



# ASSOCIATION OF STATE FLOODPLAIN MANAGERS, INC.

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## **Re: National Flood Insurance Program Nationwide Programmatic Environmental Impact Statement**

ASFPM appreciates the opportunity to comment on the Nationwide Programmatic Environmental Impact Statement for the NFIP. We are disappointed the recent version does not seem to reflect the June 2017 public comments received on the draft version. We use this letter to restate our concerns with the NPEIS and ask that FEMA revise the recommendations to reflect public comments.

The Association of State Floodplain Managers is a national professional organization representing 36 chapters and 18,000 members dedicated to managing flood risk to reduce flood damage and taxpayer costs from flood disasters. Our members work in the local, state, regional and private sector to protect natural systems that help reduce flooding and protect our natural resources. For most members their primary function is helping administer the NFIP.

The NFIP is a federal program, or federal action, that has nationwide impacts on land use development patterns, natural floodplain functions, endangered species protections, water quality and climate change. The NFIP requires communities that participate in the program to direct where and how development occurs in flood hazard areas to ensure it is done in a way that reduces future flood damage. It is important to note that of the 22,000 communities that belong to the NFIP, 6,000 of those communities would have no land use regulations or building code standards if it were not required by the NFIP. While the NFIP has been promoted as being important for the economy, environment and community resilience, the environmental impacts of the program must be acknowledged and mitigated. ASFPM generally supports the affordability recommendations included in alternatives 2, 3 and 4. However, we have concerns over the analysis of impacts to endangered species and critical habitat included in the NPEIS, especially the near total lack of any consideration of addressing Endangered Species Act issues programmatically versus, on a permit-by-permit, development-by-development basis.

*Dedicated to reducing flood risk and losses in the nation.*

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Practitioners understand the chronic understaffing of the services (NOAA and USFWS), as well as the specialized knowledge/skills needed to address ESA compliance issues. And even with those difficult issues, a programmatic solution was found in Puget Sound. It is disappointing that FEMA rejected a programmatic approach and instead relies on local floodplain managers, most with no knowledge of the ESA and minimal knowledge of the NFIP, to determine compliance with federal law and the ESA. Therefore, the recommendations and comments that follow are intended to help improve the analysis and conclusions laid out in the current draft NPEIS in order to develop mitigation strategies that will truly provide protections for critical species and habitat. Unfortunately, it appears all these recommendations were ignored in the development of the final NPEIS.

## **Recommendations**

### **1. Consider Delay of the Final NPEIS Until After the 2017 NFIP Reauthorization by Congress**

With the NFIP set to expire Dec 8, 2017, it is unclear at this time what an NFIP reauthorization will ultimately include. From the draft bills introduced, there is potential that the reauthorization bill will contain elements or changes to the current structure of the NFIP that could significantly impact the analysis and conclusion included in the NPEIS. If the 2017 NFIP reauthorization includes significant new circumstances or program elements, FEMA will be required to consider and evaluate these new elements. If the final NPEIS has already been issued, then a Supplemental Environmental Impact Statement would need to be issued to account for these new program elements. ASFPM recommends FEMA delay issuing the final NPEIS until the 2017 NFIP reauthorization is finalized by Congress to determine if any new analysis for the final NPEIS may be needed due to the reauthorization.

### **2. The NPEIS Needs to Consider and Analyze the NFIP's De Facto Land Use Authority through its Minimum Floodplain Management Criteria, and the Implications on Requiring ESA Consultation with the Services**

Throughout the NPEIS, FEMA asserts the agency is not responsible for private floodplain development, and therefore, is not responsible for ensuring floodplain development is compliant with the ESA. The NPEIS states that floodplain development is not a federal action under the NFIP, that the NFIP does not encourage or cause floodplain development to occur, does not have land use authority to prescribe the types of development that may take place in the floodplain, nor does it play a significant role in facilitating or encouraging floodplain development.

