



September 22, 2011

***Via Certified Mail, Return Receipt Requested***

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Re: Endangered Species Act Violations: Federal Emergency Management Agency's  
Implementation of the National Flood Insurance Program in Puget Sound,  
Washington

To Whom It May Concern:

On behalf of National Wildlife Federation ("NWF"), we write to request that you take immediate action to remedy ongoing violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, by the Federal Emergency Management Agency ("FEMA") in the Puget Sound region, Washington. FEMA implements the National Flood Insurance Program ("NFIP"), an action that harms wildlife species that are protected under the ESA, including chinook salmon and killer whales. Pursuant to a 2004 federal court ruling in a case brought by NWF, FEMA initiated consultation under § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and in September of 2008, the National Marine Fisheries Service ("NMFS") determined that continued implementation of the NFIP in the Puget Sound region would jeopardize the survival of these species. However, FEMA has failed to implement the reasonable and prudent alternative outlined by NMFS as necessary to avoid jeopardy and adverse modification of critical habitat. Further, FEMA has failed to propose its own modifications to the NFIP or take other action that would avoid the ongoing jeopardy to, and unlawful "take" of, these species identified by NMFS.

This letter constitutes notice required by Section 11(g) of the ESA, 16 U.S.C. § 1540(g), prior to commencement of legal action.

### **Endangered Species Act Background**

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978). A review by the U.S. Supreme Court of the ESA’s language, history, and structure convinced the Court that “Congress intended endangered species to be afforded the highest of priorities.” Id. at 174. “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” Id. at 184. To accomplish this purpose, the ESA includes both substantive and procedural provisions that are designed to protect and recover imperiled species. In order to meet these obligations, the Court declared that “endangered species [have] priority over the ‘primary missions’ of federal agencies.” Id. at 185.<sup>1</sup>

Section 7 of the ESA, the heart of the ESA’s requirements for federal actions, imposes a strict substantive duty on federal agencies to ensure that their activities do not cause jeopardy to listed species or adverse modification to their critical habitat. 16 U.S.C. § 1536(a)(2). Jeopardy is defined by regulation to mean an action that “reduce[s] appreciably the likelihood of both the survival and recovery of a listed species in the wild.” 50 C.F.R. § 402.02; see also id. (adverse modification defined as “direct or indirect alteration that appreciably diminishes the value of the critical habitat for both the survival and recovery of a listed species.”). Section 7 further establishes an interagency consultation process to assist federal agencies in complying with this duty. An agency must initiate consultation under Section 7 whenever it takes an action that “may affect” a listed species, subject to limited exceptions. See 50 C.F.R. §§ 402.14(a), (b).

Once consultation has been initiated, it is the duty of the expert wildlife agency (NMFS for anadromous and marine species) to formulate its expert biological opinion as to whether the action under review, together with cumulative effects, will jeopardize the listed species or adversely modify its critical habitat. 50 C.F.R. § 402.14(g). If it is the agency’s opinion that jeopardy will occur, it is required to formulate, if possible, a “reasonable and prudent alternative” (“RPA”) to the action that will avoid jeopardy and adverse modification. Id. §§ 402.14(g), (h). An RPA is a non-jeopardizing alternative action that can be implemented consistent with the intended purpose of the action, that is within the action agency’s authority, that is economically and technologically feasible. Id. § 402.03.

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<sup>1</sup> The ESA defines two categories of imperiled species. “Endangered” species are those that are in danger of extinction in all or a significant portion of their range. 16 U.S.C. § 1532. “Threatened” species are those that are likely to become an endangered species in the foreseeable future. Id.

Separately, ESA § 7(d) prohibits federal agencies, after the initiation of consultation under ESA § 7(a)(2), from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d); Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1128 (9th Cir. 1998) (section 7(d) violated where BOR executed water service contracts prior to completion of formal consultation); Marsh, 816 F.2d at 1389 (construction of highway outside species habitat barred by § 7(d) pending completion of consultation). This prohibition is not an exception to the requirements of § 7(a)(2); it remains in effect until the procedural requirements of § 7(a)(2) are satisfied, 50 C.F.R. § 402.09; and it ensures that § 7(a)(2)'s substantive mandate is met. See, e.g., Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994); Greenpeace v. National Marine Fisheries Service, 80 F. Supp. 2d 1137 (W.D. Wash. 2000). Section 7(d) thus does not permit activities to continue that otherwise are in violation of the procedural or substantive requirements of § 7(a)(2). See 51 Fed. Reg. at 19940 (“section 7(d) is strictly prohibitory in nature”). Additionally, any harm to the protected resource itself is considered a violation of Section 7(d). Pacific Rivers Council, 30 F.3d at 1057 (“timber sales constitute ‘per se’ irreversible and irretrievable commitments of resources under § 7(d), and thus cannot go forward during the consultation process”).

