



Testimony of Jon Chandler
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On Behalf of the
National Association of Home Builders

Before the
House Transportation and Infrastructure Committee

Hearing on
“An Examination of FEMA’s Limited Role in Local Land Use Development
Decisions”

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Introduction

Chairman Shuster, Ranking Member DeFazio and Members of the Committee, thank you for the opportunity to testify today. My name is Jon Chandler, and I am the CEO of the Oregon Home Builders Association, a state association of the National Association of Home Builders (NAHB).

NAHB represents more than 140,000 members who are involved in building single-family and multifamily housing, remodeling, and other aspects of residential and light commercial construction. Collectively, NAHB's members employ more than 1.26 million people and construct approximately 80 percent of new housing in America each year.

Most of NAHB's home builder members are small business owners who construct 10 or fewer homes annually and typically have less than 12 direct employees. They know firsthand how changes to land development strategies directly affect not only homeowners, but also small businesses and communities.

Today I will address the land use problems created by linking the Endangered Species Act (ESA) with the National Flood Insurance Program (NFIP). NAHB has a long history of supporting the NFIP and we are committed to ensuring that it remains available and affordable to its policyholders while being mindful of the cost to the taxpayer.

At the same time, NAHB remains vigilant to ensure that the NFIP is not undermined needlessly as the result of excessive regulatory burdens. NAHB is strongly opposed to the inappropriate use of the ESA to make national changes to the NFIP program. This will add duplicative, burdensome and costly regulatory barriers which will prevent the development of communities near well-paying jobs, and increase the price of housing beyond the means of many middle-class working American families.

Background

Since its creation in 1968, the Federal Emergency Management Agency (FEMA) has implemented the NFIP through three basic categories of actions.

First, FEMA designates Special Flood Hazard Areas (SFHA) which have traditionally been defined as the 100-year floodplain, or an area with a 1 percent chance of flooding annually. FEMA publishes and periodically updates and amends SFHAs through Flood Insurance Rate Maps (FIRM) based on technical geographic data concerning the proper location of the Base Flood Elevation (BFE).

Second, FEMA enrolls communities in the NFIP when they satisfy the minimum eligibility requirements. To be eligible, a community must demonstrate that it regulates land use in the SFHA by (1) requiring permits for development; (2) prohibiting development in floodways that would obstruct the discharge of floodwater and therefore raise the BFE; (3) prohibiting residential development below BFE; and (4) requiring flood proofing construction methods for nonresidential development below BFE. Also, through the Community Rating System (CRS), FEMA encourages communities to undertake floodplain management measures that go beyond the minimum land use criteria for NFIP eligibility.

Third, Congress mandates that FEMA make flood insurance available for developments in an NFIP eligible community.

Although the NFIP faces many problems, such as challenges with mapping and financial stability, not all the difficulties stem from within the program itself.

Legal Battles on ESA

Recently, environmental groups have worked to tie the ESA to the NFIP. According to Section 7 of the ESA, federal agencies, such as FEMA, are required to ensure that “any action authorized, funded, or carried out by such agency” is not likely to jeopardize or result in the destruction of critical habitat of any endangered or threatened species.¹ FEMA accomplishes this by “consulting” with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS).²

The outcome of a consultation is a written statement by the FWS and the NMFS (collectively known as the Service) explaining how the agency’s actions affects a species or its critical habitat.³ In addition, if the Service determines that the agency’s action will jeopardize a species or adversely modify its critical habitat, then the Service will suggest “reasonable and prudent alternatives which [the Service] believe will not violate [the ESA] and can be taken by the Federal agency...in implementing its action.”⁴

A number of courts have held that under Section 7, FEMA must consult with the NMFS concerning certain impacts of the NFIP on endangered species because FEMA has discretion to alter its activities to protect endangered species.