The NPEIS states that, "The regulation of land use falls under the state's police powers, which the Constitution reserves to the states, and the states delegate down to their respective political subdivisions." Although FEMA may not be issuing individual land use permits authorizing floodplain development, the original intent of the NFIP was to establish a unified national program for floodplain management. As set forth by Congress in the National Flood

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Insurance Act of 1968, this was to be done partly by "...encouraging sound land use by minimizing exposure of property to flood losses," and to "guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards" (42 USC §4001 (c)(1) & (e)(2)). The original program intent, as established by Congress, clearly saw the program as a mechanism to limit and guide local floodplain development through the establishment of the minimum floodplain management criteria. This clearly shows the NFIP does have the authority to alter its minimum floodplain management criteria to limit the impacts on ESA-related species or other environmental impacts.

ASFPM also does not agree with the assessment that, "the NFIP neither causes development to occur, nor is it a driver in facilitating or encouraging floodplain development." What we have seen in the 49 years since the NFIP was created is that it has become a de facto land use authority through the creation of minimum floodplain management criteria, and the unintended consequences of a mandatory purchase of flood insurance requirement. Unfortunately, the mandatory flood insurance purchase requirement and the minimum floodplain management criteria have resulted in driving private land use decisions and behaviors, since there is an incentive to fill floodplain lands in order to either remove the mandatory flood insurance purchase requirement, or to reduce flood insurance rates. While alternatives to filling do exist to lower flood insurance premiums, and communities are encouraged to adopt higher regulatory standards, many communities do not prohibit the use of fill or prohibit new structures located within the mapped Special Flood Hazard Area. A quick survey of the 1,440 Community Rating System participating communities, which covers 69% of all NFIP policies and are recognized for having floodplain management programs that exceed the minimum NFIP requirements, a significant majority of communities are not receiving credit for Activity 430 – Development limitations prohibiting fill (DL1) or prohibiting new structures (DL2).

Because the avoidance of the mandatory flood insurance purchase requirement and compliance with the minimum floodplain management criteria is often the leading driver for the use of fill in the SFHA, it is somewhat disingenuous to state that the NFIP has no influence on private land use in the floodplain. Section 4.1.1.1 discusses the low participation rates for flood insurance policies, and the draft NPEIS concludes that other factors besides the availability of flood insurance may be driving individuals to develop within the floodplain. The 2013 Congressional Research Service report, *The National Flood Insurance Program: Status and Remaining Issues for Congress*, indicates the low participation in the flood insurance market, and identifies five possible explanations for the low market penetration. Of the five possible explanations listed, at least four of those factors would indicate people generally try to avoid purchasing a flood insurance policy, despite their potential flood risk:

- (1) the policy is seen as not being worth the cost,
- (2) a lack of compliance with the mandatory purchase requirement or failure to ensure that property owners maintain coverage for the life of their loan,
- (3) private insurance agents do not market NFIP policies, and
- (4) many homeowners in risky areas either do not have a mortgage or have a mortgage from a lender that does not enforce the mandatory purchase requirement.

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These possible explanations would seem to lend some evidence that many people located within floodplains or developing floodplain land do try to avoid the mandatory flood insurance purchase requirement. Given that FEMA will remove the mandatory purchase requirement through the use of fill to elevate properties above the Base Flood Elevation or in the construction of a levee that limits flood water access to floodplain habitat, there is an incentive to fill floodplain lands. The reality is that the minimum floodplain management criteria **does** incentivize floodplain filling, and FEMA **does** have the authority to alter the criteria to account for the program's impacts on ESA-species or other environmental considerations. FEMA, in its 1976 EIS on the NFIP, commented on the deleterious impacts of fill on floodplain functions and in particular wetlands, but said that structures in general would be elevated on piles or columns instead of fill. However, as stated above, the most common form of elevation is to use fill, not just to meet the elevations requirements, but also to remove the insurance requirement.