The ESA also prohibits activities that cause “take” of endangered species. 16 U.S.C. § 1538(a)(1)(B). This prohibition can be, and typically is, extended to threatened species by regulation. Id. § 1533(d). The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Id. § 1532(19). Congress intended the term “take” to be defined in the “broadest possible manner to include every conceivable way” in which a person could harm or kill fish or wildlife. S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973). NMFS has defined “harm” to include “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102. When a federal agency consults pursuant to § 7(a)(2), the biological opinion includes a statement concerning “incidental” take, providing a limited exemption from liability if take occurs. Id. § 402.14(i).

NMFS first listed Puget Sound chinook as a threatened species under the ESA in March of 1999. 64 Fed. Reg. 14308 (March 24, 1999). The protected population includes all naturally spawned chinook salmon residing below impassable natural barriers in the Puget Sound region from the North Fork Nooksack River to the Elwha River, inclusive. Id. at 14,313. NMFS listed Hood Canal summer-run chum salmon at approximately the same time. 64 Fed. Reg. 14508, 14512 (March 25, 1999). In 2005, NMFS affirmed that the chinook and chum remain threatened under the ESA. 70 Fed. Reg. 37160 (June 28, 2005). NMFS further designated hundreds of river and stream miles in Puget Sound as “critical habitat” for the chinook and the chum in 2005. 70 Fed. Reg. 52630 (Sept. 2, 2005).

NMFS recently completed a status review of Puget Sound chinook (and other listed Evolutionarily Significant Units (“ESUs”). 76 Fed. Reg. 50448 (Aug. 15, 2011). That review noted that most populations of Puget Sound chinook numbers have declined in abundance since 2004 and no significant changes to the “widespread loss and degradation of habitat” that warranted the original listing had yet occurred. Similarly, a recent review of progress towards meeting the goals of the chinook ESA Recovery Plan concluded that habitat continued to decline and that regulatory programs to protect habitat had not significantly changed from the 1990s era efforts that contributed to the chinook’s listing. See 2011 Implementation Status Assessment Final Report; see also id. at 36 (“All but a few watersheds are relying on existing and/or planned updates to state and local land use regulatory programs to protect habitat against further decline. However, our cursory survey of federal, state and local regulatory programs found that despite the ESA listing of Puget Sound chinook salmon in 1998, few regulatory programs have changed much since that time. In particular, even though Section 7 requires consultation by federal agencies whose programs or actions may adversely affect listed species, many have been slow to change without external pressure (such as through litigation.)”) (specifically identifying FEMA).<sup>2</sup>

NMFS listed Southern Resident killer whales (also known as orcas) as an endangered species in November of 2004. 60 Fed. Reg. 69903 (Nov. 18, 2005). The listing notice identifies reduced quantity and quality of prey—chiefly chinook salmon—among the causes for the orcas’ decline. The orcas’ critical habitat includes 2,560 square miles of inland waters in Puget Sound, the Strait of Juan de Fuca, and Haro Strait. 71 Fed. Reg. 69054 (Nov. 29, 2006). A 2008 recovery plan focuses on rebuilding chinook populations that were adequate to sustain orca populations in Puget Sound. 73 Fed. Reg. 4177 (Jan. 24, 2008).

Puget Sound steelhead were listed as threatened species in 2007. 72 Fed. Reg. 26722 (May 11, 2007). In listing the steelhead, NMFS concluded that the primary threat to the steelhead was the present and threatened destruction of its habitat, observing that loss of riparian habitat was a key factor in the decline of this species. Id. at 26732. In its 2011 status review, NMFS confirmed that Puget Sound steelhead have shown widespread declines in abundance since 1985, with a particularly low abundance over the past five years and, for some populations, sharp declines. NMFS has not yet designated critical habitat for the steelhead.

