



# Oregon

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## TESTIMONY OF CHRISTINE SHIRLEY

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BEFORE THE  
HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE  
SEPTEMBER 21, 2016

Chairman Shuster, Ranking Member DeFazio, and Members of the Committee:

I am pleased to be here today to discuss the State of Oregon's perspective on the National Flood Insurance Program in light of Endangered Species Act (ESA) consultations and the resulting changes to the program. My name is Christine Shirley and I am the National Flood Insurance Program Coordinator for the State of Oregon. I work directly with communities in Oregon, providing assistance in floodplain management and implementation of the National Flood Insurance Program.

### **Pioneers in Land Use Planning**

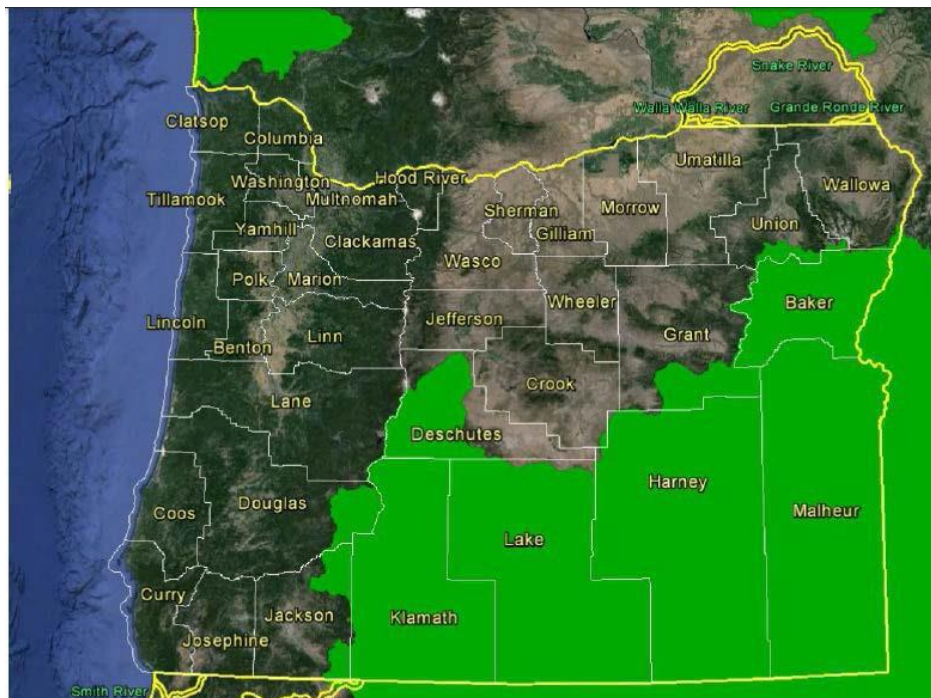
Oregon is a pioneer in land use planning. In 1973, Oregon passed legislation to implement a land use planning program that preserves local control and responsibility for land use decisions while establishing an overarching set of statewide land use planning goals. At its core, it directs new development into towns and cities, protects rural areas for fishing, farming and forest uses, and evaluates environmental impacts at the planning level (not at the permit level through a simplified process akin to the National Environmental Policy Act or NEPA process as in other states). Our state land use planning program has succeeded in protecting farm and forest lands from rural sprawl, while encouraging urban growth in appropriate areas, thus protecting the environment. Research shows that far fewer acres are developed in Oregon for each new resident than in other states.

### **New Federal Directive on State's Land Use System**

Today, Oregon finds itself at the forefront of a federal directive to incorporate an *additional* layer of land use management on our state's floodplains. In 2009, environmental organizations filed a lawsuit contending that the Federal Emergency Management Agency (FEMA) failed to consult with the National Marine Fisheries Service (NMFS) – a division of NOAA Fisheries – on how floodplain development allowed under the National Flood Insurance Program (NFIP) might affect fish listed under the Endangered Species Act (ESA). The ensuing consultation resulted in a "jeopardy biological opinion" and a set of recommendations to FEMA from NMFS known as the "Reasonable and Prudent Alternative," or RPA, which was published in April of this year.