In fact, the NPEIS acknowledges the impact that the minimum floodplain management criteria have in prohibiting or limiting local land use authority (language from the NPEIS is indented below). Despite the seemingly contradictory opening sentence, the conclusion of the paragraph demonstrates how local land use is restricted or limited by the established minimum floodplain management criteria of the NFIP for which the vast majority of the communities in the nation (22,000) belong to so their citizens are able to buy flood insurance. A notable NFIP restriction prohibits any fill in the floodway (a significant portion of the floodplain) that would cause any increase in flood elevation. It goes on to say that an analysis indicated that 9,000-square-miles of floodways in the nation have been protected by this requirement.

*Although FEMA does not have the land use authority to restrict development in floodplains, the minimum floodplain management criteria (44 C.F.R. § 60.3) include certain limitations to how such development is carried out that may benefit water resources. One of FEMA's minimum floodplain management criteria is 44 C.F.R. § 60.3(a)(2), which requires communities to ensure that all proposed floodplain development is compliant with Federal and State laws. To the extent that the FEMA requirement in 44 C.F.R. § 60.3(a)(2)—that communities are required to comply with Section 404 of the Clean Water Act (CWA) for all proposed floodplain development—increases compliance with the CWA, this requirement benefits water resources, including surface and groundwater quality, floodplain functions, and aquatic ecosystems, because the CWA was promulgated for the protection of these resources.*

*Also, the minimum criteria include a requirement that, where appropriate analysis has been conducted, encroachment in riverine floodways may not cause an increase in flood heights (subject to limited exceptions). This requirement helps protect hydraulic characteristics of the floodplain by allowing the floodway to function naturally during storm events without increasing flood levels within the community and by assisting in preventing degradation of surface and groundwater quality and protecting aquatic*

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*ecosystems. It was estimated that approximately 9,000 square miles of floodways have been protected by this requirement (AIR - Wetmore et al., 2006). Additionally, per 44 C.F.R. § 60.3(e)(3) and (e)(6), communities cannot locate new construction seaward of mean high tide (e.g., construction cannot occur over water) or place fill within coastal velocity zones (V Zones). Zones V1-30, VE, and/or V identified on FIRMs are considered coastal high hazard areas and subject to tidal surges, wave action, and high winds from storms and hurricanes. These minimum criteria requirements help protect against high water levels, erosion, and scour, which can undercut building foundations and cause degradation of water quality and impacts to aquatic ecosystems. Mangroves and sand dunes are also protected under FEMA's minimum floodplain management criteria. Before these areas may be altered, the community or project proponent must undertake an analysis to demonstrate that the proposed development activities would not increase potential flood damage. By limiting encroachment in mangroves and sand dunes, these natural features continue to protect the shoreline from coastal storms, reduce flood damage to communities, and benefit surface and groundwater quality and aquatic ecosystems.*

Indeed, the statement points to how the criteria (44 CFR §60.3) "increases compliance with the CWA." Despite the opening paragraph stating "FEMA does not have the land use authority to restrict development in floodplains," the paragraph concludes by stating FEMA has, in fact, restricted development in floodplains "by limiting encroachment in mangroves and sand dunes." This again points to the fact that FEMA does have de facto land use authority as does the prohibition of fill in V Zones. Therefore, the minimum floodplain management criteria and the NFIP should be considered a federal nexus or federal action that requires FEMA to consult the services under Section 7 of the ESA regarding impacts related to the NFIP.

### **3. ASFPM Believes the NPEIS is Deficient because it Does Not Recount the History of the NFIP in Regard to ESA Compliance**

The NPEIS does not include any commentary or analysis on one of the more significant controversies in recent years – lawsuits against FEMA for inadequate consultation on the ESA. In response to lawsuits brought under the ESA, FEMA has been required, either by the courts or through settlement agreements, to undertake consultations under the ESA on the implementation of the NFIP in particular communities or regions. In consultations undertaken in Monroe County, Florida, the Puget Sound region of Washington and in Oregon, the services have found the NFIP implementation in those areas was likely to jeopardize the continued existence of threatened and endangered species and adversely modify designated critical habitat.