One of the earliest cases concerned the Florida Key Deer. In 1990, wildlife organizations filed suit against FEMA for failing to consult over the impacts of the NFIP on the Key Deer. In 1994, the district court ruled against FEMA, and FEMA then entered into consultation with the FWS. The outcome of the consultation was a Biological Opinion (BiOp) and reasonable and prudent alternatives (RPAs) that required Monroe County, FL to condition “the grant of building permits to landowners on the completion of FWS review.”⁵

Subsequently, not satisfied that FEMA was indeed protecting listed species, the wildlife organizations amended their original complaint. In 2005, the district court agreed that neither FEMA nor the FWS had complied with their section 7 obligations.⁶ FEMA appealed that decision to the 11th Circuit, arguing that it has no duty to consult under the ESA. The 11th Circuit held that FEMA must consult under section 7 because it has discretion (1) to set the criteria used to determine if a community has adequate land use controls in place, and (2) in its development of the CRS.⁷

In 2004, the National Wildlife Federation (NWF) challenged FEMA’s failure to consult over the impacts of the NFIP on federally protected salmon. In this case, similar to the Key Deer case in south Florida, the judge found that FEMA has discretion to set the land use control criteria when creating the factors used in the CRS program. The court also said that with respect to FEMA’s mapping function, FEMA has the discretion to not authorize placing fill material in floodplains. Compared to the Key Deer, this case went further and the judge ruled that FEMA has no discretion when issuing flood insurance, and therefore

¹ 16 U.S.C. § 1536(a)(2).

² *Id.* While the FWS is responsible for most species, NMFS has authority over certain marine species.

³ 16 U.S.C. § 1536(b)(3)(A).

⁴ 16 U.S.C. § 1536(b)(3)(A).

⁵ *Key Deer v. Paulison*, 522 F.3d 1133, 1139 (11th Cir. 2008).

⁶ *Id.* at 1140.

⁷ *Id.* at 1142-43.

held that FEMA does not have to consult with NMFS concerning the actual issuance of flood insurance.⁸ This is of particular interest because the basic purpose of the NFIP is the issuance of flood insurance, but contrasted with CRS and mapping, Congress gave FEMA no discretion on the issuance of flood insurance.

In response to these court cases and others, FEMA has consulted with the Service concerning the impact of the NFIP on specific species.

Oregon Case

In 2010, FEMA settled a lawsuit by, among other things, agreeing to consult with the NMFS over its implementation of the NFIP in Oregon (including 260 cities, towns and counties). The outcome of the consultation is a BiOp that the NMFS finalized on April 14, 2016 (hereinafter the NMFS' BiOp). The BiOp concludes that FEMA's implementation of the NFIP in Oregon "is likely to jeopardize the continued existence of 16 ESA-listed anadromous fish species and Southern Resident killer whales, and it will result in the destruction or adverse modification of designated or proposed critical habitat for the 16 anadromous fish species."⁹

Under NMFS' BiOp, FEMA and the NFIP participating communities in Oregon face two unmanageable options: (1) immediately suspend "all NFIP related activities," including halting the issuance of any new building permits for projects occurring within SFHA,¹⁰ or (2) agree to fully implement NMFS's proscribed modifications to the NFIP program (requiring FEMA to undertake a series of federal rulemakings).

State and local governments in Oregon will also need to establish new permitting and mitigation requirements to restrict future land development and construction activities in and around areas described and mapped by FEMA as "riparian buffer zones."¹¹ The BiOp will require changes to FEMA's floodplain mapping program, and the manner in which communities demonstrate full compliance with the National Flood Insurance Act (NFIA), and by implication the ESA. While requirements under NMFS's BiOp would require FEMA to amend existing NFIP regulations, FEMA has until January 1, 2021 to complete all necessary rulemakings under the NFIP.¹²

Future land development and construction activities occurring within current SFHA will need to comply with numerous requirements, including:

- Demonstrating the proposed development or construction will achieve a "no net loss of natural floodplain functions."

⁸ *National Wildlife Federation v. FEMA*, 345 F. Supp. 2d 1151, 1173-74 (W.D. Wa. 2004), see also *Coalition for a Sustainable Delta v. FEMA*, 812 F.Supp.2d 1089 (E.D. Cal. 2011).

⁹ Letter from William Stelle, Jr., Regional Administrator, NMFS West Coast Region to Mark Eberlein, U.S. Department of Homeland Security, FEMA Region X (April 14, 2016), http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

¹⁰ U.S. Department of Homeland Security, Federal Emergency Management Agency Region X. *Letter to all NFIP communities within the State of Oregon*. June 13, 2016.

¹¹ U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) "Not Likely to Adversely Affect" Determination for the Implementation of the National Flood Insurance Program in the State of Oregon*. April 14, 2016. Page 279. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

¹² *Id.* page 286.

