U.S. Department of Homeland Security
Region X
130 228th Street SW
Bothell, WA 98021-9796

FEMA

January 11, 2012

FAQ: What are the Compliance Options available to my jurisdiction and what is required to implement each?

Jurisdictions have the option of complying with the Biological Opinion by either:

A) Adopting the Model Ordinance (**Door 1**)

FEMA Region X developed a RPA compliant model ordinance that incorporates all the substantive provisions of the RPA and the minimum standards of the NFIP. Communities that adopt and enforce the ESA compliant model ordinance will be considered to be in compliance with the ESA.

B) Using a Programmatic Approach that utilizes existing regulations and edits and supplements those regulations as needed (**Door 2**)

Washington State requires communities to adopt and enforce multiple state statutes that, when combined with the NFIP, could potentially achieve compliance with the ESA. Communities are required to enforce ordinances dealing with growth management, critical areas, and shorelines. When the combination of these individual programs can be shown to achieve the same protection to salmon habitat, communities will be considered to be in compliance with the ESA. FEMA has provided a checklist to help guide communities develop the documentation to show their suite of rules and regulations, when combined with the NFIP, will assure no adverse effect on salmon populations or their habitats.

C) Utilizing a Permit-by-Permit Approach (**Door 3**)

Communities that elect not to adopt FEMA's RPA compliant model ordinance, and cannot demonstrate their suite of other rules and regulations meet the same standards under the Door 2 Approach, must demonstrate that each and every floodplain development permit meets the "no adverse effect" standard contained in the RPA. The community must require each applicant to provide a habitat assessment demonstrating the proposed project will have no adverse effect on salmon habitat. A habitat assessment must address short-term, long-term, and cumulative effects to salmon and salmon habitat.

Comparison of the Door 1, 2, and 3 options

FEMA considers that any communities that adopt and enforce the model ordinance (Door 1) are in full compliance with the Biological Opinion (BO) for the NFIP in Puget Sound. The programmatic option (Door 2) is presented to allow jurisdictions to utilize (to the extent possible) their existing regulations, and to potentially allow greater potential flexibility in the application of NFIP BO standards for those cases where

jurisdictions can adequately address them via rigorous, funded, long-term management plan(s) across their entire watershed(s). Jurisdictions may have part of such plans within their current planning documents. Communities need to describe current and estimated future land management actions, and the combined effects of all regulations upon Threatened and Endangered Species (TES) populations and their habitats within affected watersheds. They would also have to provide sufficient evidence that any proposed mitigation action beyond (outside) of the Protected Area would result in a net effect of maintaining or improving habitat conditions. No short-term or long-term adverse effects are allowed within the Protected Area. Jurisdictions must document to FEMA how project design criteria and implementation of mitigation efforts will be monitored, enforced, and adaptively managed (latter if necessary). The Door 2 option provides a holistic assessment of all possible proposed actions across a landscape. It requires a significant commitment of time and funds by jurisdictions, especially large ones such as counties.

The Door 3 permit-by-permit option requires that each project proposal strictly abide by the RPA standards on a parcel-by-parcel basis in order to minimize the potential of any adverse direct, indirect, interconnected, interrelated, or cumulative effects. No adverse effects resulting from direct or indirect project actions are allowable within the Protected Area. If a habitat assessment determines that the project does not meet the "no adverse effect" standard for the Protected Area, the project must either be abandoned, redesigned, or receive permission from the services (NMFS and/or USFWS) to allow the adverse effect to occur. Such permission may be sought through consultation with the services via sections 4(d), 7, or 10 of the Endangered Species Act.

Projects located in the Protected Area that are submitted through the Door 3 approach would not be approved based on minimization, replacement, or compensation actions that only partially offset any adverse effects at the site. If minimization, replacement, or <u>on-site</u> compensation can demonstrate that there will be <u>no</u> short- or long-term adverse effects to TES populations or their habitats, those actions would be allowed in a Door 3 approach. Note that this standard is not No Effect, it is No Adverse Effect. Please also note that <u>off-site</u> compensatory actions would not be allowed under Door 3 because of the difficulty in estimating and tracking their sufficiency and appropriateness on a permit-by-permit basis. This is because the overall effects to the watershed would not be assessed under a permit-by-permit approach, compared to a programmatic approach where such overall effects would be assessed.