The NPEIS is intended to consider changes to the NFIP to meet two needs – (a) to implement the legislative requirements of BW-12, and (b) to demonstrate FEMA's compliance with the ESA

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in implementing the NFIP. However, it would seem the second need for the NPEIS should have resulted in addressing the ESA coordination issues that have been identified in these lawsuits and judgements in a more programmatic approach than delegating responsibility to local communities that lack the relevant expertise. If, at a minimum, FEMA does not think that the past lawsuits and judgements are relevant, then there should be justification of why it reached this conclusion.

#### **4. ASFPM Recommends the Reconsideration of what are Considered “Federal Actions” Taken by FEMA through the Administration of the NFIP, including its De Facto Land Use Authority**

In the draft and final NPEIS, FEMA only acknowledges a limited number of program implementation actions that could arguably be perceived as influencing development, and arguably be considered federal actions. On page 2-9, the conclusion that “some perceive that certain actions taken under the NFIP – specifically the issuance of a certain Letter of Map Change (LOMC), mapping a levee system as meeting the requirements for accreditation, or designating a levee system in an AR or A99 Zone – encourage(s) some floodplain development.” This statement leads to the conclusion that FEMA believes that the only program implementation that may potentially be seen as a federal action would be issuing LOMCs, the mapping of accredited levees or the mapping of AR or A99 Zones. ASFPM disagrees with this conclusion.

FEMA does have a greater range of actions it can enact that directly influences local community land use acknowledged above, including the program’s de facto land use authority through the establishment of minimum floodplain management criteria. Other federal actions that can be taken by FEMA through the implementation of the NFIP besides the establishment of the minimum floodplain management criteria include:

- the enrollment, probation or suspension of communities in the program,
- enacting Section 1316 of the National Flood Insurance Act of 1968 (the denial of flood insurance coverage to individual non-compliant properties),
- the admission of communities to the CRS program and the retrograding of CRS communities due to non-compliance,
  - through the writing of individual flood insurance policies or backing policies written by Write-Your-Own (WYO) companies, and
- mandating that NFIP must approve any flood map changes in the community, because those changes determine if a property is subject to NFIP regulation or not, and decides specific regulations that must be met.

ASFPM is disappointed that FEMA did not reconsider the direct and indirect impacts of the NFIP on land use development, especially the incentives to place fill, and the full suite of federal actions that FEMA could take to influence the program’s impact on ESA-species and critical habitats.

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## **5. Because of the NFIP's De Facto Land Use Authority, the NPEIS Effects Analysis for each Alternative Should have been Revisited**

Throughout the alternatives analysis, the NPEIS continues to revisit the statement that because FEMA does not have land use permitting authority, that development in the floodplain cannot be dictated from the federal level and that FEMA has no legal authority under the NFIP to prohibit development within the floodplain. As discussed above, ASFPM does not agree with this assessment. As the NPEIS demonstrates, the current minimum floodplain management criteria does in fact limit encroachment and development in specific habitats (mangroves and coastal dunes). Because of this, and as discussed above, ASFPM believes that FEMA too narrowly limited its analysis of alternatives and the direct/indirect effects analysis for many of the impact criteria.

Several of the impact criteria/attributes should have been thoroughly re-evaluated for the impacts that the program has on those attributes, through setting minimum floodplain management criteria and being able to limit encroachments to protect certain habitats or features, or through incentivizing the use of fill in mapped floodplains. These impact criteria include aesthetics/visual resources, climate change, infrastructure, socio-economic resources, land use planning, water resources and biological resources. ASFPM believes there are significant impacts to several of the criteria that were not noted in the draft NPEIS and continue to be understated in the final NPEIS. In light of the impact that the NFIP may have regarding incentivizing the use of fill in mapped floodplains, this includes assessing whether the NFIP may:

- be considered an action that is likely to adversely affect ESA-species,
- result in substantially reducing the presence of wetlands and riparian areas or other sensitive natural communities,
- substantially reduce or eliminate the suitability or eliminates the connectivity of floral/faunal habitats,
- alter functions of natural communities,
- modify surface water or groundwater quality, or
- modify unique hydrologic characteristics such as floodplain function.