- Requiring NFIP participating communities to establish mandatory mitigation programs for new land development or building activities within SFHA and require developers to undergo a separate pre-construction permit review process that include mitigation requirements such as:¹³
 - *2 to 1 offset requirement* for activities NMFS finds results in lost flood storage,
 - *3 to 1 offset requirement* for activities that remove trees (exceeding 6 inches in diameter), and
 - Requires developers/builders to offset any increase impervious surfaces (roads, sidewalks, roofs) by removing existing impervious surfaces within SFHAs.

- Mandating national changes in FEMA's floodplain mapping program.

The NMFS believes that the very existence of the NFIP encourages future development in and around the SFHA. Floodplains are important ecological and environmental areas for aquatic species, like salmon, that are protected by the government under ESA. However admirable it may be to conserve floodplains to protect endangered species, it is not the role of the NFIP.

However, FEMA has already issued public statements stating that it intends to fully comply with all the requirements within the NMFS's final BiOp. Failure by FEMA to comply with all mandatory requirements identified by the NMFS in the BiOp could result in FEMA being sued for violating the ESA.

Effect on Development

Given Oregon's history of progressive land management decisions, the problems raised by the imposition of the BiOp in Oregon bring into focus an additional layer of concern for the development community. State and local land management decisions, including the adoption of urban growth boundaries and requirements for long-term land supplies, have already put Oregon at the forefront of land protection efforts.

The irony of the situation is that states such as Oregon or California, and many others, have invested time and money in land use planning, infrastructure development and economic revitalization. If the BiOp is required nationwide, it could undermine those efforts. Participation in the NFIP program and the adoption of the minimum floodplain requirements does not preclude communities from also being subject to separate state laws governing policies such as zoning, planning or takings.

For example, under Measure 49, any state or local government entity in Oregon that enacts a land use regulation that restricts certain property uses must provide compensation to the property owner for the difference in value of the property. Local governments, whose participation in the NFIP at the community level is not mandatory, may soon face a challenging dilemma when claims begin to be filed under Measure 49. The terms of the BiOp will result in large areas of land that can no longer be developed which impact the value of that land, and due to the measure, local governments are held accountable for the difference in cost. Many communities will be unable to afford that cost, and may be forced to consider dropping out of the NFIP. However, because of the mandatory requirements for a mortgage holder in the SFHAs to purchase flood insurance, dropping out of the NFIP could result in

¹³ *Id.* page 279.

many constituents defaulting on their mortgage if they cannot afford the high rates for private flood insurance or if it is not available to them. This places communities in a lose-lose situation.

Metropolitan regions covered under one of Oregon's urban growth boundary (UGB) areas must coordinate among affected local governments to account for long range urban population that is consistent with a 20-year population forecast under Oregon's statewide planning goals and guidelines. If implementation of the BiOp removes land from the UGB, given its inclusion of high hazard areas, then other land previously protected from being developed must be brought into the UGB to meet the minimum long-term land supply requirement.

The NFMS's BiOp would require local governments in Oregon to change their existing local land use policies. This means that any new housing development occurring within areas mapped as SFHA must have lower density levels to perverse floodplain functions.¹⁴ The NMFS's mandate to local governments in Oregon to reduce housing unit density within UGB areas mapped as SFHA goes completely against Oregon's UGB approach.

The NMFS's does attempt to provide some flexibility by allowing these jurisdictions to develop their own reduced density standards. However, the NMFS determines those lower density standards are equivalent to the NMFS's proposed standard under the BiOp.¹⁵ Thus, the NFMS recommends Oregon jurisdictions with UGBs require that all new development located within SFHA adopt an approach called "cluster development or open space zoning."¹⁶ The NMFS defines "cluster development or open space zoning" as;

alternative site planning technique that concentrates dwelling units in a compact area to reserve undeveloped space elsewhere on the site. In this technique, lot size, setbacks, and frontage distances are minimized to allow for open space. The basic principle of cluster development is to group new homes onto part of the development parcel, so that the remainder can be preserved as unbuilt open space.¹⁷

Some might misinterpret the NMFS's definition of "cluster development/open space zoning" as being completely compatible with the concept of future development within UGBs by concentrating future development into a small area. However, application of the NFMS's definition would create significant implementation problems for local governments, developers and builders alike. By requiring UGB communities to reduce housing density to maximize open space, even if those areas located within UGB areas slated for higher density, the result will be a reduction of future housing units.¹⁸ At the very least, communities with UGBs will need guidance from the NMFS and/or FEMA explaining how they can achieve both lower density in the floodplain to protect salmon habitat and still meet future housing demand as required by the UGB.