In its recommendations, NMFS stated it wants “FEMA [to] improve floodplain mapping so hazards are clear, limit development in the areas of highest flood hazard and require developers to mitigate floodplain losses by restoring floodplain elsewhere.” NMFS also asserts “[t]hese recommendations will help Oregon communities make informed decisions about development in flood plains, recognizing the implications for both public safety and the environment.”<sup>1</sup>

The outcome of this consultation and ensuing recommendations means that (1) 232 of the 260 communities in Oregon will have to be remapped once FEMA adopts new standards based on the RPA, and (2) that all communities will be required to revise and adopt local regulations to comply with FEMA’s new development standards in order to continue to secure flood insurance under the NFIP. The consequences of a community not participating in the NFIP are significant. Home and business owners would not have access to federally backed flood insurance and may have difficulty obtaining mortgages.



Note: The unshaded areas are the affected areas.

Source: FEMA [https://www.oregon.gov/LCD/docs/FEMAs\\_NFIP\\_ESA\\_Consultation\\_OR.pdf](https://www.oregon.gov/LCD/docs/FEMAs_NFIP_ESA_Consultation_OR.pdf)

I want to stress that Oregon supports the principle of sound floodplain management because it protects people, property, habitat function, and other values. As a result, the State has endeavored to be good partners with FEMA and NMFS during this multi-year consultation and its aftermath. We intend to remain good partners in the years ahead. Even so, we have significant concerns about the current process to date and the lack of a workable approach for Oregon

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<sup>1</sup> Source:

[http://www.westcoast.fisheries.noaa.gov/publications/habitat/fact\\_sheets/oregon\\_fema\\_biop\\_factsheet\\_2016.pdf](http://www.westcoast.fisheries.noaa.gov/publications/habitat/fact_sheets/oregon_fema_biop_factsheet_2016.pdf)

communities. We have identified a number of issues and lessons learned that may be of interest to the Committee.

### **Early Consultation**

Primary among those lessons is the importance of early consultation that informs the RPA. In the Oregon experience, the State was only allowed limited interaction with the agencies during the consultation period. As a result the Oregon RPA does not fit well with Oregon's land use planning program. The State is now faced with the more difficult task of trying to mesh the RPA with Oregon's system. The bottom line is that we will need additional assistance from our federal partners if that process is to be successful.

### **Be Transparent & Cooperative**

It is imperative that FEMA develop an implementation strategy and provide guidance to local governments using a transparent and cooperative process. Local governments, developers, conservation groups, and others must be engaged in conversation with FEMA as materials are drafted, rather than being asked to respond after FEMA begins producing new procedures and materials. To that end, the state is committed to facilitating topical work groups to provide a forum for such engagement. I will say more about these work groups later.

To their credit, after April 2016 release of the Biological Opinion, both FEMA and NMFS did emphasize local outreach. Both federal agencies partnered with the State holding three webinars for local government and State agencies to answer immediate questions. Then, in July - again with participation from FEMA and NMFS - the State hosted ten in-person workshops across Oregon that attracted over 230 local government planners and other stakeholders and provided a valuable opportunity for affected communities across Oregon to voice their concerns and to get information directly from the federal agencies. The workshops will be followed up with a set of work groups, which will continue to advise FEMA.

### **Give Local Government Time & Understand Their Resources**

It is also imperative that FEMA and NMFS recognize and address local government concern that any necessary changes will take time and resources to implement. Most of Oregon's local governments have yet to carve out time or budget in their annual work plans to respond to new FEMA directives. This is not because they were unaware of the ESA consultation, but because the outcome and implementation timeframes have been highly uncertain. Local government cannot be expected to respond quickly when they have been largely left in the dark about what might be expected of them. As it turned out, the RPA in Oregon is significantly different than previous RPA's (e.g., Puget Sound of Washington State), so it was prudent for local governments to wait before taking any action based on assumptions.

### **Establish Realistic Timelines**

A considerable amount of effort will be required to sort out what FEMA will require of local government to implement the Oregon RPA. After this is worked out, FEMA must allow enough time for local governments to adopt and implement any required changes.

The State has been told by FEMA that they intend to develop guidance to implement Interim Measures by April 2017 and then have local governments adopt changes to their permitting programs within a year of releasing the guidance. This proposed schedule is simply not workable. Based on past experiences with the FEMA Map Modernization program, a minimum of four to five years will be needed to develop new guidance, and for affected local governments to adopt and for the State to review local code changes. The State will also need substantial additional staffing to help provide the necessary technical assistance to local governments. These tight timelines are dependent on the responsiveness of FEMA. State and local governments cannot hit their targets if the federal agencies are lax on theirs.

