

CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS

Policy Session Worksheet

Presentation Date: November 7, 2024 **Approx. Start Time:** 2:00 pm **Approx. Length:** 1 hour

Presentation Title: National Flood Insurance Program Potential Compliance Measures

Department: Transportation and Development

Presenters: Dan Johnson, DTD Director, and Jennifer Hughes, Planning Director

WHAT ACTION ARE YOU REQUESTING FROM THE BOARD?

Staff is requesting direction on how, or whether, to proceed with implementation of new requirements for continued National Flood Insurance Program participation.

EXECUTIVE SUMMARY:

There are 980 National Flood Insurance policies in the County, representing approximately \$291 million in covered improvements. Due to litigation over the impact of federal flood insurance rules on endangered species, the Federal Emergency Management Agency (FEMA) has announced it will implement new zoning and permitting requirements for communities to remain part of the National Flood Insurance Program. By December 1, 2024, FEMA expects the County to have chosen one of three options if it wishes to remain in the flood insurance program:

1. Adopt a model ordinance that considers impacts to species and their habitat and requires mitigation to a no net loss standard;
2. Require a habitat assessment and mitigation plan for development on a permit-by-permit basis; or
3. Prohibit development in the Special Flood Hazard Area (SFHA), or approximately 15,000 acres of County land.

If the County does not notify FEMA of a choice, FEMA's default expectation is that the County will implement the permit-by-permit pathway.

It is unclear if FEMA has the authority to require this choice and there appear to be conflicts between the FEMA directives and state land use law. However, failure to comply with FEMA requirements could risk participation in the National Flood Insurance Program.

Each option would create additional burdens for property owners within the County's SFHA (since 2016, Planning and Zoning has processed an average of 29 SFHA development applications per year). Imposing new requirements for development will likely require amendments to the County's Zoning and Development Ordinance, which would begin with the adoption of one of these measures.

This policy session will allow staff to understand the Board's perspective before conducting further study of potential options.

Background

To be a participating community in the National Flood Insurance Program (NFIP), the County is required to regulate development in the Special Flood Hazard Area (SFHA), which is area mapped as having a one percent or greater chance of flooding in any given year. See **Attachment A** for the mapped SFHA in Clackamas County. Clackamas County currently has jurisdiction over approximately 15,000 acres, or 2.5 percent of the total land area, of SFHA. The majority of the SFHA is farm- or forest-zoned lands. However, preliminary mapping identifies roughly 1,000 acres of SFHA in the unincorporated urban area and as much as 3,000 acres in rural residential zones.

The NFIP is managed by FEMA. If a local government chooses not to participate in the NFIP, there are several notable consequences:

- No resident will be able to purchase an NFIP policy. (Private flood insurance may be available, but staff is unsure how developed this market is and how affordable the coverage is relative to the NFIP.)
- Existing NFIP flood insurance policies will not be renewed. FEMA estimates there are approximately 980 National Flood Insurance Program policies in Clackamas County, representing \$291 million in covered improvements.
- No federal grants or loans for development will be made in the SFHA under programs administered by federal agencies such as HUD, EPA, and SBA.
- No federal disaster assistance will be provided to repair insurable buildings located in the SFHA for damage caused by a flood.
- No federal mortgage insurance or loan guarantees will be provided in the SFHA. This includes policies written by FHA, VA, and others.
- Federally insured or regulated lending institutions, such as banks and credit unions, must notify applicants seeking loans for insurable buildings in the SFHA that there is a flood hazard and that the property is not eligible for federal disaster relief.

The Clackamas County Zoning and Development Ordinance (ZDO) includes a Floodplain Management District that applies to the SFHA. In this overlay zoning district, development is subject to regulations that meet or exceed the minimum requirements for NFIP participation. Currently, these regulations focus on minimizing loss to life and property from flooding by applying certain construction standards and limiting fill and floodway development. They also contribute to the County's compliance with Oregon Statewide Planning Goal 7, *Areas Subject to Natural Hazards*. Since 2016, Planning and Zoning has processed an average of 29 development applications annually in the SFHA.

Based on the following, it seems clear that the NFIP regulations will move toward acting as habitat protection.