While these policies may seem specific to Oregon, the underlying principles of land use planning, infrastructure management and capital facilities maintenance, are not. The federal government is unable to take into account all of the numerous local and state regulations that could negatively affect

¹⁴ *Id.* pg. 289.

¹⁵ *Id.* pg. 290.

¹⁶ *Id.* pg. 290.

¹⁷ *Id.* pg. 279.

¹⁸ *Id.* pg. 279.

communities if misunderstood or attempted to circumvent. The NFIP has traditionally worked with state and local governments to prevent these types of problems, but moving forward with policy changes such as required under the NMFS' BiOp are undoing Congress's thoughtful work.

Duplicative Requirements

Regardless of whether provisions within the NFIP are subject to the ESA's Section 7 consultation, many builders' lawful land development and construction activities must already go through the Section 7 consultation process.

The ESA Section 7 consultation process is the most sweeping and powerful regulatory program under the statute. Under Section 7, the Service has the authority to prohibit land development and construction activities if it determines it could jeopardize the continued existence of an endangered species or could potentially destroy or adversely modify designated critical habitat for endangered species.¹⁹ For home builders, the Section 7 consultation process is triggered because land development projects often need a federal permit in order to proceed.

According to the Services' permitting data, they conducted nearly 90,000 informal and formal consultations from 2008-2015.²⁰ Nearly two thirds of all 90,000 Section 7 consultations conducted by the Service were for land development or construction activities that required a federal permit – typically a wetlands permit under the Clean Water Act (CWA) Section 404. This data demonstrates how the majority of private residential land development or construction activities require a federal wetlands permit and are already fully regulated by the Service to ensure the protection of endangered species, regardless of whether or not the NFIP is subject to ESA.

Because many builders already go through this process due to wetlands permitting, it is duplicative to layer on an additional ESA consultation at the program level through the NFIP.

Intent of NFIP

The NFIP's purpose is not to protect endangered species. FEMA has correctly pointed out that under the NFIA Congress did not give the Agency land use authority. FEMA further stated that if "Congress intended to prohibit development, it could have prohibited all federal assistance to federally-backed loans for the acquisition or construction in the floodplain, instead of merely requiring a structure to be covered by flood insurance."²¹ FEMA correctly emphasizes Congress's original intent under NFIA, to ensure that all structures built within a floodplain meet higher construction standards and obtain and maintain insurance coverage. The NFIP's intent is not to prohibit communities from obtaining the housing they need.

¹⁹ Statutory provisions of the ESA's Section 7 consultation program are found at 16 U.S.C. §1536(a)(1)(2) while the regulatory requirements are located at 50 C.F.R. §402.02.

²⁰ Source FWS's Section 7 consultation database called Tracking and Integrated Logging System (TAILS).

²¹ Letter from Mark Carey, Director, FEMA Mitigation Division to Kim Kratz, PhD., NMFS Ass't Regional Administrator, West Coast Region (Jan. 14, 2015); Letter from Mark Carey, Director, FEMA Mitigation Division to Kim Kratz, PhD., NMFS Ass't Regional Administrator, West Coast Region (Jun. 3, 2015).

FEMA's Floodplain Mapping Program

Congress directed FEMA to “identify and publish information with respect to all floodplain areas...within five years following August 1, 1968.”²² In addition, FEMA must review and update these maps every five years²³ and correct and update these maps, if information is provided to FEMA proving that the existing map is incorrect.²⁴

The maps are based solely on technical evaluation of the base flood elevation. If FEMA determines that an area is at or below the BFE, FEMA must designate that area as the SFHA. FEMA is fundamentally drawing a line on a map and it cannot draw that line simply to benefit endangered species.

