

Frequently Asked Questions:

Riparian Areas and the RPA

Q: The RPA says no adverse effects to habitat function are allowed in the riparian buffer zone (RBZ), which includes the floodway, channel migration zone plus 50 ft. (CMZ), and the riparian buffers (FEMA is calling this area the “Protected Area”). Some of these are outside of the 100-year floodplain, so does the RPA still apply there?

A: In short, no. The consultation with FEMA was on the effects of the NFIP, which is implemented within the mapped 1 percent chance (aka “100-year”) floodplain. That means FEMA’s obligation to modify how the NFIP is implemented – an obligation that FEMA ultimately delegates¹ to local governments – applies only in the 100-year floodplain. However, if the RBZ or Protected Area extends outside of the 100-year floodplain, jurisdictions may still have an independent responsibility to protect this area in order to comply with the Endangered Species Act (ESA).

Q: The RPA says no adverse effects to habitat function are allowed in the RBZ, but the river in our jurisdiction is mostly leveed. Does that change anything about how we comply with the RPA?

A: Yes. In a leveed area, the floodway is going to be inside the levee, and where levees are protecting urban and suburban built environments against the 100-year event, the channel migration zone is considered contained within the levee. That means the largest extent of the RBZ or Protected Area, will be the riparian buffer. So, the protected area still requires the same level of protection, it is just a much smaller protected area than an area without levees.

Q: Does the RPA mean my jurisdiction cannot authorize any development or redevelopment in the protected area, even if it has already been intensively urbanized in preceding decades?

A: The answer will be site specific, and will turn on what habitat values still exist in the affected site. Fish use floodplains for multiple important life history requirements (feeding, rearing, sheltering, spawning), and when habitat for these functions is not available, fish can be harmed. However, in an already modified or built environment, not all of these habitat values remain. A Habitat Assessment will likely need to be conducted to confirm what if any habitat functions still remain. It is possible that in an intensively built environment, most if not all habitat function will have already been lost, so development and redevelopment in these areas could occur and still meet the no adverse effects test.

¹ The ESA compliance obligation is delegated to local governments together with NFIP criteria implementation, which is also carried forward at the local level.

Frequently Asked Questions:

Roles, Responsibilities and Risk under the ESA

Q: The ESA requirements are hard to understand – who has what job to satisfy the different standards?

A: Section 7 of the ESA requires Federal agencies to avoid jeopardy to listed species. Because NMFS' analysis showed that carrying out the NFIP as it exists in FEMA's regulations increases the risk of jeopardizing listed salmon and Southern Resident Killer Whales, FEMA must change how the NFIP is implemented in this region. Local governments will have a role in helping FEMA do this, because they actually carry out the NFIP at the local level. Local governments also have an independent obligation under the ESA to avoid "take" – death, injury, or harm to listed species. (ESA section 9).

Q: I am at the planning department of the local government - when we review our plans and regulations for the NFIP/RPA submittal, what standard are we supposed to meet?

A: FEMA is changing how the NFIP is implemented in this region in response to NMFS' biological opinion. To do this FEMA has asked local governments to protect floodplain habitat from additional development. NFIP communities can choose whether they comply with FEMA's Model Ordinance, comply primarily with the RPA elements in the NMFS Biological Opinion (Communities can use a combination of RPA elements and Model Ordinance elements to put together this second compliance package approach), or comply with an ESA permit by permit approach. Which compliance approach the community has chosen determines which standards must be met. Along with the standards of each of these choices, communities will also be required in many cases to provide habitat assessments and possibly mitigation plans when development is proposed in the 100-year floodplain.

Q: Does that mean if my local government submits its ordinances to FEMA and they approve the package, we are "ESA -OK" with respect to the NFIP?

A: Yes, if the package is substantively correct, it will be "ESA-OK." If FEMA approves your package as meeting "Door 2" requirements – that your protective ordinances sufficiently avoid adverse effects, or mitigate adverse effects in the appropriate locations – then your jurisdiction likely satisfies a "no jeopardy" standard. But it is important to note - this may not avoid "take in the form of harm." "Harm" is where the habitat is modified in a manner that fish can't use it sufficiently for important life requirements (feeding, rearing, sheltering, spawning) and so are injured or die as a result. Since fish do use floodplains for all of these life requirements, protecting this type of habitat is important to avoid harm. And, beyond the complying with Door 2, as mentioned above communities will still have to show the level of habitat effects expected to occur in the floodplain and how any adverse effects will be avoided or mitigated.