- In response to a 2009 federal lawsuit arguing that the NFIP violates the Endangered Species Act (ESA), FEMA entered into a negotiated settlement and agreed to consult with National Marine Fisheries Service (NMFS).
- NFMS issued a Biological Opinion (BiOp) to FEMA regarding FEMA’s implementation of the NFIP in Oregon
- The BiOp concluded that FEMA’s implementation of the NFIP in Oregon was resulting in:
 - Jeopardy to 16 ESA-listed anadromous fish species and Southern Resident killer whales; and ▪
 - The destruction or adverse modification of designated or proposed critical habitat.
- The BiOp included a “Reasonable and Prudent Alternative” (RPA), which imposes a “no net loss or beneficial gain” standard on all SFHA development in 30 Oregon counties and cities within those counties. See **Attachment B** for the affected area.
- The RPA effectively shifts the burden from FEMA to local jurisdictions to adopt more restrictive development standards for the SFHA
- FEMA issued a Draft Implementation Plan in October 2021

The Implementation Plan calls for “no net loss” of three floodplain functions on properties within the SFHA:

- Flood storage -> *restricts placement of fill*
- Water quality -> *restricts addition of impervious surface*
- Riparian habitat -> *restricts removal of vegetation*
- This translates to significant reductions in development capacity and development restrictions for SFHA properties
- FEMA has initiated environmental review of the Implementation Plan under the National Environmental Policy Act (NEPA)
- Through an Environmental Impact Statement (EIS), FEMA will consider the effects of the proposed Implementation Plan on the natural, physical and human environment.
- FEMA issuance of the draft EIS is anticipated in early 2025
- Full implementation of the final plan is expected in 2027. Additional regulations, beyond those required by the pre-implementation compliance measures (PICMs) discussed below, may be mandated with full implementation.

Issue

On July 15, 2024, Clackamas County was notified by the FEMA of new requirements for PICMs (i.e., implementation measures in advance of full implementation of the response to the BiOp anticipated in 2027). See **Attachment C**.

FEMA has directed NFIP participating cities and counties in the affected area to select one of the following PICM options by December 1, 2024:

1. Adopt a model ordinance that considers impacts to species and their habitat and requires mitigation to a no net loss standard;
2. Require a habitat assessment and mitigation plan for development on a permit-by-permit basis; or
3. Prohibit development in the SFHA.

If a community fails to inform FEMA of its selection, FEMA states that the community will default to the permit-by-permit PICM pathway. If the model code option is selected, code adoption must occur by July 31, 2025; however, the permit-by-permit option must be implemented until code adoption is final.

Failure to implement a PICM may result in a compliance visit. Noncompliance with FEMA's requirements could result in the County being removed from the NFIP, which has significant consequences for the County and its residents and property owners.

Next Steps

There are a number of practical and legal issues related to implementing any of the PICMs. Broadly:

- It is unclear if FEMA has the authority to require the PICMs.
- There appear to be conflicts between the FEMA directives and state land use law.
- Each of the PICMs will impose new burdens on owners of property in the SFHA.
- Both the model code and the site-by-site habitat assessment will impose new burdens on the County, specifically in the Planning and Zoning program, to administer new regulations.
- Amending the ZDO will require an extensive public process, including individual notice to all owners of property in the SFHA and public hearings. Staff anticipates a high degree of public interest and participation. This project is not on the Long Range Planning work program for the current two-year work program period that ends on June 30, 2025.

Despite these significant concerns, also concerning is any failure to act that may result in a compliance visit from FEMA, jeopardize the County's continued participation in the NFIP, or lead to risk to the County under the ESA.

Given the substantial amount of SFHA in the unincorporated County and the number of affected properties (approximately 5700 tax lots are partially or wholly in the SFHA, at least 3200 of which are developed with improvements valued at more than \$10,000), selecting the PICM option of prohibiting all development in the SFHA does not appear to be feasible.

FEMA has just kicked off a series of technical workshops that are designed to provide more detail on the model code and site-by-site habitat assessment PICM options. Over the next few weeks, key Planning and Zoning staff will have the opportunity to attend these workshops. The hope is that staff will then be better able to provide the Board with a detailed analysis of the pros and cons of these two options.

FEMA has directed affected local governments to begin implementing the site-by-site habitat assessment on December 1, 2024, even if another PICM is ultimately adopted.

However, it is staff's opinion that we must amend the ZDO to impose new requirements for development, even if the site-by-site approach is taken; that amendment process will take time. Although there are no guarantees, it appears likely that if the County establishes a reasonable schedule for implementation of a PICM and works toward compliance, FEMA is unlikely to move forward with enforcement in the near-term.

FINANCIAL IMPLICATIONS (current year and ongoing):

Is this item in your current budget? YES NO

What is the cost? Existing staff time, amount is unknown What is the funding source? Existing budgeted General Fund support of the Long Range Planning program

This project will require prioritizing staff time to this project at the expense of other work.

STRATEGIC PLAN ALIGNMENT:

- How does this item align with your Department's Strategic Business Plan goals?