The mapping and regulatory changes for development in floodplains suggested by RPA Elements 3 and 4 (described in the addendum) will pose significant challenges to state resources as new maps and NFIP regulations are rolled out over the next decade. This is because FEMA relies on the State to provide technical support to local communities during the map review and adoption process. There will be a significant public education need as new maps are produced. And, the State will need to review new flood hazard codes to verify their compliance with any new NFIP regulations and statewide land use planning goals for over 230 communities. Keep in mind that these new maps are anticipated by the RPA to be delivered shortly after maps produced by FEMA's RiskMAP program are to be adopted by local government. Many local governments will barely have enough time to catch their breath before a new round of Flood Insurance Rate Maps are introduced.

### **Timely Response Needed From Federal Agencies**

Another key challenge has been timely responsiveness from FEMA and NMFS. Several commitments to supply specific clarifications were made by federal agency staff during the July workshops that have yet to be fulfilled. For example, FEMA agreed to provide information about the kinds of data FEMA expects local government to collect beginning in January 2017 when issuing floodplain development permits. But these instructions have yet to be delivered. During these same July workshops, NMFS agreed to prepare an errata to the RPA to clarify certain ambiguities identified by participants. But the State and local governments as of today do not have this errata.

### **Use Feedback from Communities Gathered During Workshops**

It is critical that FEMA use the information brought forward by stakeholders to create ESA implementation strategies, guidelines, and processes that meet local needs, respects our existing regulatory systems, and contributes to species recovery. That is the current hope in Oregon. We believe that if local regulatory programs are ignored, it will cause further problems for all involved. For instance, if FEMA places too much of the implementation burden onto local governments by forcing every project in the special flood hazard area to undertake a professional biological assessment as a condition of permitting new development may well come to a standstill, at least for smaller projects or projects in smaller communities. This is because most local governments lack both the necessary expertise and financial resources, and because such individualized assessments may be too costly for smaller projects.

The State instead favors a strategy that streamlines the permitting review process for most projects by developing non-discretionary checklists that can be completed by landowners and others with little scientific knowledge about the threatened species in question. Development of such checklists are possible if FEMA will put forth the upfront effort and work with states and local governments.

In addition to the big picture conclusions and recommendations above, many specific issues were raised at the above mentioned workshops that will require further deliberation.

### **Credit for Using Current State Land Use System**

We heard the desire to get credit for and leverage Oregon's existing land use and planning programs, that encourages high density development within pre-defined urban growth boundaries thus lessening environmental impacts outside of these boundaries. We heard that some state laws and regulatory issues will need to be resolved before guidance can be prepared by for local implementation. Many saw a critical need to establish a riparian mitigation banking program. Workshop attendees wanted specific technical resources such as model code, checklists, and maps to be developed. These will not be fast or easy to produce.

### **Consider Species Recovery Work Outside the Floodplain**

Another concern is how resulting federal guidance focused on the NFIP special flood hazard area might fit within existing state and local land use programs. Because the goal is species recovery – and in Oregon the focus is on salmon recovery – flood plain management cannot be disconnected from river basin or watershed management. The RPA in the Biological Opinion is part of but not *the* solution for species recovery. Thus the federal focus on floodplains must work within the larger ecosystem context. In Oregon, comprehensive state and local land use plans provide critical context and they must be respected.

### **Climate of Uncertainty Creates Development Concerns**

Uncertainty caused by changing rules and maps and unclear implementation timelines continue to be raised as an issue. Many local governments have – consistent with Oregon's land use planning program – created and received public approval for plans to redevelop lands near rivers within their existing city limits rather than expand onto greenfields and rural areas. Cities and special districts such as Springfield, Beaverton, and Enterprise, and the Port of Coos Bay have expressed significant concern that their existing redevelopment plans could be undermined if there is a new requirement to set aside large areas of urban-zoned land adjacent to rivers as riparian buffer zones; plans that, incidentally, encourage density within urban growth boundaries, improve existing riparian function, and discourage sprawl outside of urban growth boundaries. We also heard and appreciate concerns of developers, homebuilders, and cities that poorly thought out implementation and perhaps onerous standards set forth in the RPA could undermine our system of containing most new development within urban growth boundaries. Many locals are fearful that investors will not undertake development in this climate of uncertainty.

