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The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATIONAL WILDLIFE FEDERATION,)
)
Plaintiff,)
)
v.)
)
FEDERAL EMERGENCY)
MANAGEMENT AGENCY,)
)
Defendant.)
)
)
_____)

No. 2:11-cv-02044-RSM

PROPERTY OWNERS FOR SENSIBLE
FLOODPLAIN REGULATION'S *AMICUS*
CURIAE MEMORANDUM

NOTE ON MOTION CALENDAR:
MONDAY, FEBRUARY 6, 2012

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- I. INTRODUCTION..... 1**
- II. FACTUAL BACKGROUND 3**
 - A. State and Local Regulatory Requirements 3**
 - 1. Washington’s Growth Management Act..... 5**
 - 2. Washington’s Shoreline Management Act..... 7**
 - 3. Washington’s Hydraulic Code 8**
 - 4. City and County Regulations Implementing State Law Requirements 9**
 - a. King County..... 10**
 - b. Snohomish County. 13**
 - c. Pierce County..... 16**
 - d. City of Kent..... 19**
 - e. City of Burlington..... 21**
 - f. City of Auburn..... 23**
 - 5. Difficulties and Defects in RPA Element 3..... 24**
- III. STANDARD OF REVIEW 26**
 - A. Issuance of Preliminary Injunction 26**
 - B. Irreparable Harm Must Be Shown On a Species Level..... 28**
- IV. ARGUMENT 29**
 - A. Plaintiff’s Motion Must Be Denied Because Plaintiff Has Failed to Demonstrate Any Irreparable Harm..... 29**
 - B. ESA Listed Species Will Not Be Irreparably Harmed Pending the Outcome of This Lawsuit Because of the Protections Provided by Existing State and Local Laws and Regulations. 32**
 - C. Plaintiff’s Requested Injunctive Relief Is Not Narrowly Tailored to Prevent the Alleged Harm to the Species 34**
 - 1. “New Development” Is Not Narrowly Defined..... 35**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- 2. In Those Cities and Counties Where Existing Regulations
Either Satisfy RPA Element 3 or Avoid Irreparable Harm,
No Injunction Is Warranted..... 36
- D. While FEMA Has Sought to Comply with RPA Element 3 to
the Extent Possible, RPA Element 3 is Irretrievably Flawed.. 37
 - 1. FEMA Lacks Authority to Implement RPA Element 3
Under Its Existing Regulations 37
 - 2. RPA Element 3 Does Not Make Sense In Most Puget Sound
Jurisdictions and Is Inconsistent With Other Provisions In
the ESA..... 39
- V. CONCLUSION..... 40

TABLE OF AUTHORITIES

Cases

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011)..... 27, 28

Animal Welfare Inst. v. Martin, 623 F.3d 19 (1st Cir. 2010) 29

Audubon Soc’y of Portland v. Nat’l Marine Fisheries Serv., No. 11–cv–00494,
2011 WL 3273139, __ F.Supp.2d __ (D. Or. 2011) 30

Ctr. for Food Safety v. Vilsack, 636 F.3d 1166 (9th Cir. 2011) 28, 32

Defenders of Wildlife v. Salazar, No. 09-cv-00077, 2009 WL 8162144, _ F.Supp.2d
__ (D. Mt. 2009)..... 29, 31, 32

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Florida Key Deer v. Brown, 364 F.Supp.2d 1345 (S.D. Fla. 2005)..... 37

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Nat’l Wildlife Fed’n v. Burlington N. R.R., Inc., 23 F.3d 1508 (9th Cir. 1994)..... 27, 28

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New Hope Power Co. v. U.S. Army Corps of Eng’r, 746 F.Supp.2d 1272 (D.C. Fla.
2010)..... 39

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Cal. 2008) 27, 28, 29, 31

Precon Dev. Corp. v. U.S. Army Corps of Eng’r, 633 F.3d 278 (4th Cir. 2011) 39

Price v. City of Stockton, 390 F.3d 1105 (9th Cir. 2004)..... 28, 34

Rock Creek Alliance v. U.S. Forest Serv., 703 F.Supp.2d 1152 (D. Mt. 2010) 33, 39