The project aligns with the Long-Range Planning program's purpose of providing land use and transportation plan development, analysis, coordination, and public engagement services to residents; businesses; local, regional, and state partners; and County decision-makers so they can plan and invest based on a coordinated set of goals and policies that guide future development.

- How does this item align with the County's Performance Clackamas goals?
- It aligns with the Performance Clackamas goal to **Honor, utilize, promote and invest in our natural resources.**

LEGAL/POLICY REQUIREMENTS:

FEMA has advised that the County must select and implement one of the PICMs to remain compliant with the requirements for continued participation in the NFIP. In addition, the BiOp determined that the NFIP in its current form is inconsistent with the ESA. Regardless of NFIP participation, the County may be subject to the ESA as it relates to development in the SFHA. Finally, there are concerns that aspects of PICM implementation are inconsistent with provisions in Oregon land use law.

The net result is that the County is placed in a difficult position. Additional legal analysis by the Office of County Counsel and coordination with FEMA and state agencies may provide clearer guidance as this project progresses.

PUBLIC/GOVERNMENTAL PARTICIPATION:

Public notice will be provided as required by law for any proposed amendments to the Comprehensive Plan or the ZDO that may eventually come before the Planning Commission or Board for consideration at public hearings. The public will have the opportunity to comment on any proposed amendments at public hearings before the Planning Commission and the Board.

OPTIONS:

1. Direct staff to:
 - Conduct detailed technical and legal analysis of two of the three pre-implementation compliance measure options: the model code and the site-by-site habitat assessment
 - Submit a draft pre-implementation compliance measure implementation schedule to FEMA
 - Return to the Board for a policy session as close to the Federal Emergency Management Agency’s December 1 deadline as feasible to share the findings and consider selection of a pre-implementation compliance measure.

2. Direct staff to draft Comprehensive Plan and ZDO amendments and schedule public hearings to implement the third PICM option, which is to prohibit all development in the SFHA

3. Direct staff to do no further work at this time

RECOMMENDATION:

Staff recommends Option 1.

Direct staff to:

- Conduct detailed technical and legal analysis of two of the three pre-implementation compliance measure options: the model code and the site-by-site habitat assessment
- Submit a draft pre-implementation compliance measure implementation schedule to FEMA
- Return to the Board for a policy session as close to the Federal Emergency Management Agency’s December 1 deadline as feasible to share the findings and consider selection of a three pre-implementation compliance measure.

ATTACHMENTS:

- A. Maps of the SFHA in Clackamas County
- B. Map of the area subject to the BiOp
- C. FEMA letter directing the County to select a PICM

SUBMITTED BY:

