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April 8, 2010

FEMA Region 10
Mitigation Division
ESA Comments
130 228th Street SW
Bothell, WA 98021-8627

Re: Comments regarding FEMA's Model BiOp Ordinance

Dear Mitigation Director Carey:

I am submitting this comment letter on behalf of the Washington REALTORS®, several local associations of the Washington REALTORS, the Master Builders Association of King and Snohomish Counties, several local building associations, and several private property owners with property in King, Snohomish and Skagit counties.[1] While we appreciate FEMA's effort to comply with the direction set forth in the Biological Opinion issued by the National Marine Fisheries Service ("NMFS") regarding the National Flood Insurance Program ("NFIP") (entitled the "Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the Ongoing National Flood Insurance Program carried out in the Puget Sound Area of Washington State," dated September 22, 2008) (hereinafter "BiOp"), we urge FEMA to substantially revise (or abandon) the Model Ordinance for the reasons set forth herein. As explained below, the Model Ordinance far exceeds what is in fact necessary or appropriate in the Puget Sound region to achieve the BiOp's goals of protecting the habitat of endangered species. To the extent FEMA decides to continue to pursue a model ordinance, FEMA should use the NEPA process to identify and consider multiple alternative means to achieve the BiOp's goals that provide greater flexibility and opportunities to Puget Sound jurisdictions and property owners.

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[1] In addition to the entities expressly named above, this letter is submitted on behalf of: Building Industry Association of Whatcom County, Jefferson County Association of REALTORS®, Kitsap Alliance of Property Owners, Kitsap County Association of REALTORS®, San Juan Association of REALTORS®, Mason County Association of REALTORS®, North Peninsula Building Association, Port Angeles Association of REALTORS®, Snohomish County-Camano Association of REALTORS®, Seattle-King County Association of REALTORS®, Tacoma-Pierce County Association of REALTORS®, Thurston County REALTORS Association, Washington REALTORS®, Whatcom County Association of REALTORS®, Whidbey Island Association of REALTORS®.

1. FEMA's Model Ordinance Carries Forward the Fundamental Flaw of the BiOp.

As a foundational comment, FEMA's Model Ordinance suffers the same fatal flaw as the BiOp itself: it is bipolar. On the one hand, the BiOp repeatedly acknowledges that the majority of the 100 year floodplain and floodplain habitat in the Puget Sound region has been modified, channelized or otherwise developed and, therefore, provides no habitat functions or benefits for endangered species. BiOp at 146. *At the same time*, the BiOp asserts that virtually every inch of the 100 year floodplain in the Puget Sound region should be protected from development to achieve the BiOp's goal of ensuring that development in the floodplain "will not result in adverse habitat effects." BiOp at 156.

FEMA's Model Ordinance carries forward this fundamental contradiction, treating every inch of the 100 year floodplain or otherwise "Protected Areas" as important habitat for endangered species. One need only look at the Green River Valley or the Ports of Seattle and Everett to recognize that not all areas mapped within the 100 year floodplain or otherwise Protected Areas provide fish habitat or habitat benefits. (Indeed, the BiOp acknowledges that it is harmful, not beneficial, to endangered species to enter these developed areas).

Based on numerous discussions with FEMA Region 10 staff over the past eighteen months, I had anticipated that the Model Ordinance would differentiate between floodplain areas with ongoing habitat value, and those developed areas that do not provide any habitat or habitat benefits. Instead, the Model Ordinance treats all floodplain areas similarly – irrespective of whether they are pristine backwater habitat immediately adjoining the channel, or fully developed industrial land a ¼ mile or more away from the nearest river. Rather than applying one size fits all regulations to the entire floodplain, the Model Ordinance should recognize differences within the mapped floodplain or otherwise Protected Areas and provide flexibility to achieve the BiOp's goal of protecting actual habitat and habitat functions but without effectively eviscerating already developed areas and otherwise unnecessarily limiting development.

