The reporting toolkit, when available, will be downloadable from FEMA's website.

## **Are projects permitted before PICM implementation, but where construction occurs after PICM begins, subject to PICM?**

FEMA encourages communities to follow local vesting laws. The agency's focus is on new permits and applications after December 1<sup>st</sup>. Construction of projects that were permitted before this deadline can continue as normal.

## **What if a community's adoption process timeline does not allow us to meet the December 1<sup>st</sup> deadline of implementing a PICM?**

While FEMA recognizes that the time it takes to implement a PICM varies by community, there is still an obligation to abide by ESA requirements. If a community cannot implement a PICM by the December 1<sup>st</sup> deadline, FEMA will work with the community to consider alternative options to remain compliant with ESA requirements in the interim.

## **How do communities make their selection known to FEMA?**

Communities can notify FEMA of their PICM selection through an email to the FEMA-R10-MIT-PICM inbox. (FEMA-r10-mit-picm@fema.dhs.gov).

## **What penalties are communities looking at if they cannot meet the December deadline?**

Communities will default to the permit-by-permit option if no selection was given to FEMA by December 1<sup>st</sup>. If FEMA does not hear from a community, the agency will contact them to identify what technical assistance is needed to implement PICM. If a community has no PICM implemented by July 31<sup>st</sup>, 2025, FEMA will prioritize an audit of floodplain development activities that occurred in the community, specifically focused on the PICM time-period to assess what has occurred and any mitigation that would have been required for development that occurred.

### **Learn more and participate**

Visit [www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration](https://www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration) to access the reporting tool, model ordinance, habitat assessment guide, and read the latest information about NFIP-ESA Integration in Oregon.

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## Pre-Implementation Compliance Measure Mitigation

### Why is mitigation required?

Unlike ESA implementation in the Puget Sound of Washington, the 2016 National Marine Fisheries Service (NMFS) Biological Opinion (BiOp) for Oregon allows for adverse effects to occur in the Special Flood Hazard Area (SFHA), as long as they result in a no net loss of floodplain functions. No Net Loss allows for mitigation and minimization of development and development-related impacts to occur in the SFHA, instead of just avoidance.

Under No Net Loss, development actions can occur as long as adverse actions are mitigated so floodplain functions can still operate at the same capacity as before the development action happened. Compliance of No Net Loss standards is most commonly achieved through the use of mitigation ratios.

### What are the floodplain functions?

NMFS, in the 2016 BiOp, has identified three floodplain functions that must be mitigated when developing in the SFHA to ensure ESA compliance:

- Floodplain Storage
- Water Quality
- Vegetation

To make mitigating for these three functions measurable, FEMA has identified proxies for each of the functions that translate to potential development actions occurring in the floodplain. These proxies include:

- Undeveloped Space (Floodplain Storage)
- Pervious Surface (Water Quality)
- Trees (Vegetation)

PICM mitigation requirements include compensation for the loss of undeveloped space, pervious surface, and the removal of trees on a development site.

Floodplain Function	Proxy (No Net loss of ...)	Mitigates Against
Floodplain Storage	Undeveloped Space	Developed Space
Water Quality	Pervious Surfaces	Impervious Surface
Vegetation	Trees	Trees Removed

*Floodplain functions, proxies, and actions mitigated against*

### Undeveloped Space

Undeveloped space is defined as the volume of flood capacity and fish-accessible (the ability of a fish to access a space) and fish-egress-able (the ability of a fish to exit a space) habitat from the existing ground to the Base Flood Elevation (BFE) that is undeveloped.

Any form of development that reduces this flood storage volume and fish accessible/egress-able habitat must be mitigated to achieve no net loss. Examples of this development include, but are not limited to:

- Addition of fill
- Structures
- Concrete structures (vaults or tanks)
- Pilings

Mitigation is required for the volumetric space that occupies the area between the existing ground and BFE. Proper mitigation includes creating an acceptable amount of undeveloped space between the existing ground and BFE as determined by the mitigation ratios.