Division Director/Head Approval _____

Department Director/Head Approval *Dan Johnson*

County Administrator Approval _____

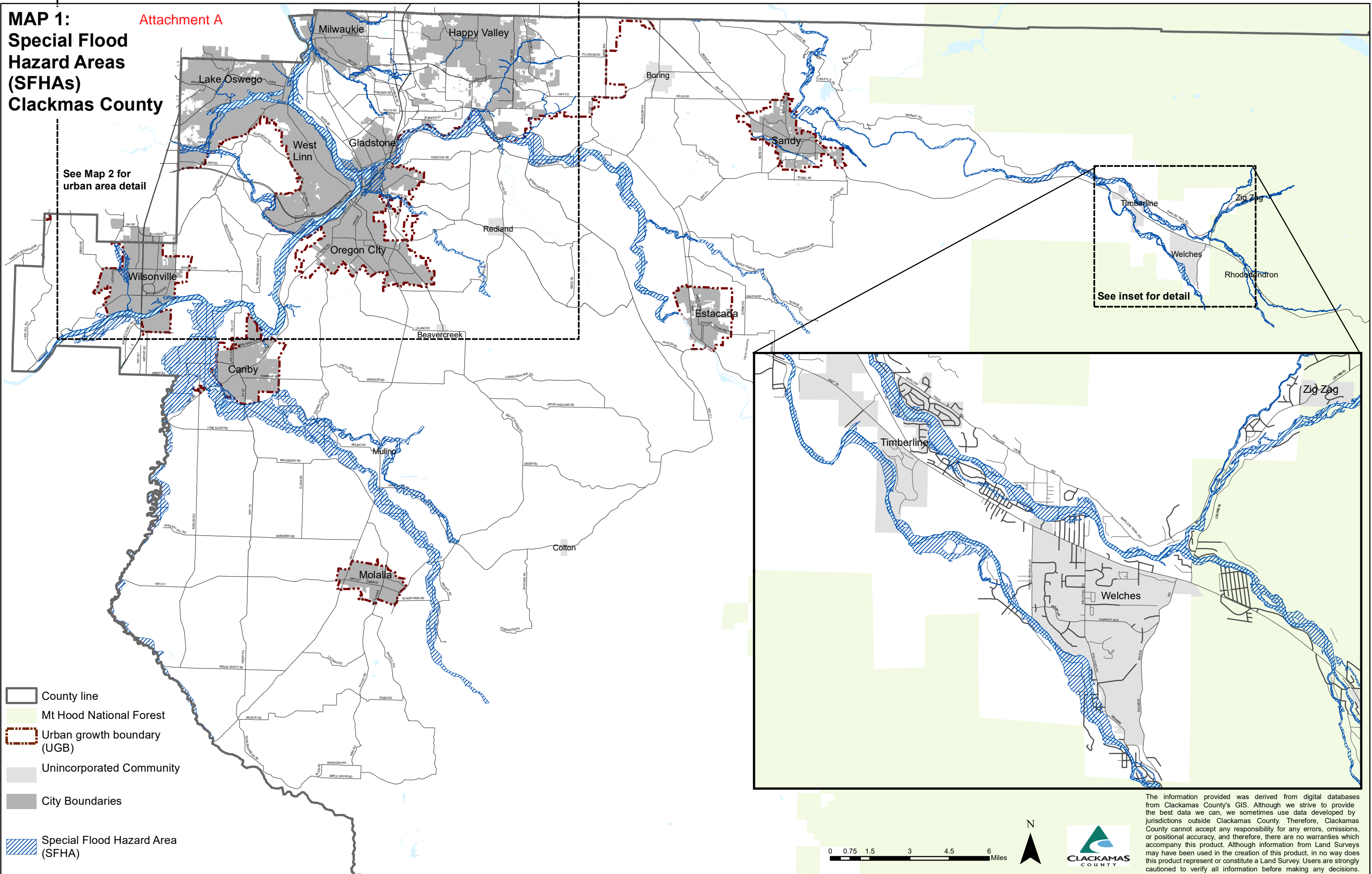
For information on this issue or copies of attachments, please contact Jennifer Hughes @ 503-742-4518.


MAP 1:
Special Flood Hazard Areas (SFHAs)