2. FEMA's Model Ordinance Should Deviate From RPA 3 and Only Require Mitigation For Actual Impacts of Floodplain Development.

The BiOp paints with too broad a brush. It identifies the myriad habitat benefits of a relatively small subsection of the floodplain (e.g., river channels, near channel habitat, and other regularly inundated areas), but then proposes to restrict development within the entire floodplain with minimal evidence or analysis to demonstrate that these areas provide similar habitat benefits. The BiOp explains with reasonable specificity why preserving *existing* habitat areas in the Riparian Buffer Zone is important to protecting endangered species, but then proposes to apply the same habitat protection and creation measures across the entire floodplain – to areas that are completely disconnected from habitat areas and that may only play *any* role in floodplain habitat once in 100 or once in 50 years. The link between development of these areas, which are beyond the relatively narrow habitat corridors adjoining the river channel, and adverse impacts to functional habitat is simply not adequately demonstrated in the BiOp.

While we acknowledge FEMA's decision to take some action to address the BiOp, FEMA is not required to follow the recommendations of the Reasonable and Prudent Alternative ("RPA") Element 3, which conflates true habitat areas with the entire floodplain. As the Ninth

Circuit Court of Appeals has explained, "A Secretary can depart from the suggestions of a biological opinion, and so long as he or she takes 'alternative, reasonably adequate steps to ensure the continued existence of any endangered or threatened species,' no ESA violation occurs." *Tribal Villages of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988). Rather than imposing the BiOp's overbroad RPA Element 3 on local jurisdictions and property owners, FEMA should permit local jurisdictions and property owners to analyze how future development of their floodplains or otherwise Protected Areas *will actually impact habitat area and functions* and mitigate accordingly.

As currently drafted, the Model Ordinance takes a "both/and" approach. Project proponents must both comply with all of the one-size fits all development regulations in the Model Ordinance and prepare a habitat assessment evaluating the impacts of their development.[2] *See* Section 7.3. This is unnecessarily duplicative, and is likely to result in mitigation that exceeds or misses the actual impacts. While some may want to see floodplain habitat restored, that is outside the purview of the BiOp and its RPA and, thus, the Model Ordinance. The BiOp reviews the impacts generated by the proposed future action above current conditions (baseline conditions), and proposes modifications to that future action to avoid adverse impacts to endangered species and critical habitat due to that future action. It is overreaching to try to require restoration below baseline conditions, which is what the "both/and" approach attempts to achieve. Instead, the Model Ordinance should require only that local jurisdictions and developers analyze the impacts of their future development on endangered species habitat and habitat functioning and mitigate for any impact generated by that development.

3. FEMA Lacks the Authority and Has Failed to Follow the Process Necessary to Propose the Model Ordinance.

The legal authority behind FEMA's approach in the Model Ordinance is suspect at best. First, FEMA attempts to rely on 44 C.F.R. 60.3(a)(2) as providing it authority to require local permittees to conform to the analysis and recommendations in the BiOp when obtaining a flood hazard permit. There is no such legal link. 44 C.F.R. 60.3(a)(2) requires that the local community "[r]eview proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law, including section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1334." There is no "ESA permit," however.

Instead, ESA consultation, and the potentially corresponding development limitations, are triggered only where a federal agency authorizes, funds, or carries out an action. 16 U.S.C. §1536(a)(2). In many, if not the majority, of instances, development on property within the floodplain will not require any permits other than a local flood hazard permit. In such instances, there will be no federal nexus triggering ESA review. Only in those cases where a floodplain development also involves a federal permit, such as a Clean Water Act Section 404 Permit, will the applicant be required to consultant with NMFS regarding the impacts of its development.

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[2] If, as part of this effort, FEMA would like to incorporate portions of the one-size fits all standards from RPA Element 3 into a revised Model Ordinance, it should provide property owners the flexibility to choose between applying the BiOp-based development restrictions *or* conducting a specific analysis of the impacts of their proposed development and corresponding mitigation.