### **The National Flood Insurance Program**

Congress first established the NFIP with the passage of the National Flood Insurance Act of 1968. 42 U.S.C. § 4012 et seq. The NFIP was subsequently broadened and modified with the passage of the Flood Disaster Protection Act of 1973, and amended again in 1994 with the National Flood Insurance Reform Act.

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<sup>2</sup> Available at <http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Puget-Sound/upload/implement-rpt.pdf>.

The NFIP is a federal program, administered and implemented by FEMA, that enables private property owners to purchase federal flood insurance. The NFIP is designed to provide an insurance alternative to disaster assistance to meet the escalating costs of repairing damage to buildings and their contents caused by floods, as flood insurance is generally unavailable from private-sector insurance companies. 44 C.F.R. § 59.2. Under the NFIP, local communities become eligible for federal flood insurance once they have adopted “adequate land use and control measures” consistent with criteria developed by FEMA.<sup>3</sup> 42 U.S.C. § 4012(c)(2); 44 C.F.R. § 59.22 (prerequisites for the sale of flood insurance). Flood insurance from FEMA is not available in communities that have not adopted land use criteria consistent with FEMA’s regulations. *Id.* § 4022(a)(1); 44 C.F.R. § 60.1(a). Virtually all jurisdictions in Western Washington with any mapped floodplain are enrolled in the NFIP.

FEMA develops, and from time to time is required to revise, “comprehensive criteria” designed to encourage the adoption of land use measures that reduce the amount of development exposed to floods, assist in reducing damage caused by floods, and “otherwise improve the long-range land management and use of flood-prone areas.” *Id.* § 4102(c). FEMA’s minimum criteria for local floodplain management are encoded in federal regulations at 44 C.F.R. § 60.3. Although the statute authorizes FEMA to adopt regulations for the general protection of the floodplain, the existing regulations are primarily designed to minimize damage to structures and water systems during flood events and eliminate the possibility that structures will exacerbate floods by increasing flood levels. The criteria are not designed or intended to protect aquatic habitat, imperiled species, or other environmental values.

FEMA oversees communities’ participation in and eligibility for the NFIP in an ongoing manner. FEMA conducts community visits and contacts to ensure proper implementation of NFIP requirements. A community’s failure to implement and enforce NFIP minimums can result in probation or suspension from the program, which would make federal flood insurance unavailable in that community. 44 C.F.R. § 59.24. Moreover, FEMA implements a Community Rating System (“CRS”), a separate, voluntary program to encourage local floodplain management regulation that exceeds the regulatory minimums. Under the CRS, floodplain management regulation above NFIP minimums is rewarded with lower insurance rates for insureds. *See* 55 Fed. Reg. 28291 (July 10, 1990).

FEMA further implements the NFIP through development and revision of maps and other information that identify flood-prone areas. 42 U.S.C. § 4101. These maps, known as Flood Insurance Rate Maps (“FIRMs”), identify various categories of flood hazard areas in which land use and building criteria are to apply. *See* 44 C.F.R. § 64.3 (identifying different zones on

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<sup>3</sup> A “community,” for purposes of the NFIP, is defined as any “state, area, or political subdivision . . . which has the authority to adopt and enforce floodplain management ordinances for the area under its jurisdiction.” 44 C.F.R. § 59.1.

FIRMs). The maps are required to be updated at least every five years to accommodate new information. Id. § 4101(e). Individuals can request and obtain from FEMA a Letter of Map Revision (“LOMR”) if they can show an inaccuracy or change in the map that affects the status of their property. 44 C.F.R. Pt. 72.

Issuance of flood insurance policies occurs through two mechanisms. First, FEMA may enter into arrangements with private insurance companies wherein approved insurers offer and administer federal flood insurance to qualified applicants. 44 C.F.R. § 62.23. Such private insurers are referred to as “write your own” (“WYO”) companies. WYO companies collect premiums from insureds, and after retaining a portion to cover costs, submit the remainder to the U.S. Treasury. See generally 44 C.F.R. Pt. 62, App. A. Loss payments are made by the WYO company, and it, in turn, is reimbursed by FEMA. Id. Contractual agreements between FEMA and individual WYO companies are renewed annually, and either the company or FEMA can elect not to continue a company’s participation in the program. Id. FEMA is required to conduct triennial reviews of WYO companies’ practices. 44 C.F.R. Pt. 62, App. B. Approximately 95% of the FEMA-administered flood insurance in the nation is through the WYO program. The other avenue for administration of flood insurance to insureds is through FEMA directly (“NFIP direct”). 44 C.F.R. § 62.1. Under NFIP Direct, a servicing agent issues flood insurance policies in FEMA’s name directly to insureds.

