MANAGING FLOODPLAIN DEVELOPMENT WITH ENDANGERED SPECIES

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OBJECTIVES

- Expand understanding of the Endangered Species Act (ESA)
- Discuss how the ESA relates to the National Flood Insurance Program (NFIP)
- Communicate potential program modifications
WHAT IS THE ENDANGERED SPECIES ACT?

- Prevent extinction, recover imperiled plants and animals, and protect the ecosystems on which they depend
- Prohibits “take” of listed species
WHAT IS AN ENDANGERED SPECIES?

- Threatened: species likely to be at the brink of extinction in the near future
- Endangered: species at the brink of extinction now
- Critical Habitat: areas vital to the survival of a listed species
WHAT MAKES A SPECIES ELIGIBLE FOR LISTING?

1. Damage to or destruction of a species’ habitat
2. Overutilization of the species for commercial, recreational, scientific, or educational purposes
3. Disease or predation
4. Inadequacy of existing protection
5. Other natural or man-made factors that affect the continued existence of the species
ENDANGERED SPECIES IN THE U.S.

- Plants: 772
- Invertebrates: 226
- Mammals: 66
- Fishes: 93
- Birds: 80
- Reptiles: 17
- Amphibians: 21
WHAT IS “TAKE”?

- Harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1542(b))
WHO DOES THE ESA APPLY TO?

- Any private or public entity
  - Section 7 establishes federal agency consultation process
  - Section 10 establishes incidental take permits for non-federal entities
NFIP & ESA COMPLIANCE OVERVIEW

- NFIP
- ESA
- Lawsuits Driving Compliance with ESA
- National Environmental Policy Act
NFIP

- Goal: reduce federal expenditures for flood losses through insurance
- FEMA maps flood-prone communities – Special Flood Hazard Areas
- Community participation in program
  - Adoption of ordinance
  - Regulation of development/activity in the floodplain through permit
  - Mandatory flood insurance for property in SFHA with federally-backed mortgage
THE COST OF FLOOD INSURANCE IS A DROP IN THE BUCKET COMPARED TO THE COST OF FLOOD DAMAGE.

$700/YEAR AVERAGE FLOOD INSURANCE POLICY

$43,000 AVERAGE FLOOD INSURANCE CLAIM
ESA

- Ensure that federal agencies protect and conserve endangered/threatened species
- Section 7 – consultation; if jeopardy, a biological opinion with reasonable and prudent alternatives (RPAs)
- NFIP – is it an action subject to ESA?
CONTEXT – NATURAL DISASTERS

- Increased scrutiny on development in the floodplain
LAWSUITS DRIVING ESA COMPLIANCE

- Florida – ESA applies to NFIP, consultation
- Washington
  - RPAs – no "adverse effect"
  - Options/doors for compliance by local communities
  - Second lawsuit on RPA enforcement – FEMA is not a land use authority
- Oregon
  - Expansion of areas protected and definition of "development"
  - Current legal challenge to RPAs
- California
  - Sac-San Joaquin Delta – effects on salmonids
  - ERF v. FEMA
ERF V. FEMA

- Biological Evaluation of NFIP's effects nationwide
- Excluding effects of floodplain development; FEMA is not a land use agency
- Court: FEMA's "broad and deep role" in floodplain management
- "No Effect" determination was arbitrary and capricious
CURRENT FEMA GUIDANCE

- Compliance with ESA for Letters of Map Change (2010/2016)
  - FEMA processing of Conditional Letter of Map Revision (CLOMR) conditioned on demonstration of ESA compliance by community/project proponent
  - FEMA is not the land use entity
Federal agencies must consider and evaluate potential impacts of actions on environment

Environmental Impact Statement for NFIP changes and ESA compliance

- Preferred alternative – map revisions contingent on ESA, and ESA compliance a condition of community issuing a permit
- FEMA – we are not the land use agency
- Local jurisdictions must document ESA compliance as condition of flood permit approval
OUTSTANDING ISSUES

- Fate of NEPA Document
- Consultation between federal agencies, without locals
- Option to leave NFIP?
Proposed Action:

- Demonstrate compliance with the ESA

Biological Evaluation

- Determined that NFIP implementation would have no effect on listed species or on designated critical habitat
Demonstrate Compliance with ESA

- Clarify that the issuing of certain Letters of Map Change requests (LOMC) (i.e. map revisions) is contingent on the community, or the project proponent on the community’s behalf, submitting documentation of compliance with the ESA.