Clackamas County

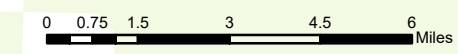
Attachment A

See Map 2 for urban area detail

See inset for detail



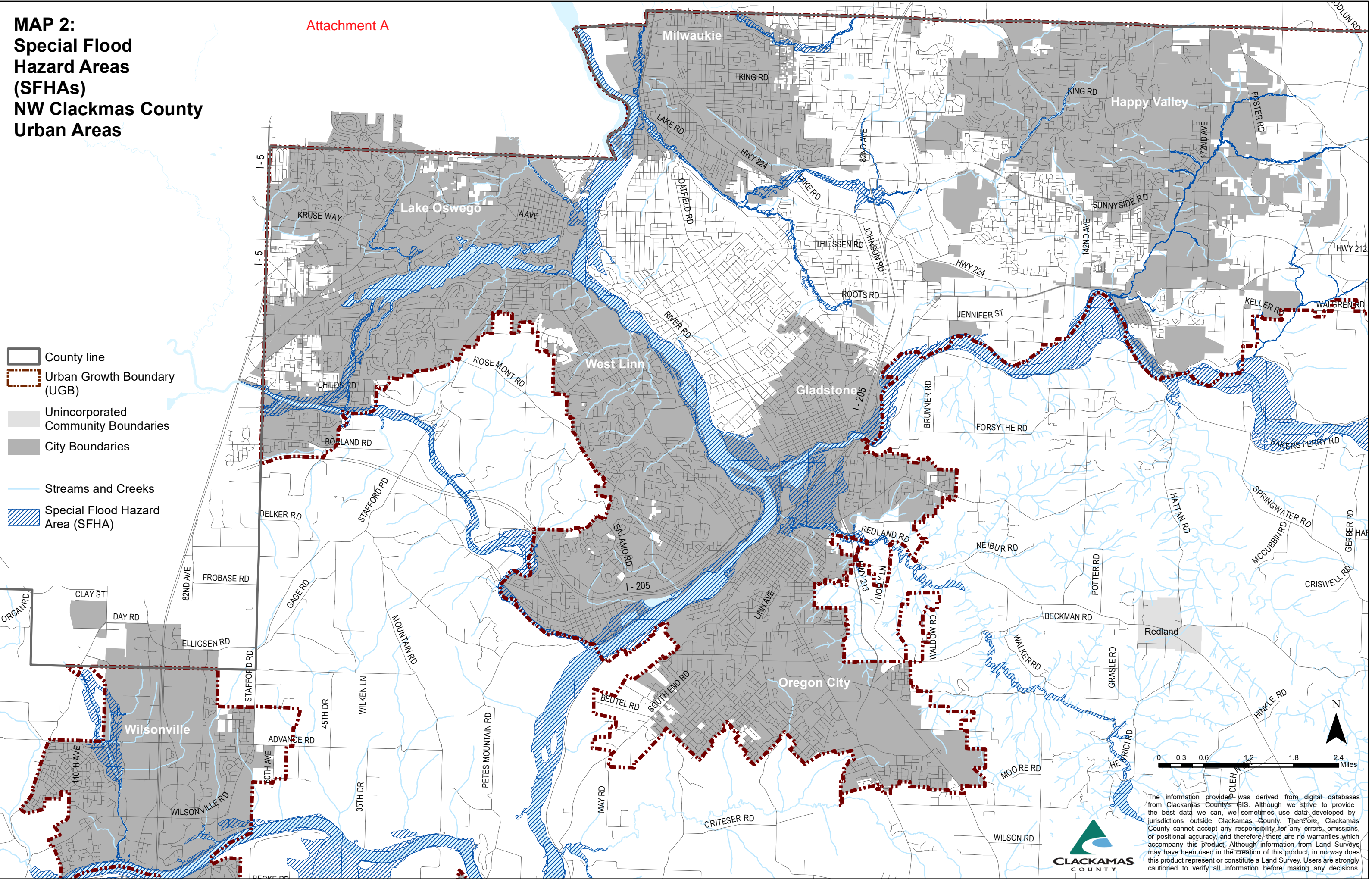
-  County line
-  Mt Hood National Forest
-  Urban growth boundary (UGB)
-  Unincorporated Community
-  City Boundaries
-  Special Flood Hazard Area (SFHA)