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

San Luis & Delta-Mendota Water Authl. v. Salazar, 686 F.Supp.2d 1026,1045 (E.D. Cal. 2009) 39

Water Keeper Alliance v. U.S. Dep’t of Defense, 271 F.3d 21(1st Cir. 2001)..... 29

Winter v. Natural Res. Def. Council, 555 U.S. 7 (2008)..... 26

Federal Statutes

16 U.S.C. § 1532(19) 38

42 U.S.C. §4012a 35

5 U.S.C. §553 38

State Statutes

RCW 30.70A.172 6

RCW 36.70A.030 5

RCW 36.70A.060 5, 6

RCW 36.70A.130 6

RCW 36.70A.170 5, 6

RCW 90.58.020 7

RCW 90.58.030 7

RCW 90.58.080 8

RCW 90.58.140 7

Federal Regulations

44 C.F.R. § 60.3(a)(2) 3, 4, 38

50 C.F.R. § 17.3 38

State Regulations

WAC 173-26-090 8

WAC 173-26-186 8

1 WAC 220-110-010 8, 9

2 WAC 220-110-050 9

3 WAC 365-190-030 5, 6

4 WAC 365-195-925 6

5 **Other Authorities**

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7 (2d ed. 2011) 28

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I. INTRODUCTION

1 Amicus Property Owners for Sensible Floodplain Regulation (“POSFR”)¹ respectfully
2 submits this *amicus* brief in opposition to Plaintiff National Wildlife Federation’s (“NWF”)
3 Motion for Preliminary Injunction. Dkt. No. 10. Plaintiff has challenged the Defendant
4 Federal Emergency Management Agency’s (“FEMA”) efforts to implement the “reasonable
5 and prudent alternative” (“RPA”) set forth in the Biological Opinion issued by the National
6 Marine Fisheries Service (“NMFS”) in September 2008 regarding FEMA’s operation of the
7 National Flood Insurance Program (“NFIP”) in the Puget Sound region (“NFIP BiOp”).
8 Pending a decision on the merits of its claims, Plaintiff seeks to preliminarily enjoin the sale of
9 NFIP-based floodplain insurance in certain areas of the Puget Sound region and the processing
10 of certain revisions to floodplain maps.

11 This case raises issues concerning FEMA’s implementation of the NFIP,² and the effect
12 of the NFIP on several species listed under the Endangered Species Act (“ESA”) in the Puget
13 Sound region.³ In the NFIP BiOp, NMFS determined that FEMA’s pre-2008 implementation
14 of the NFIP was likely to jeopardize the continued existence of several ESA-listed species and
15 destroy or adversely modify their designated critical habitat. NFIP BiOp at 149 (Hasselman
16 Decl., Ex. 1). As part of the NFIP BiOp, NMFS provided a seven element RPA, which
17

18
19 ¹ POSFR is a Washington non-profit corporation formed by property owners and industry groups concerned about
20 the unnecessary over-regulation of floodplain areas in the Puget Sound region. POSFR represents the interests of
21 the Building Owners and Managers Association of Seattle-King County, Master Builders Association of King and
22 Snohomish Counties, Washington REALTORS, and a number of individual property owners affected by the
23 NFIP BiOp and the current suit.

24 ² The NFIP consists of the following four basic components: (1) the identification and mapping of flood-prone
25 communities; (2) the development of minimum development standards applicable within the floodplain that local
26 jurisdictions must adopt and enforce to qualify to participate in the NFIP; (3) the provision of flood insurance;
and (4) the development of a community rating system that offers communities discounted flood insurance
premiums if they adopt flood management regulations that exceed FEMA’s minimum criteria.

³ POSFR uses the phrase “ESA-listed species” throughout this *amicus* brief to refer to the several endangered and
threatened species identified in the NFIP BiOp, which include the Puget Sound Chinook salmon, Puget Sound
steelhead, Hood Canal summer-run chum salmon, Lake Ozette sockeye salmon, and Southern Resident killer
whales. NFIP BiOp at 1.