Thus, FEMA's alleged authority to require ESA compliance under 44 C.F.R. §60.3(a)(2) is suspect at best.

Moreover, to date FEMA has failed to follow the requisite procedures to propose the Model Ordinance. As FEMA is well aware, it has not gone through the standard rule making process required to legally modify its minimum standards. Similarly, it does not appear that FEMA has conducted any NEPA analysis regarding the environmental impacts of the Model Ordinance. By comparison, the Federal Insurance Administration prepared a Final Environmental Impact Statement when it last updated the NFIP's minimum standards. *See* Final Environmental Impact Statement, Revised Flood Plain Management Regulations of the National Flood Insurance Program, September 2006.

The federal Bureau of Reclamation was recently ordered to undertake NEPA review to evaluate the environmental effects of program changes implemented to comply with a biological opinion and corresponding reasonable and prudent alternatives. *San Luis & Delta-Mendota Water Authority, et al. v. Salazar*, __ F.Supp.2d __, 2009 WL 3823934 (E.D. Cal. 2009). The Court held that if implementation of the biological opinion and its reasonable and prudent alternative triggered significant changes to the operational status quo of an existing project or program, NEPA review was required. *Id.* at 14. Here, the programmatic changes proposed as part of the Model Ordinance will significantly change the status quo regarding implementation of the NFIP in the Puget Sound region. Consequently, FEMA must complete NEPA review prior to issuing the Model Ordinance for consideration by local jurisdictions adoption. To date, FEMA has not indicated that it has initiated, much less completed, this NEPA review.

Until FEMA has taken these steps - both formal rule making and NEPA analysis - it cannot legitimately assert any authority over local governments to threaten, much less suspend, their NFIP coverage for failure to implement the Model Ordinance, or take any other steps to implement FEMA's obligation to comply with the BiOp.

Rather than evading its NEPA obligations, FEMA should view NEPA review as an opportunity to consider the alternative ways in which it could achieve the objectives of the BiOp other than implementation of RPA 3. This process would identify alternative means to protect habitat and habitat functioning with less draconian implications for local governments and property owners.

4. The Commentary on Page 23 Is Not an Adequate Exception for Developed Areas. Local Jurisdictions Need Flexibility to Divide the Floodplain and Other Protected Areas into Different Zones or Classifications Based on Their Actual Habitat Effects.

Since beginning my review of the Model Ordinance, I have heard some assert that the "commentary" on page 23 of the Model Ordinance is intended to give local jurisdictions the flexibility to recognize and reduce the regulatory burden on already developed areas. Specifically, the commentary on p. 23 provides in relevant part: "As an alternative to this section C.1 [regarding riparian habitat zones], a community may prepare a map showing a smaller riparian habitat zone, based on best available science. Such a map could exclude bluffs, steep slopes, and/or developed areas that have no effective riparian habitat functions."

This commentary provides little to no actual relief. First, the commentary only allows jurisdictions to exclude developed areas from the definition of Protected Areas as part of the riparian habitat zone. These areas remain within the Special Flood Hazard Area ("SFHA"), and as such remain subject to all of the BiOp-based development regulations set forth in the Model Ordinance. *See, e.g.,* Section 5 ("The provisions of this Section 5 shall apply to the Regulatory Floodplain"); Section 6 ("The provisions of this Section shall apply to the Special Flood Hazard Area"); Section 7 ("The provisions of this Section shall apply to the Regulatory Floodplain").