Participation by a community in the NFIP is voluntary. However, as a practical matter, failure to enroll in the NFIP can significantly affect current and future property owners in the community’s floodplains and the availability of federal financial assistance in the flood-prone areas of the community. If a community chooses not to participate in the NFIP, federal assistance such as mortgages from a federally-insured or regulated bank, or a Veterans Administration loan, are prohibited if the building used to secure the assistance is in the 100 year floodplain. 42 U.S.C. § 4012a. The National Flood Insurance Act also prohibits other federal agencies such as the Federal Housing Administration and the Small Business Administration from making or guaranteeing a loan secured by a building in a floodplain unless flood insurance has been purchased. Id. Federal flood insurance cannot be purchased for buildings in non-participating communities. 42 U.S.C. §§ 4022, 4106.

### **The NFIP Consultation**

FEMA’s failure to comply with the requirements of the ESA in its implementation of the NFIP has been an ongoing concern, both in Puget Sound and nationally, for many years. In National Wildlife Fed. v. Federal Emergency Management Agency, 345 F. Supp. 2d 1151 (W.D. Wash. 2004), the Western District of Washington held that the FEMA’s implementation of the NFIP in Puget Sound was a federal action subject to the ESA and that it was harming ESA-listed Puget Sound chinook salmon. The Court found that FEMA’s provision of flood insurance encouraged development in sensitive floodplain habitats and that, without FEMA-issued insurance, development in these areas would be significantly precluded. The Court ordered

FEMA to consult with the NMFS pursuant to ESA § 7(a)(2) on the impacts of the NFIP in Puget Sound.

Four years later, after protracted discussions between the two agencies, NMFS issued a biological opinion (“FEMA BiOp”) on the impacts of the NFIP in western Washington, including not just chinook but also Hood Canal summer chum, Puget Sound steelhead, and Southern Resident killer whales. The FEMA BiOp determined that the implementation of the NFIP jeopardized the survival of these species and adversely modified their critical habitat. For example, the BiOp found that long-term implementation of the NFIP would reduce by 30% the total number of chinook salmon available as prey to orcas. The BiOp also documented a high degree of “take” of listed species associated with continued development in the floodplains that was influenced or affected by FEMA’s actions.

In accordance with the ESA, the BiOp articulated a comprehensive RPA that would avoid jeopardy to these species. The RPA calls for substantive changes in multiple aspects of the program. For example, FEMA is directed to make changes to its floodplain mapping program, including only issuing letters of map revisions where adverse effects are avoided or mitigated. (RPA#2). FEMA is also prohibited from recognizing levees that are certified by the U.S. Army Corps of Engineers—whose standards require the elimination of most native vegetation on levees—and from disqualifying levees that elect to maintain native vegetation from eligibility for emergency funding. (RPA#5). FEMA is also required to “ensure” that adequate mitigation occurs for any development that occurs in the floodplain while the RPA is being implemented. (RPA#6).

The most significant element of the RPA calls for changes to FEMA’s minimum development criteria. (RPA#3). Under this RPA element, FEMA is required to implement revised minimum standards that reduce the environmental impacts of floodplain development through prohibiting development that has adverse effects, using aggressive mitigation, and relying on “low impact development” construction standards to eliminate stormwater runoff. FEMA was required to ensure that all participating NFIP communities implement these standards on a phased schedule that requires jurisdictions in the most sensitive habitat areas to comply first, by September 22, 2010.

The FEMA BiOp includes an incidental take statement that insulates both FEMA and jurisdictions that are enrolled in the NFIP from liability for harm to listed species, providing they take action consistent with the RPA’s requirements and providing that their rate of floodplain development does not exceed historic rates.

On September 10, 2010, shortly before the deadline for FEMA to ensure application of ESA standards in the first tier of communities, NMFS sent a letter to FEMA that extended the

deadline for compliance with RPA#3 for one year, to September 22, 2011.<sup>4</sup> Other deadlines were not extended. Since that time, FEMA has pursued a “three door” approach under which jurisdictions have the option of: (1) adopting a model ordinance crafted by FEMA that purports to implement the RPA; (2) demonstrating to FEMA that their existing floodplain regulation is protective to the same extent as the RPA standards; or (3) ensuring, on a permit-by-permit basis, that individual floodplain permitting actions do not have adverse impacts to listed species.