FEMA's Frequently Asked Questions:

Q: Who is in charge of the review of submittals for compliance?

A: FEMA will review submissions for compliance compared against the performance standards described in the Biological Opinion issued by NMFS. If FEMA needs technical assistance to determine whether a community's proposed performance standard is compliant, FEMA will ask NMFS for assistance in that determination.

Q: Where do I submit my compliance documentation to FEMA?

A: Communities may submit their compliance packages to FEMA. Our address is:

FEMA Region 10,
c/o John Graves
Mitigation Division
130-228th Street SW
Bothell, Washington 98021

Q: What if I change my regulations at a later date?

A: If a community changes the regulations, policies, or procedures that were used to determine compliance with the Biological Opinion, then the community must resubmit the information to FEMA for concurrence on the changes.

Q: What happens if I don't choose a compliance option?

A: As indicated in the letter to communities on July 23, 2010, if a community does not choose to either adopt the Model Ordinance or document how their existing regulations essentially comply with that ordinance, then they will default to the permit by permit option. Communities may choose at a later date to provide documentation to FEMA. FEMA will then review that information for programmatic compliance with the Biological Opinion.

Q: Will FEMA use enforcement actions for non-compliance with the Biological Opinion?

A: FEMA views non-compliance with the provisions of the Biological Opinion as a potential violation of Title 44 Code of Federal Regulations Part 60.3(a)(2) [44CFR60.3(a)(2)] and, therefore, a failure to enforce the minimum requirements of the National Flood Insurance Program. FEMA will use all available compliance tools such as technical assistance, a NFIP Community Rating System retrograde, probation, and/or suspension from the program in order to gain compliance with the NFIP and the Biological Opinion.

**Demystifying National Flood Insurance Program
Alignment with the Endangered Species Act
Edmonds, WA March 1 & 2, 2011**

Q: When will the Model Ordinance be finalized?

A: FEMA and NMFS have agreed to the language that is currently in the model ordinance and a final version will be available April 15.

Q: Why not just accept programs implemented by local communities that are required by Washington State law as compliance with the Endangered Species Act?

A: FEMA recognizes that many state and local regulations already contain provisions that would meet or exceed the performance standards of the Biological Opinion. However, many of the state and local programs have not been determined to be programmatically compliant with the ESA and, therefore, cannot be automatically considered compliant with the Biological Opinion standards.

Q: Why can't we just use SEPA?

A: FEMA has found that many communities exempt smaller projects such as a single family structure from the SEPA requirements. If such exemptions were removed then SEPA could be used as a screening tool.

Q: Will habitat assessments be required on all projects?

A: Sections 7.1 and 7.2 of the Model Ordinance provide a list of projects that may be completed without a habitat assessment, and possibly without a floodplain development permit. These projects are usually small in nature and were determined to have minimal potential to cause an adverse affect. FEMA and NMFS will routinely evaluate projects that are reported to FEMA and determine if there are projects that can be categorically determined to not have an adverse affect, and thus would not require a habitat assessment.

Q: Who reviews a habitat assessment to make sure it is adequate?

A: Local communities are responsible for determining if a habitat assessment is adequate. FEMA and NMFS are providing guidance and technical assistance to communities to help them understand this responsibility. Communities may need to hire resources, pass the cost of a third party review to the applicant, or work out an agreement between communities to provide a review of habitat assessments and mitigation plans.

Q: How do communities resolve conflicts between environmental stewardship and economic development?

A: Communities and ports must weigh the impacts of economic development with the inherent responsibility to develop in an environmentally responsible way. The ESA applies to everyone, not just federal agencies, and proposed development actions must be analyzed for their impacts on the environment and measures identified to minimize those impacts, regardless whether they occur in a floodplain.