The information provided was derived from digital databases from Clackamas County's GIS. Although we strive to provide the best data we can, we sometimes use data developed by jurisdictions outside Clackamas County. Therefore, Clackamas County cannot accept any responsibility for any errors, omissions, or positional accuracy, and therefore, there are no warranties which accompany this product. Although information from Land Surveys may have been used in the creation of this product, in no way does this product represent or constitute a Land Survey. Users are strongly cautioned to verify all information before making any decisions.

**MAP 2:
Special Flood
Hazard Areas
(SFHAs)
NW Clackamas County
Urban Areas**

Attachment A

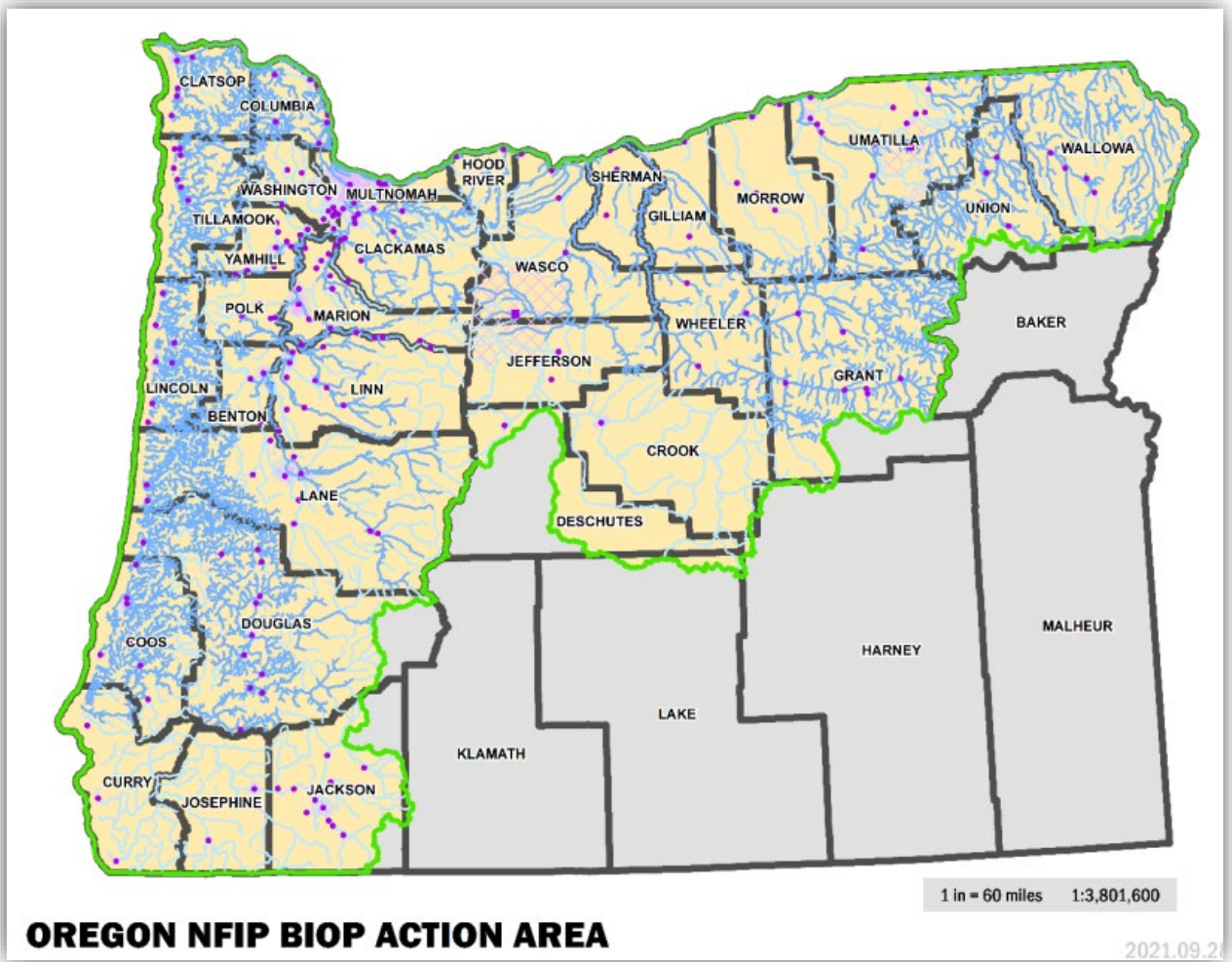


- County line
- Urban Growth Boundary (UGB)
- Unincorporated Community Boundaries
- City Boundaries
- Streams and Creeks
- Special Flood Hazard Area (SFHA)



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FEMA

July 15, 2024

Gary Schmidt
2051 Kaen Road
Oregon City, Oregon 97045

Dear Gary Schmidt:

The purpose of this letter is to announce the start of the United States Department of Homeland Security's Federal Emergency Management Agency's (FEMA) Pre-Implementation Compliance Measures (PICM) for National Flood Insurance Program (NFIP) participating communities in Oregon. The intent of PICM is to ensure the continued existence of threatened or endangered species in compliance with the Endangered Species Act (ESA). These measures include coordination with communities to provide appropriate technical assistance, help identify available resources, deliver trainings, and facilitate workshops to ensure on-going community participation in the NFIP. These pre-implementation compliance measures will assist communities in preparing for the Final NFIP-ESA Implementation Plan by helping them develop short and long-term solutions to ensure their on-going participation in the NFIP.

FEMA is currently conducting a National Environmental Policy Act (NEPA) evaluation of impacts associated with the Oregon NFIP-ESA Implementation Plan. FEMA developed this plan, in part, due to a Biological Opinion in 2016 from National Marine Fisheries Services. The Biological Opinion recommended specific measures for FEMA to take to avoid jeopardizing endangered species, including interim compliance measures. The release of the Final Implementation Plan (Plan) is anticipated by 2026, following the Record of Decision in the Environmental Impact Statement (EIS) process, then FEMA will fully implement the Plan in 2027.

FEMA has heard concerns from several communities regarding challenges they are facing to meet the expectations of this Plan. To provide communities with the support needed to incorporate ESA considerations to their permitting of development in the floodplain, FEMA will inform, educate, and support our Oregon NFIP participating communities through the PICM before the Final Implementation Plan is released.

NFIP participating communities in Oregon must select one of the PICM pathways which include the following: (1) adopt a model ordinance that considers impacts to species and their habitat and requires mitigation to a no net loss standard; (2) choose to require a habitat assessment and mitigation plan for development on a permit-by-permit basis; or (3) putting in place a prohibition on floodplain development in the Special Flood Hazard Area (SFHA). Communities must pick a PICM pathway by December 1, 2024. If a community fails to inform FEMA of its selection, they will default to the permit-by-permit PICM pathway. Communities will be required to report their floodplain development activities to FEMA beginning in January of 2025. Failure to report may result in a compliance visit.