Fish accessibility and egress-ability is a key component of floodplain storage, as it ensures we are maintaining habitat dynamics for ESA-listed species. Mitigating with ratios for undeveloped space will ensure you are also accounting for fish accessibility and egress-ability.

## Pervious and Impervious Surfaces

Pervious surfaces are surfaces that can be penetrated by water and help regulate the rate of surface water runoff. Impervious surfaces are the opposite. They are surfaces that cannot be penetrated by water and thereby increase surface water runoff, leading to erosion of stream banks, degradation of habitat, and increased sediment loads in streams. Impervious surfaces also heat up water as it travels to the waterbody and increase the overall temperature of the waterway. Additionally, impervious surfaces carry pollutants into the waterbody that would have otherwise been filtered out by pervious surfaces.

In PICM, there are three options to mitigate against the addition of impervious surfaces:

- A replacement of the equivalent amount of area where impervious surfaces were added with pervious surfaces;
- Development actions use documented low impact development or green infrastructure practices to infiltrate and treat stormwater produced by the new impervious surface; or
- When the above two methods are not feasible, require professional stormwater retention to ensure no increase in peak volume or flow and proper treatment to minimize pollutant loading.

## Trees

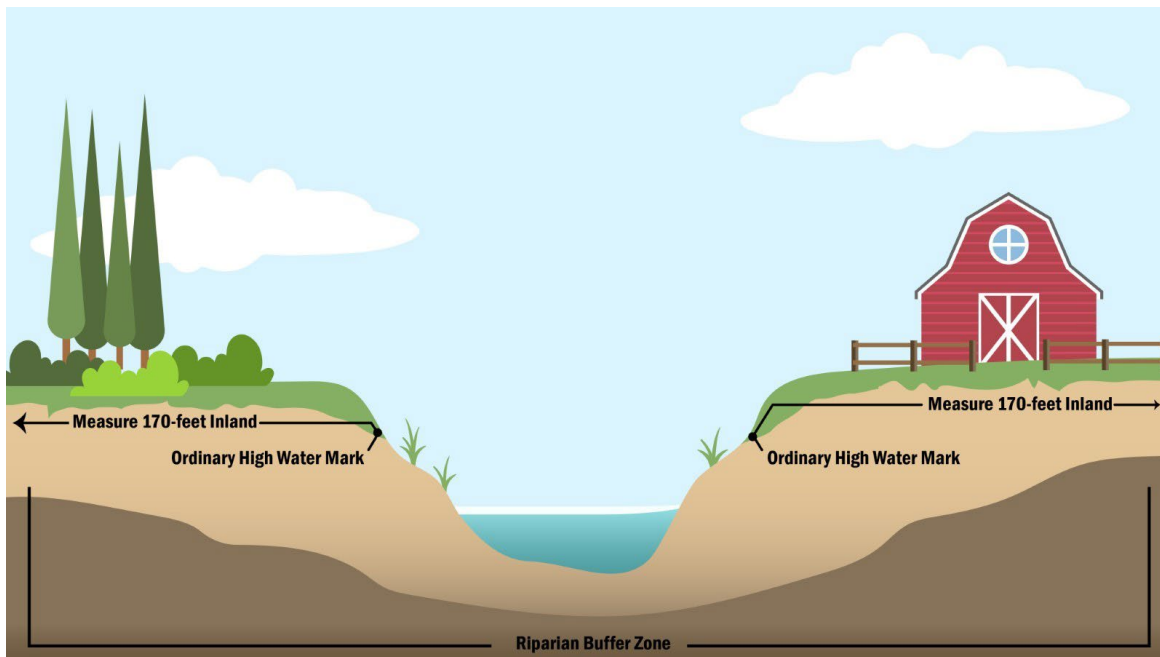
Trees play a vital role in the ecosystem and habitat of salmon. They stabilize banks against erosion, provide shade which regulates temperature for the waterbody, and creates habitat that attracts insects and other vital food sources. Under PICM, each tree over 6" diameter breast height (dbh) that is removed in the SFHA, must be replaced as identified by ratios. As larger trees provide a greater role in ecosystem services, more trees are required to replace them.