As of the date of this letter, we understand that FEMA has approved four jurisdictions as having adopted the model ordinance under “Door 1.” We further understand that five jurisdictions have had their floodplain regulations approved by FEMA as compliant with the FEMA BiOp under “Door #2,” with several more pending. As of September 22, 2011, according to FEMA, all other jurisdictions in Western Washington are expected to ensure, on a case-by-case basis, that each individual development project within any floodplain in their jurisdiction does not adversely affect listed species. (“Door #3”). Approximately half of the jurisdictions have been approved by FEMA to proceed through “Door 3,” while the other half have not.

During the three years since NMFS issued the BiOp, FEMA has continued to issue flood insurance policies for new construction in Puget Sound without change. Pursuant to a Freedom of Information Act (“FOIA”) request, NWF has obtained FEMA’s records regarding how many new flood insurance policies—for new construction—have been issued since 2000. According to these files, over 42,000 new structures have been insured since 2000, a significant number of them after the Court’s 2004 order finding FEMA in violation of the ESA. While the rate of new construction has slowed in recent years due to the global recession, we are not aware of any action by FEMA to substantively change the program that results in less development, more environmental protections, or increased mitigation in Puget Sound floodplains since 2004.

### **Legal Violations**

FEMA is currently in violation of both the substantive and procedural protections of the ESA. Those violations will remain ongoing until FEMA implements the FEMA BiOp’s RPA in full, suspends implementation of the NFIP in Western Washington pending the completion of a new ESA consultation on a proposed alternative, or sets forth its own alternative to the proposed action with an analysis to show that the alternative avoids jeopardy.

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<sup>4</sup> The 2010 letter from NMFS did not purport to modify the FEMA BiOp, nor did it contain any analysis of the environmental impacts of additional delay in implementing the FEMA BiOp’s requirements. Accordingly, the letter has no legal effect on the deadlines imposed by the FEMA BiOp. The actual compliance deadline for Tier 1 jurisdictions, therefore, expired in September of 2010. Nonetheless, NWF elected to forego commencing this litigation in favor of continued efforts to work cooperatively with FEMA.

First, FEMA is in violation of the ESA's prohibition against jeopardizing listed species and adversely modifying critical habitat. The FEMA BiOp lays out in detail how FEMA's implementation of the NFIP results in jeopardy to listed species like chinook and orcas, and how such jeopardy can be avoided through implementation of the RPA. FEMA has declined to adopt that RPA, and the actions that it proposes to adopt in its stead simply shift the burden to other parties and involve other processes, voluntary actions, and/or weaker substantive standards. See, e.g., Florida Key Deer v. Brown, 364 F. Supp. 2d 1345, 1356 (S.D. Fla. 2005), aff'd, 522 F.3d 1133 (11th Cir. 2008) (NFIP BiOp that relies on permit-by-permit analysis violates ESA because it fails to account for cumulative effects and relies on voluntary actions). It is well settled law that where an agency chooses to depart from the expert opinion of the wildlife agency in a biological opinion, it bears the burden of demonstrating that its actions comply with the ESA. Village of False Pass v. Clark, 565 F. Supp. 1123, 1160-61 (D. Alaska 1983), aff'd, 733 F.2d 605 (9th Cir. 1984) (agency deviates from RPA "subject to the risk that [it] has not satisfied the standard of section 7(a)(2)"). FEMA has not met, and cannot meet, this burden with the incomplete and insufficient actions it has taken to implement the BiOp. Specifically:

(a) FEMA has not fully implemented RPA#2 requiring substantive changes in FEMA's mapping practices, including procedures governing approval of changes to floodplain maps that incentivize fill of floodplains. FEMA's proposed practice of requiring an analysis of impacts to listed species for individual projects does not capture cumulative effects, has not been adequately enforced, and is not supported by an analysis to show that it is sufficient to avoid jeopardy and adverse modification of critical habitat in any event.

