



MEMORANDUM

To: Clackamas County Planning Commission

From: Ben Blessing, Senior Planner
Taylor Campi, Senior Planner

Date: January 6, 2025

RE: File ZDO-291, *FEMA PICM Implementation*

The purpose of the January 13th study session is to brief the Planning Commission on **ZDO-291**, amendments to the [Comprehensive Plan](#) and [Zoning and Development Ordinance](#) (ZDO) that are needed in order to comply with new floodplain development requirements—Pre-Implementation Compliance Measures (PICM)—for communities that participate in FEMA’s National Flood Insurance Program (NFIP). At this study session, staff will provide background on the County’s floodplain management program, FEMA’s process and new directives for NFIP communities, the County’s options and actions to-date, and anticipated next steps. The Planning Commission will have the opportunity to ask staff questions in order to prepare for an upcoming public hearing on this matter.

BACKGROUND

The amendments that will be included in ZDO-291 are necessary because of the County’s participation in the [National Flood Insurance Program](#) (NFIP). The NFIP was created in 1968 to share the risk of flood losses through flood insurance, and to reduce flood damages by restricting floodplain development.¹ See Attachments A1 and A2 for the mapped SFHA in Clackamas County.

¹ Throughout this memo, the term “**floodplain**” will be used. The regulated floodplain is often referred to as the 100-year floodplain; technically, however, it is the **Special Flood Hazard Area (SFHA)**, which is the area that has been mapped as having a statistical one-percent chance of flooding in any given year.

The NFIP provides a variety of benefits for participating jurisdictions. Clackamas County participates in the NFIP so that:

- Residents can purchase federal flood insurance policies.
- Existing flood insurance policies can be renewed.
- Federal disaster assistance can be provided to repair insurable buildings located in identified flood hazard areas for damage caused by a flood.
- Federal mortgage insurance or loan guarantees can be provided in identified flood hazard areas. This includes policies written by FHA, VA, and others.
- Federal grants or loans for development can be made in identified flood hazard areas under programs administered by Federal agencies such as HUD, EPA, and SBA. Since 2007, **Clackamas County has received over \$4 million in federal Disaster Management funding** for hazard mitigation projects. Participation in the NFIP made the County eligible for this funding.

In order to qualify for participation in the NFIP, the county had to adopt regulations for development in the floodplain that meet FEMA's minimum requirements. These regulations are established in [ZDO Section 703: Floodplain Management District](#). Section 703 serves to protect people and structures from flood danger by establishing strict standards for development in the floodplain, including requirements to elevate or floodproof structures, and criteria for anchoring, foundation design, construction materials, cut and fill, and other factors related to the development's resilience in event of a flood.

However, environmental impacts are not currently addressed in the county's Floodplain Management District. Environmental impacts are addressed in other overlay districts, such as the River and Stream Conservation Areas ([Section 704](#)), Habitat Conservation Areas ([Section 706](#)), and Water Quality Resource Areas ([Section 709](#)). These environmental overlays often overlap with the Floodplain Management District, but not always.

The new directive from FEMA now requires all development in the floodplain to address specific environmental impacts in order to ensure compliance with the Endangered Species Act (ESA). New regulations on development in the floodplain are intended to protect certain fish and marine species listed under the ESA. While final implementation of the changes is anticipated in 2027, earlier this year FEMA directed most Oregon municipalities, including the County, to select and implement one of three [Pre-Implementation Compliance Measures](#) (PICM) in their floodplain development permit process by December 1, 2024. Non-compliance could put at risk the County's NFIP certification, which carries significant consequences.

1. Origin and timeline of new NFIP requirements

In **2009**, environmental advocacy organizations sued FEMA for violating the Endangered Species Act by not consulting with [National Marine Fisheries Service](#)

(NMFS) about how the NFIP could jeopardize threatened species. FEMA resolved the lawsuit by formally consulting with NMFS to review the impact of the NFIP.

In **2016** NMFS issued its [Biological Opinion](#) (BiOp) that concludes that the NFIP in Oregon jeopardizes the survival of several threatened species, including salmon, sturgeon, eulachon, and orcas. The BiOp contained a reasonable and prudent alternative (RPA) with recommendations from NMFS to FEMA on how to avoid jeopardizing the threatened species. The RPA imposes a “no net loss or beneficial gain” standard on all floodplain development in 31 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 floodplain.

In **2021**, FEMA issued a draft implementation plan on how to reduce the negative impacts of the NFIP on threatened species.