Rather than providing local jurisdictions an illusory "escape valve" through alternative mapping for the riparian habitat zone, the Model Ordinance should allow local jurisdictions to first determine which floodplain areas and otherwise Protected Areas within their jurisdictions provide actual habitat for endangered species; which floodplain areas and otherwise Protected Areas, although not containing actual habitat, may have an effect on habitat; and which floodplain areas and otherwise Protected Areas have little or no effect on habitat or habitat functioning. Based on this evaluation, local jurisdictions could create alternative "zones" or classifications within the floodplain and otherwise Protected Areas that reflect actual habitat values and effects. Development standards could then be established based on these different zones to address the actual impacts of future development on habitat and habitat function in those areas (e.g., areas of existing habitat could be preserved; areas with flood storage or water quality impacts could be required to mitigate those impacts; already developed areas could be conditioned to address water quality and quantity impacts; etc.). Again, there is no basis in the BiOp or the ESA for requiring application of development restrictions that do not have corresponding benefits to endangered species or their habitat. Too many of the provisions of RPA 3 show no link between the restriction and the intended benefit.

5. The Model Ordinance Exposes Local Jurisdictions to Takings and Substantive Due Process Challenges for Overreaching Development Restrictions.

By requiring adherence to the BiOp-based development regulations irrespective of the actual impacts of the proposed development on habitat, the Model Ordinance exposes local governments to inverse condemnation and substantive due process claims. While it is permissible for local governments to adopt development regulations as part of their exercise of the police power, those regulations must be narrowly tailored and the least intrusive means of accomplishing the government's objective. In the case of the Model Ordinance, the obligation to comply with BiOp-based development regulations irrespective of the actual impacts of a project on habitat or habitat functions violates these requirements.

While generally the burden of proof in such instances is on the property owner claiming a regulatory taking, "in a challenge to a government exaction of land to mitigate for adverse impacts from a proposed land use activity, the burden is on the government to identify a specific impact that needs to be mitigated and demonstrate that the exaction is roughly proportional to the identified impact." Washington State Attorney General Rob McKenna, *Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property*, December 2006, at 13. In this case, multiple provisions of the Model Ordinance in effect exact property without any demonstrated link to protecting habitat and habitat functions. For example, the Model Ordinance would mandate that property owners set aside at least 65% of their land containing native vegetation as no-development zones. Section 7.4. Further, the Model Ordinance would require subdivision

developers to dedicate one or more lots within the floodplain for open space. Section 5.1(B). Also, the Model Ordinance would mandate that on lots partially within and partially outside the floodplain, development be limited to only the non-floodplain portion. Section 5.2(1). (Of note, the Model Ordinance implies, but does not expressly state, that subdivisions of property entirely within the floodplain would be prohibited completely.)

All of these BiOp-based restrictions effectively take property from the land owner without first demonstrating any nexus to impacts actually generated by the proposed development. The land is simply deducted from the developable area of the property without first reviewing whether and how the development of the remaining land or the deducted land might impact habitat or habitat function. Similarly, there is no analysis of whether restricting or exacting the property is the least intrusive means to protect habitat or habitat functions. Before a government may restrict property in this way, it must demonstrate a nexus between the restriction and the impacts of the development, and show that the restrictions are not broader than necessary to achieve the goal. [3]

Rather than asking local governments to expose themselves to such takings and substantive due process claims, the Model Ordinance should provide local governments with flexibility to create mitigation obligations that are commensurate with the actual habitat impacts of the proposed future development.

6. Rather than Improving Habitat Conditions In the Floodplain, the Model Ordinance Is Likely to Trigger Disrepair and Corresponding Degradation.

The BiOp and Model Ordinance are premised on the vision that implementation of the BiOp-based development standards will improve floodplain habitat and habitat function. In fact, the strict application of these standards is likely to stymie some projects that could have beneficial impacts.