(b) FEMA has failed to implement RPA#3 regarding minimum development criteria for eligibility in the program in a way that avoids jeopardy and adverse modification. FEMA's "three door" alternative to the RPA has failed and will continue to fail because:

(1) The model ordinance ("Door 1") has been adopted by only a handful of jurisdictions to date, there is no analysis to show that it is equivalent to the requirements of the FEMA BiOp, and it is not equivalent. We have documented our concerns that the model ordinance does not fully embody all of the standards contained in RPA#3 in previous correspondence. While we appreciate the changes FEMA has made, not all of those concerns have been addressed. Moreover, because FEMA has refused to provide us with copies of the documentation supporting its Door 1 approvals for these jurisdictions, it is not yet clear whether jurisdictions adopting the model ordinance have done so without meaningful changes to that ordinance that allow additional cumulative habitat degradation. A brief review suggests that some or all jurisdictions approved under Door 1 have not actually adopted updated floodplain development codes.

(2) FEMA's approvals of 5 jurisdictions through the "checklist" approach ("Door 2") appears to be fundamentally flawed. Several of these jurisdictions have not yet actually adopted the draft ordinances reviewed by FEMA. In other cases, the

standards for development approved by FEMA allow significant new development that may result in additional cumulative habitat degradation and don't meet RPA standards. There appears to be no analysis supporting FEMA's equivalence determinations.

(3) Permit-by-permit review, which is the default action for virtually all jurisdictions, is not an adequate substitute for landscape-level consideration of impacts, nor is there any analysis that would indicate that it is. Moreover, NFIP communities lack the expertise, funding, or incentives to carry out adequate habitat assessments on individual projects, and FEMA has failed to adopt mandatory guidance setting clear standards. Indeed, FEMA's draft guidance appears to recommend using mitigation to avoid impacts in ways that are plainly contrary to the FEMA BiOp. Finally, to date, the level of compliance remains deeply problematic. A significant number of jurisdictions have not even declared an intent to comply with FEMA's inadequate requirements, and habitat assessments have taken place for only a tiny handful of development projects to date. Not surprisingly, in every instance, the conclusion of these few assessments is that there will be no adverse effect on listed species, and no identifiable changes to projects to prevent harm.

Finally, a uniform flaw in all three approaches to BiOp compliance is FEMA's failure to address the application of state vesting law to ESA requirements. FEMA has chosen to implement the BiOp by placing the burden of ESA compliance on local jurisdictions rather than updating its own minimum criteria. As such, it is likely that local jurisdictions will incorrectly apply state vesting law to any updated criteria they adopt to comply with FEMA's directives. Even if a jurisdiction's new standards satisfied the ESA (and in most cases they will not), it is likely that it would continue to be process and permits vested applications under the old, non-compliant standards far into the future. However, the requirements of the ESA are not subject to state vesting laws and all permits should be processed under ESA-compliant standards in order to avoid a continuing contribution to jeopardy and adverse modification.

(c) FEMA has largely refused to implement RPA#5 regarding levees. Its claim that it lacks authority to implement this RPA is legally incorrect, and particularly surprising given the extended negotiation leading to adoption of the RPA. Moreover, FEMA has not proposed or implemented any alternative measure related to levees, that it believes are within its authority, to replace the RPA that is it not implementing.

(d) FEMA has completely refused to implement RPA#6 regarding mitigation. The FEMA BiOp requires FEMA to "ensure" that any adverse habitat effects that take place during the BiOp's implementation period are adequately mitigated. FEMA at this point does not even know what effects have accrued since NMFS issued the FEMA BiOp in 2008, and has taken no steps to "ensure" that these unevaluated impacts are mitigated.

(e) FEMA has not adequately complied with RPA#7 regarding reporting and oversight. The substantial majority of NFIP communities to date have ignored FEMA's request to provide additional information on permitting activities but have not faced any adverse consequence and continue to receive flood insurance for new development. The information obtained through the Annual Reporting process has been documented by NMFS to be of little value, leaving this RPA—intended to ensure that projects are tracked and mitigation required—unable to function effectively.