Under the terms of the NMFS's BiOp, however, the Service will require FEMA to cease processing requests from landowners and local governments for revisions to existing floodplain maps under the NFIP's letters of map revision process (LOMR) unless the landowner or the local government can demonstrate to FEMA's satisfaction that all potential impacts to an endangered species or the floodplain function has been fully mitigated. Specifically, the Service has required FEMA to stop processing LOMR-F requests as of last week (September 13, 2016) unless the landowner can demonstrate all potential impacts to endangered species have been fully mitigated.²⁵

The purpose of this new requirement appears to expand the ESA's current Section 7 consultation obligation to include exclusively private actions by landowners by requiring them to first provide proof from the Service that they are complying with all the provisions of the ESA before submitting any floodplain map revision requests of FEMA.²⁶

The result will be to add significant time and expense for private landowners or local governments seeking revisions to an existing FIRM by requiring all landowners to first complete the complicated and expensive ESA Section 7 consultation process or Section 10 incidental take permit process (ITP). While the Service's Section 7 consultation process can take between two months to four and half months to complete, the Section 10 ITP typically takes landowners over two years to complete.

NAHB views this as an inappropriate expansion of FEMA's authority since FEMA does not authorize or approve the construction of structures or the placement of fill in or around floodplains. FEMA also does not determine what mitigation, if any, is required for the construction of building or placement of fill. FEMA's role is to ensure that the information depicted on FIRMs are accurate and scientifically sound. It is not FEMA's role under the LOMR process to determine what level of mitigation should be required to offset presumed impacts to endangered species.

Another significant change to the NFIP's floodplain mapping program is the requirement under NMFS's BiOp that FEMA delineates “Zone E” areas on FIRMs for all riverine areas nationwide. Under FEMA's

²² 42 U.S.C. § 4101(a).

²³ 42 U.S.C. § 4101(e).

²⁴ 42 U.S.C. § 4101(f).

²⁵ U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) “Not Likely to Adversely Affect” Determination for the Implementation of the National Flood Insurance Program in the State of Oregon*. April 14, 2016. Page 280. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

²⁶ *Id.* pg. 280.

existing floodplain mapping classification regulations, Zone E means areas of special flood-related erosion hazards.²⁷ Currently, FEMA determines mapping zones depending on the types of flooding which take into account hydrologic, topographic, geologic and climatologic variability. To accurately reflect this information in new and updated FIRMs requires extensive engineering research, flood studies and incorporates extensive consultation with local communities which is not currently accounted for in the BiOp.

The BiOp presupposes a mapping outcome that would otherwise be determined by FEMA, the expert agency, through an established process that includes steps mandated by both regulation and statute.²⁸ Included in this process is an extensive engineering study as well as consultation with the community and stakeholders impacted by any potential remapping of the area. This will require massive changes to the national mapping program and undermines the intent of actions taken by Congress under the Homeowner Flood Insurance Affordability Act (HFIAA) and the Biggert-Waters Flood Insurance Reform Act (BW-12).

Thus, since FEMA's maps are based solely on technical information, Congress should consider whether FEMA has the discretion to take into account endangered species concerns when undertaking its mapping duties.

FEMA's minimum eligibility criteria

The NFIP authorizes FEMA to conduct studies and investigations concerning the "adequacy of State and local measures in flood-prone areas as to land management and use, flood control, flood zoning, and flood damage prevention..."²⁹ Based on those studies and investigations, Congress provided FEMA with authority to develop the minimum criteria that communities must meet to be eligible to participate in the NFIP.³⁰

One of the significant changes under the NMFS's BiOp would restrict the subdivision of existing lots within the SFHA. Specifically, the NMFS provides:

FEMA should allow no division of parcels that would create lots smaller than 5 acres within special hazard areas. This restriction on the size of lots limits the total number of lots and thus prevents densification of floodplain development, thereby restricting the number of future structures likely to be exposed to flood related hazards, and maintaining land to accommodate flood functions and processes.³¹

²⁷ 44 C.F.R. 64.3(a)(1).

²⁸ 44 C.F.R. 60.3.

²⁹ 42 U.S.C. § 4102(a).

³⁰ 42 U.S.C. § 4102(c).