The BiOp and corresponding Model Ordinance have already begun to cause numerous Puget Sound region property owners to conclude that they will be effectively prohibited from developing, redeveloping or selling their properties. For example, the Green River Valley is currently pending remapping into the floodplain. As FEMA is aware, the vast majority of the Green River Valley in Kent is developed as industrial land with nearly 100% impervious surface and little or no native vegetation. In most cases, the existing grade is several feet below the anticipated base flood elevations for the region. Property owners in the Valley have already begun to conclude that the Model Ordinance will act as a virtual bar on the future redevelopment of their property, effectively eviscerating its value. They simply cannot foresee how they will be able to meet the Model Ordinances 10% impervious surface limitation, or its compensatory flood storage requirements (even if they flood proof to the base flood elevation, the Model Ordinance implies they will be required to compensate for the loss of flood storage capacity created by the buildings themselves). The likely result is that the existing buildings in the Valley will be occupied for the balance of their useful lives and then largely abandoned pending reaccreditation of the levees along the Green River. This will provide no habitat benefits for endangered species

[3] Of note, Section 7.6 regarding compensatory flood storage appears only to require compensatory storage where the proposed development actually displaces effective flood storage volumes. This connection – between removing land from development and actual impacts – should be duplicated throughout the Model Ordinance.

and in fact the lack of upkeep and repair are more likely to cause harm to habitat (e.g., poorly maintained stormwater systems discharging greater sediments and pollutants). This result is counter to the goals and objectives of the BiOp.

By comparison, if the Model Ordinance recognized existing developed areas and provided reasonable avenues to maintain and redevelop those areas, those redevelopment projects could integrate features that could improve habitat. For example, redevelopments would be required to comply with upgraded stormwater standards, which would reduce the water quality and water quantity impacts compared to the existing development. As currently drafted, the Model Ordinance is a significant impediment to these improvements.

7. The Model Ordinance Should Permit the Local Jurisdiction to Evaluate the Environmental Impacts of Development Proposed within the Floodplain.

The Model Ordinance provides that an applicant may forego a habitat assessment if it has gone through an individual consultation with NMFS regarding the impacts of its proposal on floodplain habitat. As a preliminary matter, if an applicant has gone through consultation with NMFS, the applicant should be exempted from *all* BiOp-based provisions of the Model Ordinance – not just preparation of the habitat assessment. If the applicant has consulted with NMFS, the applicant has reviewed the impacts of its proposed project on endangered species and critical habitat; has demonstrated that its project will have no effect or may, but is not likely to adversely affect endangered species and critical habitat; has mitigated for any effect; and/or has obtained an incidental take statement from NMFS. In such instances, it is illogical and overreaching to require that applicant to meet *any* of the BiOp-based development regulations contained in the Model Ordinance.

Moreover, NMFS simply lacks the resources to consult regarding all of the flood hazard permits issued by the more than 125 jurisdictions participating in the NFIP in the Puget Sound region. Except as an act of spite (either aimed at NMFS or local property owners), it is ridiculous for the Model Ordinance to propose consultation with NMFS as an alternative to compliance with the development regulations in the Model Ordinance. For those permits where there is no federal permit (e.g., Clean Water Act Section 404 Permit), the local jurisdiction, not NMFS, should act as the agency with jurisdiction to evaluate the impacts of a proposed development on endangered species and critical habitat. The local jurisdictions are much more likely to be familiar already with the floodplain areas at issue and potential environmental impacts of development of those areas. There is simply no reason that NMFS is the only agency, or even the preferred agency, to conduct this review, when the local jurisdiction, not NMFS or any other federal agency, is responsible for issuing the flood hazard permit.

To the extent local jurisdictions may currently lack expertise to conduct this analysis, requiring local review of these issues will provide them an opportunity to get educated and hire or contract with the appropriate staff. Most important for the applicant, it should reduce the review time from NMFS's current one to two year period to a more reasonable timeframe.

8. The Model Ordinance Shifts an Unwarranted Mapping Burden to Private Property Owners. In Some Instances, These Provisions Amount to a Defacto Moratorium.