Some localized or short-term adverse effects are potentially allowable outside (beyond) the Protected Area under Door 3, but the effects of these impacts must be fully be mitigated so that the net result is that current conditions are either maintained or improved. Jurisdictions must analyze for any cumulative effects due impacts from other current or reasonably for-seeable future, non-federal actions that overlap with any lingering observable or measureable effects of the proposed action, and fully mitigate those effects.

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Requirements common to all Door options regarding actions within the Protected Areas

Some limited impacts to listed fish species and aquatic habitat functions and processes may be allowable if they are determined to be 'beneficial', 'insignificant' or 'discountable'. Those are the terms used to describe actions that do not constitute adverse effects. "Beneficial effects are contemporaneous positive effects without any adverse effects to the species. Insignificant effects relate to the size of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not: 1) be able to meaningfully measure, direct, or evaluate insignificant effects, or 2) expect discountable effect to occur. " (Endangered Species Consultation Handbook, USFWS and NMFS 1998, pages 3-12 and 3-13).

The following uses are allowed within the Protected Area:

1) "repair of existing building in its existing footprint , including damages by fir or other casualties;
2) removal of noxious weeds;
3) replacement of non-native vegetation with native vegetation;
4) ongoing activities such as lawn and garden maintenance;
5) removal of hazard trees;
6) normal maintenance of public utilities and facilities; restoration or enhancement of floodplains, riparian areas and streams that meets Federal and State standards" (NFIP BO Appendix 4, page 223).

In addition, the BO states (NFIP BO Appendix 4, pages 222 and 223) that within the Protected Area "Uses that are <u>not</u> permitted <u>unless</u> shown not to adversely affect water quality, water quantity, flood volumes, flood velocities, spawning substrate, and/or floodplain refugia for listed salmon, include the following: new buildings, including accessory buildings; new impervious surfaces; removal of native vegetation; new clearing, grading, filling, land-disturbing activity or other 'development' (see definition) other than for the purpose of replacing non-native vegetation with native vegetation, and for other approved restoration work; septic tanks and drain fields, dumping of any materials, hazardous or sanitary waster landfills; receiving areas for toxic or hazardous waste or other contaminants, and stream relocations, unless the primary function of the action is to restore natural ecological function." Please note that page 223 of the BO uses the term "RMZ" (not to be confused with the RBZ) instead of Protected Area. This older acronym referred to the Riparian Management Zone, which is synonymous with the Protected Area.

In summary, some construction and disturbance within the Protected Area is allowed, as long as it can be rigorously demonstrated and documented that the net result of all actions (including mitigation) will not result in adverse effects to TES populations or to the aquatic habitat variables, and will result in a net effect of maintaining or improving current habitat conditions.

Requirements common to all Door options regarding actions beyond (outside) the Protected Areas

No net adverse effects to TES populations or their habitats can occur, including no adverse effects regarding "water quality, water quantity, flood volumes, flood velocities, spawning substrate, and/or floodplain refugia for listed salmon" (NFIP BO Appendix 4, page 222). In addition, all indirect effects of actions outside of the Protected Area that impact stormwater, riparian vegetation, bank stability, channel migration, hyporheic zones, wetlands, or large woody debris (LWD)" must be mitigated (NFIP BO Appendix 4, page 223).

Requirements for use of the Programmatic (Door 2) approach

Communities may be able to demonstrate compliance with Door 2 via a couple of options. The first option is to modify existing regulations to strictly conform to the performance standards in the Biological Opinion as demonstrated on the NFIP-ESA Biological opinion Checklist.

Another approach that allows for some flexibility is for jurisdictions to complete something analogous to a watershed management plan, possibly largely contained within one or more of their current management plans. Such a plan would likely require stratification of a jurisdiction's land-base by general site conditions and current habitat functions. The jurisdiction could then propose what mitigation measures it will use, where those actions will take place, and the methods proposed to use to estimate how the combined effects of all proposed actions will result in either maintaining or improving current habitat conditions for each affected watershed. Note that this does not require that habitat be restored to fully, properly functioning, natural conditions and functions. Temporal and spatial scales need to be defined for both negative and positive effects for each project for those habitat functions relevant for baseline conditions. See the FAQ regarding Habitat Analysis at an Appropriate Scale for more information.