³¹ U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) "Not Likely to Adversely Affect" Determination for the Implementation of the National Flood Insurance Program in the State of Oregon*. April 14, 2016. Page 328. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

Restricting development to 5-acre lots will have a pronounced impact on home building. According to the Census Bureau, the average lot size in the Pacific Division³² is .15 acres.³³ Using this data, the NMFS is requiring lots in the flood plain to be 33 times larger than the average lot. Furthermore, requiring large lots, in combination with the urban growth boundary, will cause lot prices and home prices to increase—thereby significantly curbing the development of affordable housing.

Similarly, the NMFS is restricting “the footprint of new structures to 10% or less of total lot size for both residential and commercial development....”³⁴ Again, such a restriction will have an enormous impact on home building. Assume that existing lots in the area are (based on the Census Data) .15 acres, or 6,525 square feet. NFMS’s restriction limits the size of the home to 652 square feet if single-story, or 1,305 square feet for a two-story home. According to U.S. Census/HUD survey data for 2015, the average size of a single-family home in the United States is approximately 2,500 square feet.³⁵ Drastically reducing the size of homes is not only a far reach from the goals of the NFIP, but it dramatically impacts growth in communities where families want to live.

The NMFS is regulating development on both new lots, and previously platted lots. It is undisputed that “zoning laws and their provisions...are peculiarly within the province of state and local legislative authorities,” not regulated by Congress.³⁶ By developing the Oregon BiOp, the NMFS is trampling over state and local governments authorities.

Furthermore, for the homebuilding industry in Oregon, perhaps one the most significant impacts resulting from the NMFS’s required changes to the NFIP is found under element 2 of the interim measures. The NMFS seeks to have FEMA significantly change the existing minimum eligibility criteria for communities seeking to be enrolled under the NFIP.³⁷

Under this measure, FEMA would have to require all NFIP communities to establish mandatory floodplain mitigation requirements for new development located within a SFHA as well as establish so-called “riparian buffer zones” (RBZ) across all perennial or intermittent streams where there would be a complete prohibition on any future land development or new construction.³⁸ These RBZ buffers would

³² Alaska, California, Hawaii, Oregon, and Washington

³³ Siniavskaia, Natalia “Lots in 2015 are Smallest on Record” (7/11/2016) <http://eyeonhousing.org/2016/07/lots-in-2015-are-smallest-on-record/>.

³⁴ U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) “Not Likely to Adversely Affect” Determination for the Implementation of the National Flood Insurance Program in the State of Oregon*. April 14, 2016. Page 289. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

³⁵ Dietz, Robert “New Single-Family Home Size Declining” (8/16/2016) <http://eyeonhousing.org/2016/08/new-single-family-home-size-declining/>.

³⁶ *Warth v. Seldin*, 422 U.S. 490, 508, n. 18 (1975); see also *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments”); *FERC v. Mississippi*, 456 U.S. 742, 768, n. 30, 102 S.Ct. 2126, 2142, n. 30, 72 L.Ed.2d 532 (1982) (“[R]egulation of land use is perhaps the quintessential state activity”).

³⁷ 44 C.F.R. §60.

³⁸ U.S. National Marine Fisheries Service. *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) “Not Likely to Adversely Affect” Determination for the Implementation of the National Flood Insurance Program in the State of Oregon*. April 14, 2016. Page 279. Retrieved on September 16, 2016. http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

extend 170 feet horizontally from the “ordinary high water mark” (OHWM) of any perennially or intermittent streams. Within these RBZs future development would be significantly restricted.

Residential development routinely needs to cross streams (perennial or intermittent) to access roads, utility lines, stormwater and or sewer lines, and to engage in various other forms of infrastructure needed to support residential subdivisions. The requirement to avoid all future residential development impacts within any areas defined by FEMA in these RBZs will significantly reduce housing production in Oregon.

The NMFS’s requirement under the BiOp element 2 says all NFIP participating governments in Oregon must create a mandatory floodplain mitigation. This is akin to the existing federal wetlands mitigation program where developers and builders whose otherwise lawful land development or construction activities impact a “waters of the U.S.,” must mitigate any unavoidable impacts to wetlands from federally approved wetland mitigation banks.³⁹

However, under NFMS’s mandatory floodplain mitigation proposal, developers and builders must mitigate for any removal of vegetation or increase in impervious surface (e.g., roofs, driveways, sidewalks, etc.) that result from new land development or construction activities within SFHA areas. Developers and builders would be required to achieve specific offset ratios (e.g., ranging between 2:1 to 3:1) for any increase in impervious surface (e.g., new buildings, sidewalks, roofs, etc.) or removal of existing vegetation within SFHA areas.

