



## ASSOCIATION OF STATE FLOODPLAIN MANAGERS, INC.

575 D'Onofrio Drive, Suite 200, Madison, Wisconsin 53719 [www.floods.org](http://www.floods.org)

Phone: 608-828-3000 Fax: 608-828-6319 Email: [asfpm@floods.org](mailto:asfpm@floods.org)

June 6, 2017

Regulatory Affairs Legal Division  
Office of Chief Counsel  
Federal Emergency Management Agency  
500 C Street SW, Room 8NE  
Washington, DC 20472-3100

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

Thank you for the opportunity to comment on the draft Nationwide Programmatic Environmental Impact Statement (NPEIS) for the National Flood Insurance Program.

The Association of State Floodplain Managers (ASFPM) is a national professional organization representing 17,000 members at the local, state, regional and private sector who are dedicated to managing flood risk to reduce flood damage and taxpayer costs from flood disasters. Our members work in local, state and private sector to protect natural systems that help reduce flooding and provide our natural resources. For most, their primary function is helping in the administration of 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. It is important to note that of the 22,000 communities that belong to the NFIP, 6,000 of those communities wouldn't have any 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 do have concerns over the analysis of impacts to ESA species and critical habitat included in the draft 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. Practitioners understand the chronic understaffing of the services 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. 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.

### **Recommendations**

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

With the NFIP set to expire Sept 30, 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 draft NPEIS. If the 2017 NFIP reauthorization includes significant new circumstances or program elements, FEMA would 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 delays 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 draft NPEIS, FEMA asserts that the agency is not responsible for private floodplain development, and therefore, is not responsible for ensuring floodplain development is compliant with the ESA. The draft 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.

Page 2-2 of the draft 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 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 local floodplain development through the establishment of the minimum floodplain management criteria. It is through the minimum criteria that 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, as found on page 4-110, "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 has 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 (SFHA). 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, would likely show that 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) policy is seen as not being worth the cost,
- (2) 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.

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** facilitate and incentivize floodplain filling, and FEMA **does** have the authority to alter the criteria to account for the program's impacts on ESA-species or environmental considerations.

In fact, the draft NPEIS seems to acknowledge the impact that the minimum floodplain management criteria have in prohibiting or limiting local land use authority. Despite the seemingly contradictory opening sentence, the conclusion of the paragraph does demonstrate how local land use can be restricted or influenced by the established minimum floodplain management criteria.

*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 benefit biological resources. To the extent that the FEMA requirement in 44 C.F.R. § 60.3 provides floodplain management regulations increases compliance with the CWA, this requirement benefits biological resources by providing protections for habitat, including surface and groundwater quality, floodplain functions, and aquatic ecosystems, because the CWA was promulgated to protect these resources. The minimum criteria include a requirement that, subject to limited exceptions where appropriate analysis has been conducted, encroachment in riverine floodways may not cause an increase in flood heights. This requirement helps protect biological resources within the floodplain by providing habitat protection during storm events, preventing degradation of surface and groundwater quality, and protecting aquatic ecosystems... 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)** (emphasis added), which provides further protections to coastal ecosystems. 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** (emphasis added). 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** (emphasis added), 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, and therefore, the minimum floodplain management criteria and the NFIP would be considered a federal nexus or federal action that would require FEMA to consult the services under Section 7 of the ESA regarding impacts related to the NFIP.

### **3. ASFPM Believes that the Draft 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 that the implementation of the NFIP in those areas was likely to jeopardize the continued existence of threatened and endangered species and adversely modify designated critical habitat.

The draft 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 in implementing the NFIP. However, it would seem the second need for the NPEIS should be identified to more properly address ESA coordination issues that have been identified in these lawsuits and judgements. If, at a minimum, FEMA does not think that the past lawsuits and judgements are relevant, then there should be justification of why this 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 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 2-8, 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.

However, 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 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 urges FEMA to reconsider the direct and indirect impacts of the NFIP on land use development, and to reconsider the full suite of federal actions that FEMA may take that may influence the program’s impact on ESA-species and critical habitats.

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

Throughout the alternatives analysis on the impact criteria, the draft 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 draft NPEIS demonstrates that 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 has 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 be 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. 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 Preferred Alternative Does Not Adequately Address ESA Concerns and was not Adequately Justified as the Preferred Alternative**

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 the threatened or endangered species in those areas, the preferred 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 management standards could address ESA concerns 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 preferred 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 for the fact that most communities do not have the regulatory expertise to incorporate or review floodplain development proposals properly for ESA compliance. While a few larger regulatory or planning-savvy communities may have (or already) have a process for determining and documenting ESA compliance, many of the smaller rural communities that already struggle with the review and enforcement of the NFIP would have 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. This would also apply to a local community being able to assess whether the proposed ESA mitigation would sufficiently mitigate impacts to listed species.

In addition to the increased complexities for local communities to determine if ESA-compliance is needed, 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 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. In many cases, many of the smaller, rural communities that rarely issue permits for floodplain development, basic NFIP implementation is already be a significant burden for them to adequately administer the minimum floodplain management criteria. An additional complex consultation process can result in greater non-compliance of local floodplain permitting, or lack of understanding of the ESA implications of a proposed 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 preferred 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 also likely show that addressing ESA concerns through a community-by-community approach would be unnecessarily burdensome. Perhaps a reconsideration of Alternative 3 or 4 would be for FEMA to take the lead in regions, or for specific species, to develop and consult with the services and the participating states and communities. This effort would be to develop alternative minimum floodplain management criteria in order to avoid jeopardy to ESA-listed species or in order to avoid adverse modification to designated critical habitat through the implementation of the NFIP in that community.

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

Although FEMA presented proposed alternatives that they did not consider in Section 2.4.5 of the draft NPEIS, the discussion of why preliminary evaluations justified why 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, 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 would negatively impact neighboring property owners, and water and biological resources, changes to the LOMR-F/CLOMR-F process could be 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.

**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 urges FEMA to provide a better consideration and assessment of how the 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 thus flood elevations), can be readily determined if FEMA will collaborate with other key Federal agencies like USACE, USGS and NOAA and agree on an appropriate national methodology.

In addition to the two alternatives presented, 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.” 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).

A handwritten signature in black ink, appearing to read 'Chad Berginnis', with a long horizontal flourish extending to the right.

ASFPM Executive Director  
Chad Berginnis