In **2023**, FEMA started reviewing the draft implementation plan using a National Environmental Policy Act (NEPA) process, which is still underway. Under the NEPA process, FEMA will analyze whether there are additional alternatives or changes to the 2021 draft implementation plan to consider. In September **2023**, environmental advocacy organizations filed a [lawsuit](#) alleging that FEMA has been too slow to implement the BiOp. Plaintiffs included the [Center for Biological Diversity](#), the [Northwest Environmental Defense Center](#), [Willamette Riverkeeper](#), and [The Conservation Angler](#).

In July **2024**, FEMA announced a new program of pre-implementation compliance measures (PICM or short-term measures) for the BiOp, separate from the NEPA full implementation (long-term measures) process. FEMA hosted several [webinars](#) and workshops between July and November to help communities prepare for implementation, which County staff attended. Some of the PICM pathways are included in the 2016 BiOp under RPA, element 2.

FEMA is expected to issue the draft EIS in **2025**, and full implementation of the final plan is expected in **2027**.

2. PICM Options

FEMA has directed jurisdictions participating in the NFIP to choose one of three PICM pathways by December 1, 2024.

1. **Adopt a model ordinance** that considers impacts to species and their habitat, requiring mitigation to a no net loss standard
 - [Model Ordinance](#) (updated November 2024)
2. **Require a habitat assessment** and mitigation plan for development on a permit-by-permit basis, in accordance with FEMA guidance:
 - [Habitat Assessment Guide](#) (updated November 2024)

- [Habitat Assessment Guide](#) (August 2024)

3. Prohibit all development in the floodplain

Given the substantial amount of floodplain in the unincorporated county and the number of affected properties (approximately 5700 tax lots contain floodplain, 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 floodplain does not appear feasible. In addition, Oregon nonconforming use law restricts the degree to which the County can prohibit replacement or alteration of existing nonconforming development in the floodplain.

The remaining options are the model code and habitat assessment, which both intend to achieve the same result: ensuring “no net loss” of three key floodplain functions:

1. Flood storage → *restricts placement of fill*
2. Water quality → *restricts addition of impervious surface*
3. Riparian habitat → *restricts removal of vegetation*

“No net loss” means that if any of the key floodplain functions are impacted by a development, the impacts must be offset by mitigation proportional to the impact. These changes will result in significant reductions in development capacity and development restrictions for floodplain properties.

Failure to implement a PICM may result in a compliance visit from FEMA. 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.

3. Challenges

“Clear and objective” standards:

Oregon land use law requires that the county adopt and apply only “clear and objective” standards to the review of housing development in urban areas. This requirement will be extended to many rural areas on July 1, 2025. As drafted, neither the model code nor the site-by-site habitat assessment process is clear and objective. However, FEMA staff has signaled a willingness to accept local modifications to the model code to make it clear and objective, provided that the required “no net loss” standard for three identified floodplain functions is maintained. Staff anticipates that it will be challenging to achieve this balance; however, the challenge would be greater with the site-by-site habitat assessment approach.

Measure 49:

If the county enacts a land use regulation that restricts a residential use and reduces the market value of a property, the owner can apply for compensation under Measure 49.

Although there is an exemption to claims based on federal law, the NFIP is a voluntary program. Therefore, it is possible that the adoption of PICM amendments could result in valid Measure 49 claims. If a property owner applied for just compensation as a result of the county adopting the PICM model ordinance or habitat assessment (permit-by-permit) requirement, the county would process the claim as provided in [ORS 195.300 to 195.336](#).

Barriers for applicants:

In most cases, floodplain development permits already require the assistance of certified or licensed professionals, but adoption of the model code will likely require even more professional assistance than currently necessary. This will create additional cost burden for floodplain development applicants. However, this burden would likely be greater if the county adopted a permit-by-permit habitat assessment requirement instead of the model code.

Some floodplain development cases will also require off-site mitigation due to limited available area or other constraints on the subject property. Identifying off-site mitigation areas may be challenging for applicants, who would need the property owner's permission to use a viable site for mitigation. It may also be difficult for the county to identify and acquire or secure development rights on viable land for mitigation banking.

Applicants will be responsible for the ongoing maintenance of any green infrastructure, pervious surfaces, or surface water treatment facilities required to achieve no net loss for development in the floodplain. It is not yet clear whether or how the county will be expected to monitor and enforce these maintenance requirements. The first draft of the model ordinance includes provisions intended to guarantee ongoing maintenance and monitoring, while the most recent version (see "Appendix A" in the [Model Ordinance](#)) does not.