As a part of the PICM, FEMA will implement a delay in the processing of two types of Letters of Map Changes in the Oregon NFIP-ESA Implementation Plan area, specifically Letters of Map Changes associated with the placement of fill in the floodplain: Conditional Letter of Map Revision Based on Fill (CLOMR-F) and Letter of Map Revision Based on Fill (LOMR-F) requests. This action was specifically requested by NMFS in their 2016 Biological Opinion and serves to remove any perceived programmatic incentive of using fill in the floodplain. This delay in processing will begin on August 1, 2024, and will be in place until the Final Implementation Plan is released.

Your community's ongoing participation in the NFIP is critical, as it provides access to flood insurance for property owners, renters, and businesses. In Clackamas County there are currently 980 of NFIP policies in force representing \$290784000 in coverage for your community.

FEMA will be conducting informational virtual webinars this summer to provide an overview and status update for the Oregon NFIP-ESA integration, introduce the Pre-Implementation Compliance Measures, and provide an opportunity for Oregon NFIP floodplain managers to ask questions of FEMA staff. In the fall, FEMA will hold workshops to provide in-depth opportunities for local technical staff to work with FEMA technical staff, to understand and discuss issues relating to the PICM.

The webinars will be held virtually over Zoom. The information at each webinar is the same so your jurisdiction only needs to attend one. You can register for a webinar using the links below.

- Wednesday, July 31 at 3-5pm PT: <https://kearnswest.zoom.us/meeting/register/tZEkc-murjstGdPJiFioethjRk-id8N-k0hj>
- Tuesday, August 13 at 9:30-11:30am PT: <https://kearnswest.zoom.us/meeting/register/tZAod-istrTsqGN0KqckRLPPEaZuu4rv96lcR>
- Thursday, August 15 at 2-4pm PT: https://kearnswest.zoom.us/meeting/register/tZlqcOGpqDojHtTXaa946aI9dMpCTcJIH_zt
- Wednesday, August 21 at 12:30-2:30pm PT: <https://kearnswest.zoom.us/meeting/register/tZYqcuGsrD8rH9DZO22vG0v9KrNzVeUZA9gy>

FEMA will also develop a questionnaire to allow communities to identify how they currently incorporate or plan to incorporate ESA considerations, both in the short-term and long-term. To assist communities in making this determination, FEMA will be offering guidance on the potential pathways that help ensure current compliance. Communities will also be asked to help identify what technical assistance and training would be most beneficial. Feedback from this questionnaire will drive FEMA's engagement and outreach.

Upon completion of the Environmental Impact Statement review and determination, the Final Implementation Plan will be distributed along with several guidance documents and a series of Frequently Asked Questions. FEMA will also be starting NFIP Compliance Audits, in which we will be reviewing permits issued by communities for development in the floodplain and will expect the community to be able to demonstrate what actions are being taken to address ESA considerations.

If you have any questions, please contact us through our project email address fema-r10-mit-PICM@fema.dhs.gov. Thank you for your community's on-going efforts to reduce flood risk in your

Schmidt
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community and for your support as we worked toward these milestones.

Sincerely,

A handwritten signature in blue ink, appearing to read "Willie G. Nunn", with a horizontal line extending to the right.

Willie G. Nunn
Regional Administrator
FEMA Region 10

cc: BenBlessing, Clackamas County
John Graves, Floodplain Management and Insurance Branch Chief
Deanna Wright, Oregon State National Flood Insurance Program Coordinator

Enclosure: Pre-Implementation Compliance Measures Fact Sheet

Oregon National Flood Insurance Program Endangered Species Act Integration

Pre-Implementation Compliance Measures Overview

Beginning this summer, FEMA will assist communities with coming changes to the National Flood Insurance Program (NFIP) in Oregon.

Why are the changes needed?

As the result of a Biological Opinion issued by the National Marine Fisheries Service, communities are required to demonstrate how floodplain development is compliant with the Endangered Species Act in Special Flood Hazard Areas. Changes are needed to protect the habitat of several species of fish and the Southern Resident killer whales to comply with the Endangered Species Act (ESA). FEMA outlined these changes in the [draft Oregon NFIP-ESA Implementation Plan](#).

Current status

FEMA is evaluating proposed changes to the NFIP outlined in the Implementation Plan through an environmental impact statement (EIS), in compliance with the National Environmental Policy Act (NEPA).