## **6. The Selected Alternative Does Not Adequately Address ESA Concerns and was not Adequately Justified**

Given the history of litigation against FEMA and the NFIP resulting in determinations that the implementation of the NFIP in those locations mentioned above would likely jeopardize threatened or endangered species in those areas, the selected alternative is not adequate in addressing ESA concerns. As discussed above, LOMCs are only a small area where there is a federal nexus that should have some level of consultation. Also, there was no consideration of alternatives that would change basic NFIP standards of 44 CFR §60.3 on a programmatic level so that through consultation with the appropriate federal agencies, basic floodplain

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management standards could address ESA concerns nationally or at a regional or state level, versus burdening communities on a per development basis, also discussed above.

Based in the discussion found in Section 2.3.2, it appears the justification of how the selected alternative was arrived at rested on the stated difficulties in consulting with the services (Alternative 3), and being able to make changes solely under its current legal authorities.

## **7. Alternatives 2, 3 and 4 do not account for Local and Federal Impediments to Implementation – i.e. the Burden on Local Communities and the Services, and whether a Proper Nexus for Consultation Exists**

The alternatives presented do not take into account the fact that most communities do not have the regulatory expertise to incorporate or review floodplain development proposals properly for ESA compliance. While a very few larger communities may already have a process for determining and documenting ESA compliance, the vast majority in the NFIP are smaller rural communities that already struggle with the review and enforcement of the minimum standards of the NFIP. Requiring communities to enforce the ESA creates one more regulatory impediment to being able to successfully implement the NFIP at the local level, providing one more hurdle for getting communities to join the NFIP.

In addition to the increased complexities for local communities to determine if ESA-compliance is needed and met, there appears to be some ambiguity as to whether individuals or communities have a true nexus for ESA consultation under Section 10 of the ESA. Section 10 consultation was originally intended for large, contiguous landscape management, not for small individual floodplain development proposals. In addition, the current process of obtaining an incidental take permit requires the development of a habitat conservation plan, which will result in a patchwork quilt of conservation plans across a landscape that may or may not be coordinated between landowners, developers or the community.

Conversely, there is no acknowledgement of the federal personnel costs associated with nationwide implementation for ESA, either through community-by-community consultation, or through consultation for each individual proposal.

Some additional discussion is found in Section 4.5.3.1.3 that does acknowledge the demand on public and private resources, which includes the need to obtain local approvals. This is acknowledged, though more for the potential to pass the cost of review onto private developers. Section 4.3.1.3.3 discusses the burden and cost to communities for implementing Alternative 2, but does not discuss the burden of implementing Alternatives 3 or 4. Additionally, the discussion in Section 4.3.1.3.3 assumes there is local knowledge or expertise available to assess ESA consultation and compliance, and only comments on the potential administrative cost. For most of the smaller, rural communities that rarely issue floodplain development permits, basic NFIP implementation is already a significant burden for them to administer the minimum floodplain management criteria adequately. The addition of a complex consultation process can result in greater non-compliance of local floodplain permitting, or lack of understanding of the ESA implications of a proposed

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development. If a community outsources its ESA compliance/consultation process to a consulting company, it could significantly increase the cost to the homeowner or developer, again discouraging communities from joining the NFIP, and thus having more buildings without a flood insurance policy getting flooded, burdening the federal taxpayer with more disaster assistance and resulting in less resilient communities.

As discussed above, the selected alternative (Alternative 2) does not adequately address ESA concerns due to its limited scope and application. A more appropriate analysis of the impacts to implementation of Alternatives 3 and 4 would have likely shown that addressing ESA concerns through a community-by-community approach will be unnecessarily burdensome.