Replacement trees must be native species that would occur naturally in the Level III ecoregion of the impact area. Replacement trees are assumed to be saplings and younger trees.

## The RBZ and Me

The Riparian Buffer Zone (RBZ) is an area of land bordering rivers, streams, and other water bodies that provides an outsized role in supporting floodplain functions that affect ESA-listed species and essential fish habitat (EFH). The RBZ serves as important habitat to fish during flooding events, providing refuge from high velocity flows in the floodway. Vegetation attracts insects and other vital food sources, filters sediment and pollutants from runoff, and moderates water temperature through the shade it provides, and stabilizes eroding banks.

Under PICM, FEMA has established a 170-foot RBZ for use in the NFIP-ESA integration area. This 170-foot standard is measured from the ordinary high-water mark of a fresh waterbody, or from the mean higher-high water line of a marine shoreline or tidally influenced river reach. This distance generally equates to 80% of the maximum potential tree height of common tree species in the implementation area. The RBZ does not extend beyond the SFHA, meaning that the RBZ ends where the SFHA ends, if it is less than 170 feet. Communities, otherwise, cannot reduce the 170-foot RBZ boundary during PICM.



Measuring the Riparian Buffer Zone

The RBZ has additional requirements on top of achieving No Net Loss standards due to its outsized role in the floodplain functions. **The RBZ does not ban development.** When developing, the RBZ requires a beneficial gain standard in addition to No Net Loss to provide additional benefits with no negative components to ESA-listed species and essential fish habitats. The beneficial gain standard is as follows:

- An area within the same reach of the project and equivalent to 5% of the total project area within the RBZ shall be planted with native herbaceous and shrub vegetation.

Beneficial gain is required for development in the RBZ, with the following exceptions:

- Habitat restoration activities,
- Activities considered exempt from No Net Loss,
- Functionally dependent uses: A use which cannot perform its intended purpose unless it is located or carried out in proximity to water. The term includes:
  - Docking and port facilities that are necessary for the loading and unloading of cargo or passengers; and
  - Ship building and ship repair facilities.
  - Functionally dependent uses do not include long-term storage, related manufacturing facilities, or ancillary facilities such as restrooms.

## Understanding the Mitigation Ratio Table

Mitigation ratios are provided in PICM to ensure that permitted development meets the No Net Loss standards without having to do further analysis of mitigation options to comply with the ESA. For instance, the intrinsic habitat value of a single tree at 6" diameter breast height (dbh) in the Riparian Buffer Zone (RBZ) has already been factored into the ratios and requires a minimum of 3 trees to be planted to make up for the loss of habitat value at the development site.

Mitigation ratios to ensure ESA compliance vary based off location in the SFHA. The RBZ and Floodway play an outsized role in supporting floodplain functions, therefore higher ratios for mitigation are required to negate the impact of development. Development actions in the RBZ-fringe (the area outside of the RBZ but within the rest of the SFHA) have a lesser impact on floodplain functions and therefore lower ratios can negate any adverse impact.

Mitigation is preferred to occur within the same site as where the development impacts occur, but offsite mitigation is possible at the same ratios if mitigation is happening in the same reach (the section of waterway where similar hydrologic conditions exist). If mitigation needs to occur outside of the reach where development is happening, ratio requirements are essentially doubled.

Mitigation ratio requirements are only necessary when development impacts are occurring in the SFHA. If development is happening partially inside the SFHA, ratios and mitigation is only required for impacts within the area.