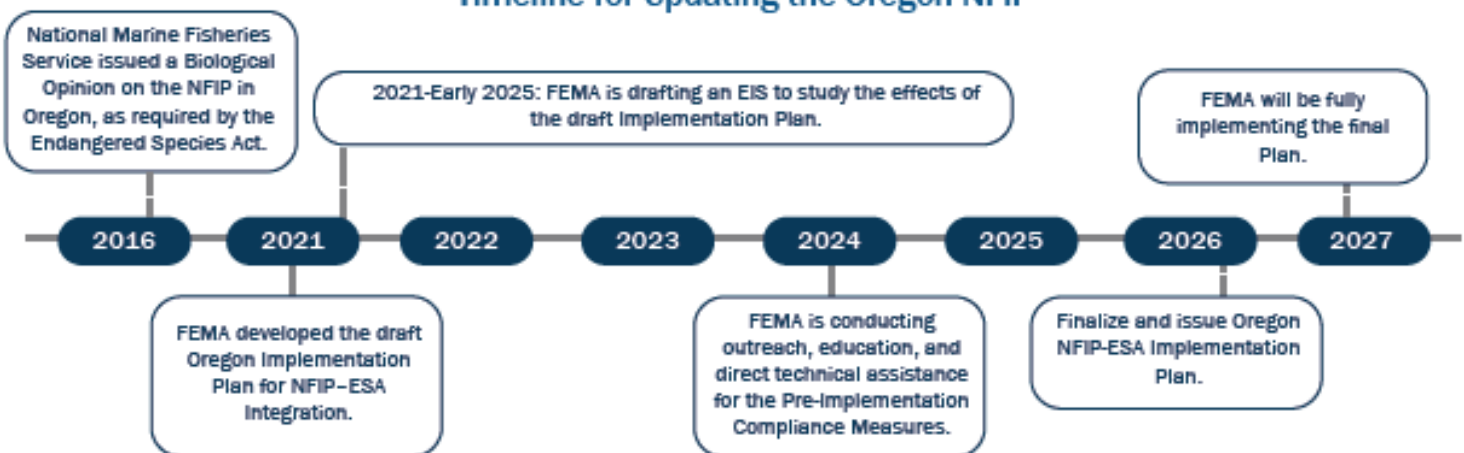
The National Flood Insurance Program serves to protect lives and property, while reducing costs to taxpayers due to flooding loss.

What is “no net loss”?

Any development action resulting in negative impacts to one or more key floodplain functions that are then mitigated or avoided to offset said impacts.

The Final Implementation Plan is anticipated by 2026 following the Record of Decision in the EIS process, then FEMA will fully implement the plan in 2027. Until then, communities need to begin taking action to protect habitat and achieve “no net loss.” FEMA is offering several resources for communities to learn more and implement interim measures, called Pre-Implementation Compliance Measures (PICMs).

Timeline for Updating the Oregon NFIP



What can communities do to comply with these changes?

Oregon communities participating in the NFIP can take short-term measures to comply with ESA requirements, known as PICMs. FEMA developed these measures in response to concerns from communities about the time and resources needed to meet requirements and ensure their future good standing in the NFIP. By implementing these measures now, communities will be better prepared for compliance audits, which will begin when the Final Implementation Plan is in place.

Communities can select one of the following three PICMs:

- Prohibit all new development in the floodplain.
- Incorporate the ESA into local floodplain ordinances.
- Require permit applicants to develop a Floodplain Habitat Assessment documenting that their proposed development in the Special Flood Hazard Area will achieve “no net loss.”

Communities must report to FEMA on their implementation of interim measures.

In addition to the above measures, as of August 1, 2024, FEMA is temporarily suspending processing applications for Letters of Map Revision based on Fill (LOMR-Fs) and Conditional Letters of Map Revision based on Fill (CLOMR-Fs) in NFIP communities to avoid potentially negative effects on ESA-listed species.

FEMA is here to support your community.

FEMA is offering several resources to assist communities in preparing for the Oregon NFIP-ESA Implementation Plan.

- **Informational Webinars (Summer 2024):** Learn about what FEMA is doing to revise the Implementation Plan and receive an introduction to the PICMs.
- **Questionnaire (Summer 2024):** Share what floodplain management measures your community is currently implementing to comply with the ESA, which PICMs you’re most interested in, and what support you need. Your feedback will help us plan the fall workshops and identify needs for technical assistance.
- **Workshops (Fall 2024):** Get an in-depth look at PICMs and talk through questions and concerns with FEMA staff.
- **Technical Assistance (Begins in Fall 2024):** Get support from FEMA to begin implementing PICMs.

Learn more and participate

Visit www.fema.gov/about/organization/region-10/oregon/nfip-esa-integration to read the latest information about NFIP-ESA Integration in Oregon.

You can also contact us at FEMA-R10-MIT-PICM@fema.dhs.gov