Second, FEMA has been, and continues to be, in violation of ESA § 7(d). The section prevents federal agencies from making irretrievable and irreversible commitments of resources “which [have] the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.” 50 C.F.R. § 402.09 (emphasis added). As this regulation makes clear, “[t]his prohibition . . . continues until the requirements of section 7(a)(2) are satisfied.” Id. The additional restrictions imposed by § 7(d) are in effect because FEMA still has not discharged its duties under § 7(a)(2) by implementing the NFIP in a way that avoids jeopardy and adverse modification. FEMA has been violating this prohibition by continuing to implement the NFIP in a way that could foreclose implementation of measures required to avoid jeopardy, including but not limited to reducing or conditioning the issuance of insurance policies for new development, changing mapping regulations and practices, and mitigating for past practice. Since FEMA initiated consultation in 2004, it has issued many thousands of new flood insurance policies in Puget Sound. Many of these policies are in jurisdictions where salmon populations are most critical to the ESU's recovery and/or where populations continue to decline due to habitat loss. These and other actions that make irreversible or irretrievable commitments of resources are contrary to law. See Pacific Rivers Council v. Thomas, 936 F. Supp. 738, 745 (D. Idaho 1996) (preservation of “status quo” as required by Conner v. Burford, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988), means enjoining the action under consultation); Pacific Coast Fed'n of Fishermen's Assoc. et al. v. BOR, 138 F. Supp. 2d 1228, 1249 & n.19 (N.D. Cal. 2001).

Third, FEMA is in violation of § 9 and § 4(d) of the ESA for violating the prohibition on unlawful “take” of salmon.<sup>5</sup> The FEMA BiOp lays out in considerable detail how implementation of the NFIP results in take of listed species:

Taken together, these [NFIP] elements result in the modification of habitat and the habitat forming processes that fish rely on to express their normal behaviors and life histories. Some exposed individuals will respond to these habitat effects by changing normal behaviors; in some cases to their detriment. Some fish will be injured by changed habitat conditions, and some will die because of habitat

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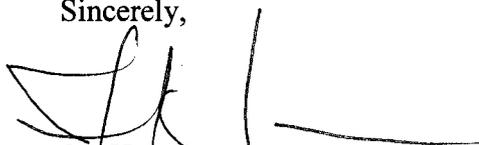
<sup>5</sup> NMFS has adopted 4(d) regulations making the take prohibition applicable to threatened chum, chinook, and steelhead in Puget Sound. 65 Fed. Reg. 42422 (July 10, 2000) (original § 4(d) rules); 70 Fed. Reg. 37160 (June 28, 2005) (chinook and chum); 73 Fed. Reg. 55451 (Sept. 25, 2008) (steelhead).

changes affected by NFIP implementation. The habitat modification caused by the NFIP include adverse effects on water quality (contaminants causing olfactory inhibition, impairing prey-base, and increasing sub-lethal health effects) and adverse effects on water quantity conditions in streams and river channels (scouring out suitable spawning substrate, increasing fine sediment load, excess velocity and volume fatiguing and flushing out juvenile fish, insufficient summer flows), as well as declining function in, and declining amounts of, floodplain habitat (increasing mortality among juveniles that require but cannot find flood refugia). Take will continue to occur from these sources at a rate generally consistent with past rates of development-related adverse effects until the RPA is implemented.

FEMA BiOp at 168 (emphasis added); see also id. at 139 (long-term implementation of the NFIP—without the changes identified in the RPA—will reduce numbers of chinook salmon by 30%). Because FEMA has elected not to adopt the RPA, “it does so at its own peril” because the waiver of liability contained in the incidental take statement no longer operates. Bennett v. Spear, 520 U.S. 154, 169-70 (1997); FEMA BiOp at 174 (“Take that occurs from actions not in compliance with the RPA (above) is not exempt. . .”). Since the court order in 2004 identifying FEMA’s ESA violation, FEMA has insured many newly built structures—the harm identified in 2004 has continued unabated, and there is no apparent plan to implement the program to meet ESA standards in the immediate future.

NWF believes that FEMA’s legal violations can and should be remedied without the need for litigation and is willing to work with you to address these issues in a way that is consistent with your authorities and protective of imperiled wildlife. If, however, this issue cannot be resolved within 60 days, NWF intends to pursue remedies that would prevent FEMA from continuing to add to the burden faced by these declining species. See, e.g., Florida Key Deer v. Brown, 386 F. Supp. 2d 1281 (S.D. Fla. 2005), aff’d, 522 F.3d 1133 (11th Cir. 2008) (enjoining FEMA from issuing flood insurance within the habitat of ESA-listed species). If you would like to discuss the contents of this letter, or believe that anything contained herein is in error, please feel free to contact us at (206) 343-7340.

Sincerely,



Jan Hasselman

Todd True

Kevin Regan

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