Lastly, the county and applicants are both in difficult positions during the current interim period: as of December 1, 2024, FEMA has directed that NFIP jurisdictions are responsible for enforcing ESA compliance in floodplain development permitting, but the current ZDO does not yet provide a mechanism for the county to enforce ESA compliance directly. However, the ZDO *does* provide a requirement that "All necessary permits have been obtained from those federal, state, or local governmental agencies from which prior approval is required" for proposed floodplain development. County staff has identified two federal agencies that may issue permits or other evidence (e.g. statement of exemption) to document that a floodplain development proposal complies with the ESA:

- The National Marine Fisheries Service (NMFS) regulates development proposals that may involve an "incidental take" (negative impact on endangered or threatened fish or marine mammals) and issues permits for projects found to be in compliance with the ESA.

- The US Army Corps of Engineers (USACE) regulates development in or affecting water bodies and issues permits for projects found to be compliance with the ESA, among other criteria.

Until the county has adopted PICM code amendments, floodplain development permits will be issued according to current code, with a condition requiring the applicant to obtain permits from NMFS and USACE as applicable, or provide documentation from those agencies that a permit is not required.

Consequences of noncompliance:

As noted above, failure to comply with PICM requirements may result in a FEMA community assistance visit (CAV) which may consist of floodplain site visits, inspection of permit files, or meetings with elected or appointed officials. If administrative problems or violations are identified during a CAV, the county will be notified and given the opportunity to correct the procedures or remedy the violations within established deadlines. If the county does not take action to bring itself into compliance, FEMA may initiate an enforcement action against the community including probation or suspension from the NFIP.

If FEMA revokes the county's NFIP certification, or if the county withdraws from the NFIP, the community would be negatively impacted as follows:

1. No resident will be able to purchase a federal flood insurance policy.
2. Existing flood insurance policies will not be renewed.
3. No Federal grants or loans for development may be made in identified flood hazard areas under programs administered by Federal agencies such as HUD, EPA, and SBA;
4. No Federal disaster assistance may be provided to repair insurable buildings located in identified flood hazard areas for damage caused by a flood.
5. No Federal mortgage insurance or loan guarantees may be provided in identified flood hazard areas. This includes policies written by FHA, VA, and others.
6. Federally insured or regulated lending institutions, such as banks and credit unions, must notify applicants seeking loans for insurable buildings in flood hazard areas that there is a flood hazard and that the property is not eligible for Federal disaster relief.
7. ESA concerns would remain—the County would still be responsible for ensuring that development in the floodplain complies with the ESA.

STATUS AND NEXT STEPS

At the BCC's November 7, 2024, policy session the board was briefed on these changes to FEMA's implementation of the NFIP, and the Board directed staff to:

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

Both PICM options—the model code and the habitat assessment—present administrative challenges, however:

- Adoption of specific code provisions will provide a clearer road map for staff and applicants.
- Applicants likely will need to retain consultant services for both options, but the site-by-site habitat assessment approach likely would require these to a greater degree.
- Under the site-by-site habitat assessment approach, it would be advisable for the County to retain a third-party reviewer with the necessary professional expertise to review the habitat assessments submitted by applicants. There are additional administrative costs associated with executing and managing this type of contract.

During the November 26, 2024, issues session, the Board approved a letter to FEMA explaining the County’s anticipated course of action. During the December 18, 2024, policy session, staff presented their findings from review of FEMA’s model code and site-by-site habitat assessment guidance, as well as attendance at multiple technical webinars and workshops hosted by FEMA. Staff recommended and **the BCC agreed to proceed with adopting the model code, with modifications necessary** to ensure that the code as applied to housing is clear and objective as required by state law. This option is not without concern but represents the best of the several problematic options provided by FEMA.

The draft schedule for PICM implementation is as follows:

Prepare public-notice-ready draft amendments to implement chosen PICM.	1/21/2025 - 2/7/2025
Notify affected property owners, community planning organizations, DLCD and other interested parties of hearing dates. Provide access to draft amendments.	2/13/2025
Planning Commission Public Hearing: Receive public testimony on proposed code amendments and provide a recommendation to the Board of County Commissioners.	3/24/2025
Board of County Commissioners Public Hearing: Receive public testimony and make an oral decision on proposed code amendments.	4/23/2025
Board of County Commissioners Adoption of Written Order: Amends development code and initiates 21-day appeal period to Oregon Land Use Board of Appeals.	5/8/2025

Staff has just begun working with counsel on editing the model ordinance to make it clear and objective, and depending on the complexity of this effort, it may take longer than initially anticipated. In addition, the proposed amendments to the ZDO must be reviewed by FEMA, and it is unknown how long that process will take. Therefore, the draft schedule may shift.

ATTACHMENTS

- A1: Map of the SFHA in Clackamas County
- A2: Map of the SFHA in the urban area of Clackamas County
- B: Map of the area subject to the BiOp