*Proposed Mitigation Ratios to Achieve No Net Loss Standards*

<b>Basic Mitigate Ratios</b>	<b>Undeveloped Space (ft<sup>3</sup>)</b>	<b>Pervious Surface (ft<sup>2</sup>)</b>	<b>Trees (6”&lt;dbh≤20”)</b>	<b>Trees (20”&lt;dbh≤39”)</b>	<b>Trees (39”&lt;dbh)</b>
<b>RBZ and Floodway</b>	2:1	1:1	3:1	5:1	6:1
<b>RBZ-Fringe</b>	1.5:1	1:1	2:1	4:1	5:1
<b>Mitigation multipliers</b>					
<b>Mitigation onsite to Mitigation offsite, same reach</b>	100%	100%	100%	100%	100%
<b>Mitigation onsite to Mitigation offsite, different reach, same watershed (5<sup>th</sup>)</b>	200%	200%	200%	200%	200%

**Do communities have to mitigate for each floodplain function, or do they choose only one of the functions to mitigate?**

Communities must mitigate for each impact to the floodplain function.

**Can a community use one action to mitigate for multiple functions?**

Communities would need to ensure that each floodplain function is properly mitigated. In some instances, one mitigation action can count towards mitigation of more than one floodplain function. For example, removing a 200 ft<sup>2</sup> structure could count towards both flood storage and water quality mitigation if the action is creating both undeveloped space and pervious surface.

**Who is responsible for measuring the RBZ?**

Communities are responsible for identifying the RBZ. FEMA will not identify them on Flood Insurance Rate Maps (FIRM).

**Why do communities have to ensure ESA compliance in SFHAs that provide no fish-accessibility?**

Even though there may not be essential fish habitat in an SFHA, development can still create indirect or cumulative impacts that have an adverse effect on ESA-listed species and habitat downstream.

**Learn more and participate**

Visit [www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration](http://www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration) to access the model ordinance, habitat assessment guide, and read the latest information about NFIP-ESA Integration in Oregon.

You can also contact us at [FEMA-R10-MIT-PICM@fema.dhs.gov](mailto:FEMA-R10-MIT-PICM@fema.dhs.gov)

## EXHIBIT B

U.S. Department of Homeland Security  
FEMA Region 10  
130 228th Street, SW  
Bothell, WA 98021-8627



# FEMA

July 15, 2024

Frank Bubenik  
City Hall  
10699 SW Herman Rd  
TUALATIN, Oregon 97062

Dear Frank Bubenik:

The purpose of this letter is to announce the start of the United States Department of Homeland Security's Federal Emergency Management Agency's (FEMA) Pre-Implementation Compliance Measures (PICM) for National Flood Insurance Program (NFIP) participating communities in Oregon. The intent of PICM is to ensure the continued existence of threatened or endangered species in compliance with the Endangered Species Act (ESA). These measures include coordination with communities to provide appropriate technical assistance, help identify available resources, deliver trainings, and facilitate workshops to ensure on-going community participation in the NFIP. These pre-implementation compliance measures will assist communities in preparing for the Final NFIP-ESA Implementation Plan by helping them develop short and long-term solutions to ensure their on-going participation in the NFIP.

FEMA is currently conducting a National Environmental Policy Act (NEPA) evaluation of impacts associated with the Oregon NFIP-ESA Implementation Plan. FEMA developed this plan, in part, due to a Biological Opinion in 2016 from National Marine Fisheries Services. The Biological Opinion recommended specific measures for FEMA to take to avoid jeopardizing endangered species, including interim compliance measures. The release of the Final Implementation Plan (Plan) is anticipated by 2026, following the Record of Decision in the Environmental Impact Statement (EIS) process, then FEMA will fully implement the Plan in 2027.

FEMA has heard concerns from several communities regarding challenges they are facing to meet the expectations of this Plan. To provide communities with the support needed to incorporate ESA considerations to their permitting of development in the floodplain, FEMA will inform, educate, and support our Oregon NFIP participating communities through the PICM before the Final Implementation Plan is released.

NFIP participating communities in Oregon must select one of the PICM pathways which include the following: (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). Communities must pick a PICM pathway by December 1, 2024. 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.

As a part of the PICM, FEMA will implement a delay in the processing of two types of Letters of Map Changes in the Oregon NFIP-ESA Implementation Plan area, specifically Letters of Map Changes associated with the placement of fill in the floodplain: Conditional Letter of Map Revision Based on Fill (CLOMR-F) and Letter of Map Revision Based on Fill (LOMR-F) requests. This action was specifically requested by NMFS in their 2016 Biological Opinion and serves to remove any perceived programmatic incentive of using fill in the floodplain. This delay in processing will begin on August 1, 2024, and will be in place until the Final Implementation Plan is released.