The Model Ordinance contains various provisions that would require individual applicants to generate floodplain data before they can apply for a flood hazard permit. For example, Section 3.5(D) would require applicants for subdivisions or developments larger than five acres to map the regulatory floodway as part of its application submittal. Section 3.4(B) is a de facto requirement to map the floodway in riparian areas – or else have all property within the floodplain be considered part of the "Protected Area." Also, Section 4.2(A)(3) requires applicants to prepare maps depicting the elevation of the 10-, 50-, 100-, and 500-year floods; and Section 4.2(A)(4) requires applicants to provide "the boundaries of the Regulatory Floodplain, SFHA, floodway, riparian habitat zone, and channel migration area."

Requiring individual applicants – rather than FEMA or the local jurisdiction – to produce this information can be a tremendous financial burden. In relatively simple cases, preparing this data can cost tens of thousands of dollars and, as FEMA is well aware, in more complicated areas, preparing this data can cost hundreds of thousands of dollars. Moreover, in some areas the mapping of a floodway is as political as it is scientific. FEMA recently issued floodplain maps depicting the regulatory floodway for Lewis County which have created a political fire storm. Similarly, FEMA has spent the better part of a decade attempting to remap the floodplain in Skagit County and has not yet begun to wrangle with the floodway. In areas without a mapped floodway, application of the Model Ordinance's mapping requirements would amount to a de facto moratorium on all developments of five acres or more for the foreseeable future.

Further, in preparing the mapping for riverine SFHAs, the Model Ordinance purports to require the applicant to consider not only its own project, but also "all other past and future similar developments." Section 7.5(B). What this actually means is not defined in the BiOp or the Model Ordinance. Are applicants free to assume that all undeveloped floodplain areas will be limited to ten percent development due to the impervious surface restriction in the Model Ordinance; or should they assume thirty five percent development based on the restrictions on removal of native vegetation? This sort of effort – predicting future development patterns – should not be the burden of an individual permit applicant, but rather should rest with FEMA or the local government. This is particularly true considering the number of mapping disputes that are erupting in the Puget Sound region. In the current environment, it is nonsensical either to burden or empower an individual applicant with the authority to create binding floodplain mapping.

9. The Model Ordinance is Internally Inconsistent with regard to Sequencing.

The Model Ordinance and associated guidance provide inconsistent direction to local governments and applicants regarding whether and how sequencing is required. Sections of the Model Ordinance state and/or expressly imply that it is possible for applicants to deviate from the BiOp-based development restrictions provided that the applicant provides mitigation. *See, e.g.*, Section 5.2(B)(2) regarding impervious surface, and Section 7.4 regarding native vegetation. By comparison, the Floodplain Habitat Assessment and Mitigation Regional Guidance effectively mandates that a jurisdiction and applicant first avoid all floodplain impacts to the greatest extent feasible before they may consider off-setting mitigation. Further, Section

7.8(A)(1) regarding the Habitat Mitigation Plan provides: "the mitigation plan shall include such avoidance, minimization, restoration, or compensation measures as are appropriate to the situation." This ambiguity and internal inconsistency needs to be addressed.

As stated throughout this comment letter, the Model Ordinance should allow future development and redevelopment provided the corresponding impacts are mitigated. Why should an applicant be required to avoid floodplain development if that development in fact has no habitat impacts? Similarly, why should an applicant be required to avoid floodplain development where it is able to otherwise mitigate all of its adverse impacts on habitat? Again, in such instances, a blanket obligation to avoid first overreaches the goals and stated objective of the BiOp. FEMA's obligation under the BiOp is to avoid adverse habitat impacts. That does not translate into or necessitate avoiding floodplain development.

10. The Model Ordinance Should Clarify that Development on Properties Outside the Protected Area and Above the BFE Do Not Require a Flood Hazard Permit.