### **New Mapping Must Support Species Recovery**

The recommended changes to floodplain mapping in Element 3 of the RPA could significantly increase the size of special flood hazard area in some places, increasing the area subject to new development restrictions. Consequently, there are concerns that newly added flood hazard areas could be so far away from salmon habitat that applying the more stringent regulatory standards would not contribute much to salmon recovery, but could have significant, negative economic impacts. We need to evaluate these claims to better understand the consequences of these RPA recommendations.

### **Conclusion & Next Steps**

While these issues pose real challenges, we do not believe they are insurmountable provided FEMA, NMFS and our Oregon stakeholders work together in good faith. But this sort of cooperation and negotiation takes time – as was demonstrated by recent sage grouse negotiations that involved federal partners in Oregon. It is vital that enough time and resources be allocated to produce a workable program that advances species recovery without undermining our State's land use planning program and economic health.

The changes brought about by FEMA/NMFS consultations must not be simply overlaid on top of existing regulatory programs. They must be woven into the fabric of existing state and local programs and regulations. Such integration will require dedicated staff at the Federal level to work in cooperation with the State and local floodplain managers.

In conclusion, I hope this outline of Oregon's experience to date helps the Committee understand the challenges faced by local governments and is instructive for other states. Interweaving Oregon's long established and successful regulatory regimes with the RPA will take a process of close cooperation with the State and its cities and counties. It is our hope that we can work with our federal counterparts to ensure a clear communication of federal interests and how they intend to work with communities to get there.

## ADDENDUM - RPA SUMMARY

### Summary of 2016 NOAA-F Biological Opinion, Reasonable and Prudent Alternatives affecting FEMA administration of the NFIP

Six Elements comprise the Biological Opinion, Reasonable and Prudent Alternatives (RPA):

**Element 1. Notice, Education, and Outreach.** NOAA Fisheries recommends that FEMA develop an education and outreach strategy for RPA implementation and provide notice to all affected NFIP participating communities in Oregon (232 cities and counties) regarding the substance of the RPA. DLCD, the designated state coordinating agency for the NFIP in Oregon, will work with FEMA to get input from local governments as FEMA develops an implementation plan.

**Element 2. Interim Measures.** Most RPA elements will take years to fully implement, however Element 2 includes measures for more immediate implementation. These interim measures are intended to slow the rate at which development currently permissible under NFIP rules degrades habitat necessary for species survival and recovery. NMFS states that these interim measure alone are inadequate to avoid continued decline of threatened fish populations and loss of habitat. NOAA-F intends Element 2 to apply the portion of the SFHA near adjacent to salmon bearing surfacewaters and recommends mitigation for the impacts of new development. The RPA directs FEMA to require local governments to adopt new standards to implement the protective measures in Element 2 as soon as possible but not later than April 2018. Interim measures will remain in place until FEMA makes changes to mapping protocols and implements additional development permit review standards as described in Elements 3 and 4.

**Element 3. Mapping Flood and Flood-Related Hazard Areas.** NOAA Fisheries recommends that FEMA implement new standards using up-to-date scientific understanding to identify and map flood hazard and flood related erosion hazard areas. Key requirements of new standards include: use of more complex flood models; mapping of 90<sup>th</sup> percentile value of 100-year flow as the Base Flood Elevation (50<sup>th</sup> percentile is currently used); and more conservative floodway calculations (likely to result in wider floodways). Also, they ask for flood and erosion hazards based on future conditions to be depicted on FIRMs. Oregon NFIP communities will be required to adopt new maps, when published, and regulate development in flood hazard areas shown on new maps. This RPA element also calls for channel migration zones to be modeled and mapped over time.

**Element 4. Floodplain Management Criteria.** NOAA Fisheries recommends that FEMA develop new, and revise existing, regulatory floodplain management criteria for NFIP participating communities. Local code revisions requested in Element 4 include: limits on development and some uses in high hazard areas (frequently flooded or subject to flood related erosion); restriction on lot divisions that create buildable parcels entirely within the SFHA; limits on the creation of new impervious surfaces in the SFHA; and mitigation standards for adverse impacts associated with allowed floodplain development and removal of riparian vegetation within the SFHA.

**Element 5. Data Collection and Reporting.** NOAA-F recommends that FEMA collect, and annually report, floodplain development information to NOAA-F. Local government would supply this information to FEMA using a standardized reporting form or system.

**Element 6. Compliance and Enforcement.** Recommends that FEMA use the existing CAV auditing and technical assistance process to ensure participating communities comply with any new FEMA guidance or standards developed in response to RPA Element 2, and eventually Element 4, within a reasonable amount of time.