Your community's ongoing participation in the NFIP is critical, as it provides access to flood insurance for property owners, renters, and businesses. In City Of Tualatin there are currently 309 of NFIP policies in force representing \$98405000 in coverage for your community.

FEMA will be conducting informational virtual webinars this summer to provide an overview and status update for the Oregon NFIP-ESA integration, introduce the Pre-Implementation Compliance Measures, and provide an opportunity for Oregon NFIP floodplain managers to ask questions of FEMA staff. In the fall, FEMA will hold workshops to provide in-depth opportunities for local technical staff to work with FEMA technical staff, to understand and discuss issues relating to the PICM.

The webinars will be held virtually over Zoom. The information at each webinar is the same so your jurisdiction only needs to attend one. You can register for a webinar using the links below.

- Wednesday, July 31 at 3-5pm PT: <https://kearnswest.zoom.us/meeting/register/tZEkc-murjstGdPJiFioethjRk-id8N-k0hj>
- Tuesday, August 13 at 9:30-11:30am PT: <https://kearnswest.zoom.us/meeting/register/tZAod-isrTsqGN0KqckRLPPeaZuu4rv96lcR>
- Thursday, August 15 at 2-4pm PT: [https://kearnswest.zoom.us/meeting/register/tZlqcOGpqDojHtTXaa946aI9dMpCTcJIH\\_zt](https://kearnswest.zoom.us/meeting/register/tZlqcOGpqDojHtTXaa946aI9dMpCTcJIH_zt)
- Wednesday, August 21 at 12:30-2:30pm PT: <https://kearnswest.zoom.us/meeting/register/tZYqcuGsrD8rH9DZO22vG0v9KrNzVeUZA9gY>

FEMA will also develop a questionnaire to allow communities to identify how they currently incorporate or plan to incorporate ESA considerations, both in the short-term and long-term. To assist communities in making this determination, FEMA will be offering guidance on the potential pathways that help ensure current compliance. Communities will also be asked to help identify what technical assistance and training would be most beneficial. Feedback from this questionnaire will drive FEMA's engagement and outreach.

Upon completion of the Environmental Impact Statement review and determination, the Final Implementation Plan will be distributed along with several guidance documents and a series of Frequently Asked Questions. FEMA will also be starting NFIP Compliance Audits, in which we will be reviewing permits issued by communities for development in the floodplain and will expect the community to be able to demonstrate what actions are being taken to address ESA considerations.

If you have any questions, please contact us through our project email address [fema-r10-mit-](mailto:fema-r10-mit-)

Bubenik  
July 15 2024  
Page 3

[PICM@fema.dhs.gov](mailto:PICM@fema.dhs.gov). Thank you for your community's on-going efforts to reduce flood risk in your community and for your support as we worked toward these milestones.

Sincerely,

A handwritten signature in blue ink, appearing to read "Willie G. Nunn", with a horizontal flourish extending to the right.

Willie G. Nunn  
Regional Administrator  
FEMA Region 10

cc: JeffFuchs, City Of Tualatin  
John Graves, Floodplain Management and Insurance Branch Chief  
Deanna Wright, Oregon State National Flood Insurance Program Coordinator

Enclosure: Pre-Implementation Compliance Measures Fact Sheet

# Pre-Implementation Compliance Measures Overview

Beginning this summer, FEMA will assist communities with coming changes to the National Flood Insurance Program (NFIP) in Oregon.

## Why are the changes needed?

As the result of a Biological Opinion issued by the National Marine Fisheries Service, communities are required to demonstrate how floodplain development is compliant with the Endangered Species Act in Special Flood Hazard Areas. Changes are needed to protect the habitat of several species of fish and the Southern Resident killer whales to comply with the Endangered Species Act (ESA). FEMA outlined these changes in the [draft Oregon NFIP-ESA Implementation Plan](#).