Section 4.1 of the Model Ordinance provides: "A floodplain development permit shall be obtained before construction or development begins within the Regulatory Floodplain. The permit shall be for development as set forth in Section 2. Definitions." Section 3.2(B), however, provides that "[a] development project is not subject to the requirements of this ordinance if it is located on land that can be shown to be (1) Outside the Protected Area and (2) Higher than the base flood elevation." As currently drafted, it is difficult to reconcile these provisions. To correct this ambiguity, the Model Ordinance should be modified to clarify that an applicant must submit a flood hazard permit application to confirm that its property is outside the Protected Area and above the BFE. Once confirmed, that applicant and property are not required to obtain a flood hazard permit or to comply with the standards in the Model Ordinance. (As Section 3.2(B) notes, the applicant may still need to obtain flood insurance.)

11. The Variance Criteria in FEMA's Model Ordinance Are Flawed and Overreaching.

The revisions to the variance criteria proposed as part of the Model Ordinance are flawed for several reasons. First, the Model Ordinance provides that a variance "shall not result in a violation of this ordinance." Section 4.9(A)(11). By its very nature, however, a variance requests a deviation from the standards of the subject ordinance. Thus, this provision effectively nullifies the variance authorization.

Second, as with other provisions of the Model Ordinance, the variance criteria mandates that a variance may not be issued unless "[t]he development project cannot be located outside the Regulatory Floodplain." Section 4.9(B)(1). Again, absent a showing that the development project will have an adverse effect on habitat, however, there is no basis in the BiOp for requiring such avoidance. This again overreaches beyond the requirements of the BiOp.

12. The Model Ordinance Creates Confusion regarding the Obligation to Provide Compensatory Flood Storage.

The compensatory storage requirements set forth in Section 7.6 appear to contradict the one-foot rise standards otherwise permitted in FEMA's minimum standards. Specifically, on the one hand, applicants for development in the riverine floodplain where no floodway has been mapped need only demonstrate that their project will not result in an increase of flood levels during the 100 year flood by more than one foot. By comparison, the compensatory storage standards require applicants to replace any flood storage volume lost by their proposed development. These two provisions are not consistent. One permits up to a one-foot rise in floodwaters, while the other effectively mandates zero-rise. Overall, the compensatory storage requirement has the effect of rendering every floodplain a "zero-rise floodplain." These provisions should be reconciled consistent with FEMA's existing minimum standards.

13. FEMA's Model Ordinance Should Not Commingle the BiOp-Based Restrictions with FEMA's Standard Minimum Criteria.

A final, but critical comment concerns the organization of the Model Ordinance. As drafted, the Model Ordinance commingles FEMA's adopted minimum standards with the BiOp-based development standards. This creates significant and unnecessary confusion. Rather than commingling these standards, FEMA should maintain its existing minimum standards as is and adopt as a separate section any provisions attempting to implement the BiOp. This is because if an applicant can demonstrate that it has already gone through consultation with NMFS or otherwise mitigated the impacts of its development on endangered species and habitat, there is simply no basis for applying any of the BiOp-based standards to that development.

By integrating the BiOp-based standards within FEMA's existing minimum standards, the Model Ordinance virtually guarantees overreaching and/or double dipping where the applicant has also completed a separate ESA consultation or other comparable review and mitigation. Further, by keeping the checklists in Appendix B (FEMA's minimum standards) and Appendix F (BiOp-based standards) separate, FEMA has demonstrated that it is not necessary to integrate FEMA's minimum standards with the BiOp-based standards.

We hope that FEMA will take these comments to heart and seriously consider revising entirely and/or abandoning the Model Ordinance. To the extent FEMA continues to pursue a model ordinance, that model should provide local jurisdictions with flexibility to recognize the developed condition of much of the Puget Sound floodplain and to require mitigation only for the actual impacts of future development. The one-size fits all BiOp-based regulations currently carried forward in the Model Ordinance are unnecessarily overreaching to achieve the BiOp's goals. Further, to the extent FEMA persists with a model ordinance, FEMA should utilize the NEPA review process as an opportunity and avenue to review alternative means to achieve the BiOp's goals.

Very truly yours,

Molly A. Lawrence

MAL:mal
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