- Clarify that pursuant to 44 CFR § 60.3(a)(2), a community must obtain and maintain documentation of compliance with the appropriate federal or state laws, including the ESA, as a condition of issuing permits to develop in the floodplain.
CLOMC PROCESS

- Community signature block on the MT-1 and MT-2 forms state the community’s role
- MT-1 form

A. REQUESTS INVOLVING THE PLACEMENT OF FILL

As the community official responsible for floodplain management, I hereby acknowledge that we have received and reviewed this Letter of Map Revision Based on Fill (LOMR-F) or Conditional LOMR-F request. Based upon the community’s review, we find the completed or proposed project meets or is designed to meet all of the community floodplain management requirements, including the requirement that no fill be placed in the regulatory floodway, and that all necessary Federal, State, and local permits have been, or in the case of a Conditional LOMR-F, will be obtained. For Conditional LOMR-F requests, the applicant has or will document Endangered Species Act (ESA) compliance to FEMA prior to issuance of the Conditional LOMR-F determination. For LOMR-F requests, I acknowledge that compliance with Sections 9 and 10 of the ESA has been achieved independently of FEMA’s process. Section 9 of the ESA prohibits anyone from “taking” or harming an endangered species. If an action might harm an endangered species, a permit is required from U.S. Fish and Wildlife Service or National Marine Fisheries Service under Section 10 of the ESA. For actions authorized, funded, or being carried out by Federal or State agencies, documentation from the agency showing its compliance with Section 7(a)(2) of the ESA will be submitted. In addition, we have determined that the land and any existing or proposed structures to be removed from the SFHA are or will be reasonably safe from flooding as defined in 44CFR 65.2(c), and that we have available upon request by DHS-FEMA, all analyses and documentation used to make this determination. For LOMR-F requests, we understand that this request is being forwarded to DHS-FEMA for a possible map revision.
CLOMC PROCESS

- **MT-2 form**

As the community official responsible for floodplain management, I hereby acknowledge that we have received and reviewed this Letter of Map Revision (LOMR) or conditional LOMR request. Based upon the community’s review, we find the completed or proposed project meets or is designed to meet all of the community floodplain management requirements, including the requirements for when fill is placed in the regulatory floodway, and that all necessary Federal, State, and local permits have been, or in the case of a conditional LOMR, will be obtained. **For Conditional LOMR requests, the applicant has documented Endangered Species Act (ESA) compliance to FEMA prior to FEMA’s review of the Conditional LOMR application. For LOMR requests, I acknowledge that compliance with Sections 9 and 10 of the ESA has been achieved independently of FEMA’s process. For actions authorized, funded, or being carried out by Federal or State agencies, documentation from the agency showing its compliance with Section 7(a)(2) of the ESA will be submitted.** In addition, we have determined that the land and any existing or proposed structures to be removed from the SFHA are or will be reasonably safe from flooding as defined in 44CFR 65.2(c), and that we have available upon request by FEMA, all analyses and documentation used to make this determination.
CLOMC PROCESS

- Determine if there is a federal action
  - Funding
  - Permitting
  - Project manager
- Determine next steps
- Conservation plan
  - Need to submit a copy of the plan
  - Documentation of compliance with the plan, such as a fee receipts
Some (but not all) FWS field offices will only interact with applicants if there is a federal action. If an applicant goes directly to the Services for concurrence, even though there is no federal action, and gets a “no effect” statement from the Services, the applicant is still required to provide a “no take” statement.

Sometimes the Services assumes that the applicant is a “federal designee” but just because the applicant is applying for a CLOMR from FEMA does not make the applicant a federal designee.
Upcoming changes?

- The CLOMC process remains the same and should not change as we implement the NPEIS Preferred Alternative.
- FEMA committed in the Record of Decision to require documentation of ESA compliance for certain LOMCs but is still finalizing what LOMCs and what these standards will be.
WHAT DOES THIS MEAN FOR FLOODPLAIN MANAGEMENT IN A COMMUNITY?

- “… community must obtain and maintain documentation of ESA compliance…”
  - FEMA proposes to issue clarification guidance
  - FEMA has not yet determined the specific ESA compliance documentation requirements

- Outstanding issues
- Stay tuned…
DISCUSSION/QUESTIONS