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FEMA Enacts Rules for Building in Floodplains to Comply With Endangered Species Act

The [Federal Emergency Management Agency](#) (FEMA) on Oct. 1 enacted new rules that will apply to developers in many flood-prone areas that provide habitat for threatened and endangered species.

The new rules — [Procedure Memorandum 64](#) — were issued in response to several successful lawsuits by environmental groups against FEMA for not appropriately considering its responsibilities under the [Endangered Species Act](#) (ESA) when allowing development to take place.

Now, FEMA wants to shift those responsibilities to the landowners themselves.

The lawsuits targeted FEMA for failing to comply with the Endangered Species Act when acting on flood map change requests. Section 7 of the ESA requires federal agencies to consult with the [Department of the Interior](#) before embarking on any projects that may harm endangered or threatened species on the property.

When a project is proposed for a parcel of land within a floodplain, FEMA can issue a CLOMR — or [Conditional Letter of Map Revision](#) — to state that the project, if it is built as proposed, would sufficiently modify the floodway, base-flow elevation and/or 100-year floodplain ([Special Flood Hazard Area](#)) as shown on FEMA's [Flood Insurance Rate Maps](#).

A CLOMR-F — a Conditional Letter of Map Revision based on Fill — is used by FEMA when the parcel or proposed structure will be elevated by fill material to be above the base, 100-year floodplain.

Property owners usually seek a CLOMR on large projects such as levees and dams and residential or commercial developments, while CLOMR-F might be used for projects on smaller parcels or small parts of a subdivision.

Right now, any five-acre or 50-lot subdivision adjacent to or in the 100-year floodplain designated "Zone A" must conduct a study to determine the "base flood elevation" and submit a [Letter of Map Change](#) (LOMC) revising the flood map. With this new guidance, a LOMC could trigger ESA consultations.

FEMA charges a fee to review the application and these letters are typically sought and issued prior to work. The "condition" of both these letters is that the tasks are completed as proposed.

Procedure Memorandum 64 appears to shift a portion of its ESA consultation obligation to private landowners by requiring them to provide proof that they are complying with the provisions of the Endangered Species Act before making any requests of FEMA.

This change will likely add time and expense to any project in which the property owners need flood map revisions to move forward, because they may first need to complete the Section 7 or Section 10 permit process.

For Section 7, that process can take 90 to 135 days on average, and the Section 10 permit takes about two years to complete.

As currently written, the Procedural Memorandum 64 is likely to impose a burden upon developers, builders and private landowners seeking an LOMC.

NAHB is adding clarifying information on [the ESA section of its web site](#) while simultaneously discussing with both FEMA and the Fish and Wildlife Service the future implications of the memorandum.

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