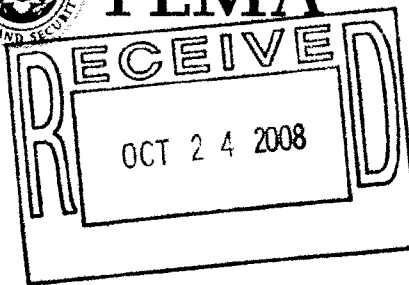




FEMA



October 21, 2008

The Honorable Bud Norris, Mayor
City of Mount Vernon
P.O. Box 809
Mount Vernon, Washington 98273

Dear Mayor Norris:

In 2003 the National Wildlife Federation sued the U.S. Department of Homeland Security's Federal Emergency Management Agency (FEMA) for failure to consult under the Endangered Species Act (ESA) with respect to its administration of the National Flood Insurance Program (NFIP). On November 17, 2004, the United States District Court, Western District of Washington at Seattle agreed, and required FEMA to consult with the National Marine Fisheries Service (NMFS) on the impacts the NFIP was having on salmon. FEMA complied by submitting a Biological Evaluation on Feb 14, 2006 to NMFS, concluding that the NFIP affected salmon, but not adversely.

In September 2008 NMFS provided a Biological Opinion in which they concluded that development consistent with the NFIP jeopardizes threatened or endangered Chinook salmon, chum salmon, steelhead, and killer whales and adversely modifies critical habitat based on potential take of listed species. Federal agencies are prohibited by the Endangered Species Act (ESA) from causing Jeopardy or Adverse Modification.

Although the Biological Opinion determination is made for FEMA, the Endangered Species Act (ESA) is applicable to everyone, whether a federal agency, state agency, local jurisdiction or individual. We all have a legal responsibility to ensure our actions do not cause a take (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct) to threatened or endangered species. Under Section 9 of the ESA, actions or decisions enacted by you and your officials are subject to this prohibition regardless of federal involvement. Additionally, any person can be subject to criminal or civil penalties for causing a take. NMFS considers the issuance of floodplain development permits without addressing the impacts on listed species or their critical habitat as a take under the Endangered Species Act.

With a Jeopardy and Adverse Modification determination, NMFS is obligated to provide a Reasonable and Prudent Alternative, which are measures FEMA can do to avoid Jeopardy and Adverse Modification to critical habitat. These measures outline steps FEMA and communities participating in the NFIP can do to minimize harm to Puget Sound Chinook salmon, Puget Sound steelhead, Hood Canal summer-run chum and Southern Resident killer whales. For details on these measures, please see NMFS' Biological Opinion at <http://www.nwr.noaa.gov/>.

pg 150-165

The Honorable Bud Norris, Mayor
October 21, 2008
Page 2

NMFS requires FEMA to modify implementation of the NFIP according to recovery priorities. The Biological Opinion requires FEMA to focus our efforts of assistance according to a tiered approach (see attached Appendix 3). We will focus our technical assistance efforts according to this tiered approach.

The Incidental Take section of the Biological Opinion authorizes a certain amount of harm to the species or their habitat during the time necessary for FEMA and participating NFIP communities to implement the Reasonable and Prudent Alternative (RPA). Thereafter, take is exempted in all county and municipal NFIP jurisdictions as soon as they implement the floodplain management criteria set forth in RPA Element 3 of the Biological Opinion, provided the activity resulting in take is carried out in conformance with RPA Element 3, including applicable mitigation requirements. In the interim, one immediate option suggested by NMFS is for your community to voluntarily implement a temporary moratorium on floodplain development that adversely impacts species or their habitat.

FEMA will be working on identifying other options or methods that your community can implement and will be sharing that with you as we develop them. Those options may include guidance, training, technical assistance, education tools, etc. One option we are working with NMFS on is the development of a model ordinance that would meet FEMA's minimum criteria while also avoiding or minimizing impacts to listed species. Once we've finalized this model ordinance, we will share it with you. Should your community adopt it, then you will have Endangered Species Act coverage under the Incidental Take Statement of the Biological Opinion.

During the interim, until full implementation of the Reasonable and Prudent Alternative, FEMA and its participating communities will be required to report our progress, including the extent of take that has occurred, mitigation that is utilized and any unmitigated actions. FEMA intends to develop a reporting tool to track activities that will help minimize the time and effort imposed upon your staff in meeting this requirement. Should communities issue floodplain development permits without mitigating for take on species or their critical habitat, FEMA will be bound, in coordination with NMFS acting under their own authority, to initiate appropriate enforcement action.

FEMA recognizes that many of you have already been implementing measures which protect/mitigate floodplain development actions affecting listed species and their habitat. However, for others, these requirements may pose a burden on your community. We will work diligently with you, the state resource agencies and the NMFS to alleviate this burden as much as

The Honorable Bud Norris, Mayor
October 21, 2008
Page 3

possible and to facilitate favorable opportunities for complying with the Endangered Species Act (ESA). We will keep you advised as we further develop our strategy for implementation. If you have any questions, please call Mark Carey, Mitigation Division Director at 425-487-4682.

Sincerely,



Dennis A. Hunsinger, PhD
Acting Regional Administrator

cc: Rick Prosser, Building Official, City of Mount Vernon
Dan Sokol, NFIP Coordinator, WA State Dept. of Ecology

JG:bb