## Current status

FEMA is evaluating proposed changes to the NFIP outlined in the Implementation Plan through an environmental impact statement (EIS), in compliance with the National Environmental Policy Act (NEPA).



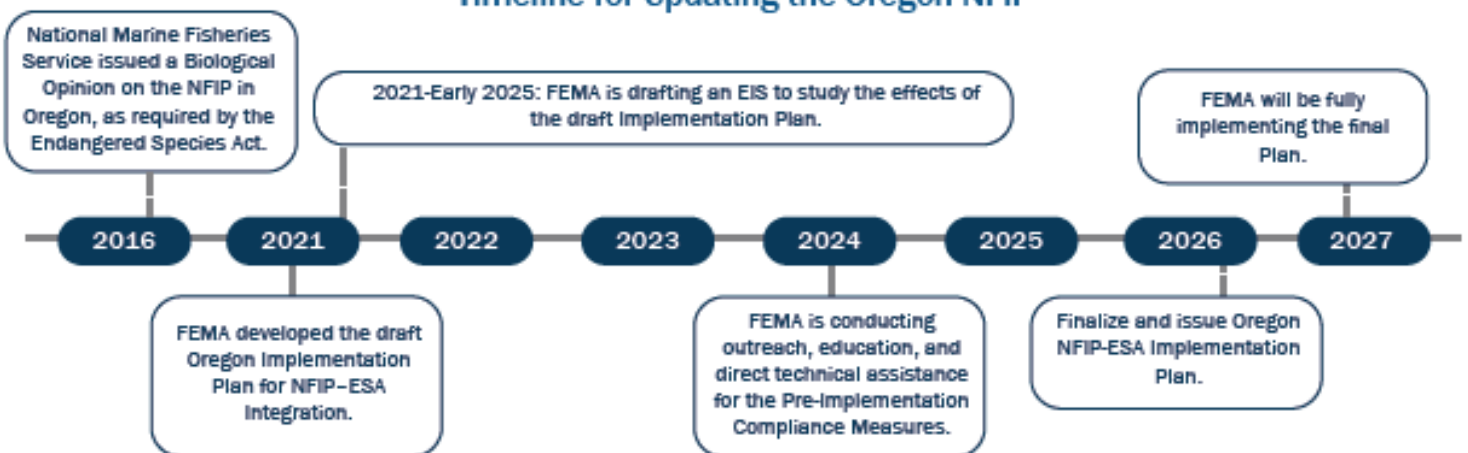
The National Flood Insurance Program serves to protect lives and property, while reducing costs to taxpayers due to flooding loss.

### What is “no net loss”?

Any development action resulting in negative impacts to one or more key floodplain functions that are then mitigated or avoided to offset said impacts.

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. Until then, communities need to begin taking action to protect habitat and achieve “no net loss.” FEMA is offering several resources for communities to learn more and implement interim measures, called Pre-Implementation Compliance Measures (PICMs).

## Timeline for Updating the Oregon NFIP





## What can communities do to comply with these changes?

Oregon communities participating in the NFIP can take short-term measures to comply with ESA requirements, known as PICMs. FEMA developed these measures in response to concerns from communities about the time and resources needed to meet requirements and ensure their future good standing in the NFIP. By implementing these measures now, communities will be better prepared for compliance audits, which will begin when the Final Implementation Plan is in place.

Communities can select one of the following three PICMs:

- Prohibit all new development in the floodplain.
- Incorporate the ESA into local floodplain ordinances.
- Require permit applicants to develop a Floodplain Habitat Assessment documenting that their proposed development in the Special Flood Hazard Area will achieve “no net loss.”

Communities must report to FEMA on their implementation of interim measures.

In addition to the above measures, as of August 1, 2024, FEMA is temporarily suspending processing applications for Letters of Map Revision based on Fill (LOMR-Fs) and Conditional Letters of Map Revision based on Fill (CLOMR-Fs) in NFIP communities to avoid potentially negative effects on ESA-listed species.