Furthermore, the NMFS’s floodplain mitigation requirement stipulates that developers and builders seeking to build within the SFHA areas must first remove an equal amount of existing impervious surface. Presumably developers and builders seeking to build within a SFHA in Oregon would first need to purchase and retrofit existing structures or existing infrastructure with pervious building materials. Given that most building activity in Oregon takes place within UGBs, the cost to developers and builders to purchase floodplain credits and or retrofit existing buildings or infrastructure will be cost prohibitive.

Unlike the existing federal wetlands mitigation program run by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, the NMFS’s requirement that all NFIP participating communities in Oregon create these floodplain mitigation program lacks the necessary clarity to understand how precisely developers, builders and local governments will comply. For example, will floodplain mitigation be achieved via mitigation banks or fee in lieu of programs? Or will the permittee be responsible? What happens in situations where no floodplain credits are available for developers and builders to acquire? These and many other implementation and administrative questions must be clarified by the NFMS or FEMA before any such floodplain mitigation requirement can be enacted.

As an example, we can contrast the eligibility requirements of the NFIP with Congress’s authorization for states to operate the Clean Water Act’s NPDES⁴⁰ permitting program. Under the CWA, the EPA issues NPDES permits unless the state has submitted its own program to the EPA for review and EPA has approved such program. The EPA must approve the state’s program unless it determines that the state’s program fails to satisfy nine criteria.

³⁹ 33 CFR §§ 332.1 - 332.8 & 40 CFR §§ 230.91 - 230.98.

⁴⁰ National Pollutant Discharge Elimination System (NPDES).

In *National Association of Home Builders v. Defenders of Wildlife*, Arizona sought to administer the NPDES program in the state.⁴¹ Defenders of Wildlife argued that EPA and FEMA must consult under ESA Section 7. The Supreme Court explained that “[b]y its terms, the [CWA’s] statutory language is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application.”⁴² The Court reasoned that if the EPA were to add ESA considerations into its approval, it would improperly be adding a tenth criteria to Congress’s exclusive list.⁴³ The Court approved of the FWS’s regulations, which only require consultation when an agency takes a discretionary action, and held that the EPA and the FWS did not have to consult over the EPA’s approval of Arizona’s program.⁴⁴

As proof from this example, NAHB urges Congress, during the NFIP reauthorization, to limit future applicability of the ESA’s Section 7 consultation requirement. Congress can clarify whether key statutory provisions of the existing NFIP (i.e. mapping and minimum eligibility criteria) are in fact subject to the ESA’s Section 7 consultation.

Conclusion

I would like to thank the Chairman and the Committee for the opportunity to testify today. The cost due to duplicative regulations have significant negative impacts on the housing market. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low- and moderate-income home buyers. Analysis done by NAHB illustrates that a \$1,000 increase in home prices leads to pricing out slightly more than 206,000 individuals from a home purchase.⁴⁵ Low- to mid-income buyers are more susceptible to being priced out of the market, and those who are on the verge of qualifying for a new home will not be able to afford the purchase.

The concern intensifies with the discussion of affordable flood insurance. Home buyers should not be subject to increases in cost due to a regulation that not only conflicts with state and local interests, but was not the intent of the original program.

The result of the numerous court rulings against FEMA is unsustainable. We face a situation where the underlying insurance policy is non-discretionary, but the supporting components (e.g. mapping, minimum eligibility criteria and CRS) are subject to consultation requirements. NAHB believes that if the supporting components of the NFIP were deemed non-discretionary, the courts would reconsider the ESA requirements.

NAHB urges Congress to use both its oversight authority, and take the opportunity during the upcoming reauthorization of the NFIP, to ensure the potential negative ramifications of the BiOp do not needlessly harm communities and housing affordability. It is necessary to retain the NFIP’s original intent and focus solely on the protection of homes and communities from flooding.

⁴¹ 551 U.S. 664 (2007).

⁴² *Id.* at 661.

⁴³ *Id.* at 663.

⁴⁴ *Id.* at 665-67.

⁴⁵ <http://www.nahb.org/generic.aspx?genericContentID=161065&channelID=311>.