<u>Project actions within the Protected Area under the alternate Door 2 approach described above</u>

All Door 2 submittals using the alternate approach described above within the Protected Area must abide by the following conditions:

- No short-term or long-term adverse effects to TES populations or their habitats due to project actions are allowed to occur except for those actions that are listed as exempt in the BO (see list beginning on page 2 of this memo)
- Any mitigation plan must include viable methods that enable the jurisdiction to be able track and document implementation of mitigation measures, and be able to demonstrate adequate effectiveness of those mitigation actions.

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- Jurisdictions must be able to demonstrate adequacy of their enforcement program regarding any non-compliance of mitigation measures.

- Acquisition of lands that currently have properly functioning conditions and functions (i.e. intact, mature, natural habitats) to offset proposed degradation at another site does not constitute adequate compensation since this would still likely result in continued additional incremental degradation relative to current baseline conditions.

- On-site compensation is far preferable to off-site compensation. Off-site compensation should only be considered in highly degraded (altered) reaches or sub-watersheds if the jurisdiction can provide sufficient evidence that avoidance, minimization, replacement, or on-site compensation is not possible, and that the net result in each watershed will be an improved trend in habitat conditions (via tracking of implementation and effectiveness monitoring, as well as records of enforcement). See the FAQ regarding Habitat Analysis at an Appropriate Scale for more information.

- Potential on-site compensation under a Door 2 programmatic approach assumes proof of implementation of projects, and evidence of the effectiveness of mitigation actions. Effectiveness monitoring would consist of a combination of the assessment of the success of past methods, along with monitoring and assessment of a statistically valid subset of ongoing projects. Jurisdictions are required to make the data and accompanying summary reports of implementation and effectiveness monitoring available to FEMA for review.

- Off-site compensation is more difficult to justify and track than on-site compensation because it requires finding suitable, available parcels of partially degraded habitats (at least degraded in some aspects) to partially improve (restore), and demonstration of how the overall effect of all actions are beneficial over a mutually agreed upon time frame. Depending on what habitat functions are being compensated for, restoration actions at the compensatory sites may range from such things as purchasing riparian stands of immature trees and requiring those trees to be allowed to mature (i.e. passive restoration), to active restoration of riparian or instream habitat functions and processes.

<u>Project Actions Beyond (outside) of the Protected Area under the alternate Door 2 approach described above</u>

All Door 2 submittals using the alternate approach described above beyond the Protected Area must abide by the same conditions as within the Protected Area, <u>except</u> that outside of the Protected Area some limited adverse effects may potentially be allowed to occur <u>if</u> the following conditions are also met:

- Current and reasonably potential future habitat functions must be protected from adverse effects associated with NFIP actions. Under the Programmatic Approach this determination can be made on the basis of all reasonably foreseeable, funded actions within the entire analysis area, which may include an entire watershed(s). Hence the impacts of projects that restore or improve conditions

can be considered together with those actions that degrade some habitat variables in other locations within the same analysis area. This option to analyze the net effects of all actions within entire watersheds or sub-watersheds is not available under the permit-by-permit approach. The net effect within the Protected Area must, however, be to maintain or improve current baseline conditions. This analysis represents a significant undertaking in effort by a jurisdiction to document and analyze the impacts of all actions across a landscape, but can provide coverage for a suite of actions under one programmatic analysis.

- In all cases potential mitigation measures must be considered and justified in the following descending order of preference: avoidance, minimization, replacement, on-site compensation, off-site compensation.

- Appendix 4 of the Biological Opinion (NFIP BO Appendix 4 page 223) also states that fish habitat and flood storage within the floodplain but outside (beyond) the Protected Area must be protected by mitigating impacts to stormwater regimes, bank stability, channel migration processes, hyporheic zones, wetlands, and large woody debris loadings and recruitment to rivers. Each of these variables must be considered when jurisdictions describe current conditions and assess the impacts of proposed actions.