## FEMA is here to support your community.

FEMA is offering several resources to assist communities in preparing for the Oregon NFIP-ESA Implementation Plan.

- **Informational Webinars (Summer 2024):** Learn about what FEMA is doing to revise the Implementation Plan and receive an introduction to the PICMs.
- **Questionnaire (Summer 2024):** Share what floodplain management measures your community is currently implementing to comply with the ESA, which PICMs you’re most interested in, and what support you need. Your feedback will help us plan the fall workshops and identify needs for technical assistance.
- **Workshops (Fall 2024):** Get an in-depth look at PICMs and talk through questions and concerns with FEMA staff.
- **Technical Assistance (Begins in Fall 2024):** Get support from FEMA to begin implementing PICMs.

### Learn more and participate

Visit [www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration](https://www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration) to read the latest information about NFIP-ESA Integration in Oregon.

You can also contact us at [FEMA-R10-MIT-PICM@fema.dhs.gov](mailto:FEMA-R10-MIT-PICM@fema.dhs.gov)

## Exhibit C



TINA KOTEK  
GOVERNOR

September 26, 2024

The Honorable Deanne Criswell, Administrator  
Federal Emergency Management Agency  
500 C Street SW  
Washington, D.C. 20024

Dear Administrator Criswell:

I am writing to convey the State of Oregon's concerns related to FEMA's National Flood Insurance Program (NFIP) and Biological Opinion (BiOp) efforts in the State of Oregon. The BiOp has a long and storied history in our state, and we share FEMA's perspective on the importance of protecting public safety and threatened species. However, FEMA's lack of public process in the development and implementation of the current set of interim measures will cause more harm than benefit to our communities, in particular many coastal and rural communities. I have asked my natural resources agencies to identify possible pathways forward, and the State offers three recommendations:

First, FEMA's imposed deadline of December 1, 2024, for local decision-making is impractical because Oregon cities and counties engage their elected officials and constituents in transparent and fact-based decision-making processes. Those processes are impossible to align with a deadline of just a few months. **I respectfully request that FEMA pause its work on pre-implementation compliance measures (PICM) that it abruptly announced on July 15, 2024, and return to the work of crafting long-term measures to modernize the National Flood Insurance Program.**

Second, the State stands ready to assist our local partners in their compliance work and reiterates its May 5, 2023, offer to deploy already-existing state programs such as land use planning, stormwater permits, habitat restoration, wetlands mitigation programs, and technical assistance grants for these purposes. I recognize that federal partners, including FEMA, the National Marine Fisheries Service (NMFS), and the National Oceanic and Atmospheric Administration (NOAA) may view these State programs as helpful but not yet complete in their depth or coverage for purposes of the BiOp. **I invite FEMA to join our agencies for a discussion on how best to continue efforts that started in the implementation planning process to identify gaps in existing State programs and pathways for moving forward to address how the State of Oregon can effectively address those within a collaborative framework.**

254 STATE CAPITOL, SALEM OR 97301-4047 (503) 378-3111 FAX (503) 378-8970

[WWW.GOVERNOR.OREGON.GOV](http://WWW.GOVERNOR.OREGON.GOV)

Administrator Criswell  
September 26, 2024  
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In Oregon, we place a premium on community engagement and collaborative design that is too often overlooked as an effective vehicle to support and assist with the implementation of federal program objectives if given the opportunity and time to contribute. **I respectfully ask that FEMA engage more fully in deliberative dialogue with my agencies in order to craft the best solutions possible for public safety and species protection. With your agreement, I will support the convening of such a process with the appropriate representatives of different interests so that together we can chart a durable and implementable path forward.**

Given the current timing of proposed implementation, my staff will be reaching out to discuss this approach with you next week. Thank you for your consideration of these recommendations.

Sincerely,

A handwritten signature in black ink, appearing to read "Tina Kotek". The signature is fluid and cursive, with the first name "Tina" being more prominent than the last name "Kotek".

Governor Tina Kotek

cc: The Honorable Rick Spinrad, Administrator, NOAA  
Members of the Oregon Congressional Delegation