## **8. The NPEIS Analysis and Alternatives does not Adequately Account for Climate Change or other Flood-Related Hazards such as Riverine or Coastal Erosion. FEMA should have revisited the Alternatives that were not Brought Forward and Analyzed**

Although FEMA presented proposed alternatives that it did not consider in Section 2.4.5 of the NPEIS, the discussion of why preliminary evaluations justified that these alternatives were not considered is inadequate. ASFPM believes that at least three of the alternatives presented should have been considered in the draft NPEIS. These three alternatives include changes to the LOMR-F process (prohibition of fill), expanding the applicability of the NFIP minimum standards out beyond the 1% annual chance floodplain, and better implementation of future conditions mapping.

**LOMR-F process:** With more focus on potential changes to the requirement for a CLOMR-F, and a better acknowledgement that fill in the floodplain negatively impacts neighboring property owners, and water and biological resources, changes to the LOMR-F/CLOMR-F process are a reasonable alternative. Changes to the state or local requirements where fill is the only means of properly elevating structures would seem to be no less burdensome than the process that is presented for the requirement for local communities to consult regarding ESA compliance. As FEMA already prohibits the use of structural fill in V Zones, the extension of this prohibition to the entire floodplain is a reasonable alternative to consider for reducing impacts to threatened and endangered species.

**Revise the 1% annual chance flood event to another standard to expand the applicability of the floodplain management criterial:** FEMA discounts this as a viable alternative for ESA compliance by indicating that expansion of the regulated floodplain may not result in promoting the conservation of threatened and endangered species. However, the evidence presented throughout Section 4.3.3 and 4.3.4 indicates that the protection of floodplain habitat and functions is a beneficial effect on sensitive natural communities, water resources, etc. The recent Waters of the United States rule developed a publication titled, [Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence](#). In this report, there is discussion of the importance of floodplain connection to riparian habitats and species. Other existing reports also provide justification to reconsider this alternative. ASFPM is disappointed FEMA did not provide a better consideration and assessment of how the

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expansion of the 1% annual chance flood event may relate to better protection of threatened or endangered species, or the protection of critical habitat.

**Incorporating climate change in flood maps:** The 2015 TMAC [Future Conditions Risk Assessment and Modelling Report](#) noted there may not currently be sufficient, actionable science and mapping methodologies to implement changes to FEMA's flood hazard mapping to account for climate change in its flood maps. However, TMAC does state the impacts of future development, land use change and erosion hazards can currently be incorporated into FEMA's flood risk mapping products.

ASFPM believes future sea level rise and increased storm intensity (to determine rainfall/runoff and flood elevations), can be readily determined if FEMA were to collaborate with other key federal agencies like USACE, USGS and NOAA, and agree on an appropriate national methodology. In addition to the three alternatives presented, modifications to the LOMR-F process, expanding the NFIP minimum standards beyond the 1% annual chance flood and future conditions mapping, FEMA should also consider supporting state or local efforts to map other flood hazards such as riverine erosion.

In February 2016, ASFPM issued a white paper titled [ASFPM Riverine Erosion Hazards](#). The main purpose of the paper "is to encourage state and local governments to begin mapping riverine erosion hazard areas in their communities. The mapping should be carried out using methodologies they feel are appropriate for their specific conditions and at a level of detail that meets their specific requirements." In addition, FEMA's September 1999 paper "Riverine Erosion Hazard Areas Mapping Feasibility" stated this mapping was technically feasible. While ASFPM does not advocate for FEMA to map erosion hazards with one set national methodology, we do encourage FEMA to consider and support the mapping efforts of state and local communities. Similar to a performance standard, FEMA can support the mapping of other flood hazards besides erosion to better identify and account for how the implementation of the NFIP can impact ESA-species or critical habitat.

ASFPM appreciates the opportunity to provide comments on this important issue. We trust that FEMA will continue to coordinate with us during this process. Please contact ASFPM Executive Director Chad Berginnis with any questions or concerns at (608) 828-3000 or at [cberginnis@floods.org](mailto:cberginnis@floods.org) or ASFPM Senior Policy Advisor Larry Larson at [larry@floods.org](mailto:larry@floods.org).



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