1 provided a potential road map for FEMA to address the jeopardy/adverse modification
2 determination. FEMA, as discussed in its response to Plaintiff's Motion, has since revised its
3 implementation of the NFIP in the Puget Sound region to comply with its substantive and
4 procedural obligations under the ESA. By focusing solely on FEMA's actions, however, both
5 the Plaintiff and Defendant miss a large part of the relevant picture – that is the extensive
6 regulations and programs adopted by Washington State and the NFIP participating local
7 governments that control floodplain development and protect species' habitat. Plaintiff cannot
8 make its case for a preliminary injunction by relying on only a portion of the information.

9 Plaintiff's Motion and requested relief must be denied for the following reasons. First,
10 Plaintiff has failed to satisfy its burden of demonstrating a likelihood of irreparable harm to the
11 ESA-listed species as a result of FEMA's response to the NFIP BiOp and its efforts to
12 implement the RPA. Plaintiff's Motion is devoid of information examining the effects of
13 FEMA's current implementation of the NFIP on ESA-listed species or their habitat. Equally
14 important – and the focus of this *amicus* brief – Plaintiff fails to account for the numerous state
15 and local regulations, which are incorporated by reference into the NFIP minimum floodplain
16 development standards, that will ensure no irreparable harm during the interim period between
17 the filing of this suit and the Court's decision on the merits.

18 Second, to the extent the Court determines any injunction is appropriate, Plaintiff's
19 Proposed Order should be rejected as not narrowly tailored or should be significantly revised
20 to limit its scope to only those areas where Plaintiff can and has demonstrated likelihood of
21 irreparable harm during the interim period.

22 Finally, due to POSFR's concern about the unnecessary over-regulation of floodplain
23 areas, POSFR identifies numerous flaws inherent in RPA Element 3, regarding the NFIP
24 minimum criteria. This information should assist the Court in evaluating the validity of
25 Plaintiff's assertion that FEMA is not properly implementing this Element of the RPA. FEMA
26

1 and NMFS are facing significant pressure from NFIP participating jurisdictions and property
2 owners to modify RPA Element 3, which they have begun through an exchange of
3 administrative interpretations and clarifications.

4 II. FACTUAL BACKGROUND

5 A. State and Local Regulatory Requirements.

6 FEMA's response to Plaintiff's Motion catalogs the actions that FEMA has taken to
7 implement RPA Element 3, but does not detail corresponding state or local activities.
8 Plaintiff, by comparison, identifies a limited number of local government actions, but largely,
9 and presumably intentionally, asserts that it is "all but impossible" to evaluate the actions
10 being taken by local governments in concert with FEMA to respond to the NFIP BiOp. Pl.'s
11 Mot. for Prelim. Inj. at 20; *see* Wald Decl. ¶ 41.

12 Evaluating state and local regulations and permitting obligations is relevant and
13 important here for several reasons. First, as Plaintiff notes, FEMA relies entirely on the state
14 and local governments to implement the NFIP's development restrictions. Thus, any changes
15 to the NFIP minimum standards or implementation of those standards necessarily occurs by
16 and through the local governments. Second, the NFIP regulations effectively incorporate by
17 reference state and corresponding local permitting requirements into the NFIP's minimum
18 standards. 44 C.F.R. § 60.3(a)(2).

19 Moreover, looking at how local governments have been and continue to regulate
20 floodplain development is also critical here because it represents a significant "blind spot" in
21 the existing NFIP BiOp's analysis of FEMA's pre-2008 implementation of the NFIP.⁴ In its
22 discussion of the environmental baseline, the NFIP BiOp acknowledges the existence of state
23

24 ⁴ There is one noteworthy exception to this point. The NFIP BiOp does consider some of King County's and
25 Pierce County's development regulations controlling floodplain development within the Incidental Take
26 Statement section of the NFIP BiOp. NFIP BiOp at 172. It does not appear, however, to similarly review any
other local jurisdictions' regulations.

1 and local programs, but then fails to substantially review them or include them in its analysis.
2 NMFS incorrectly concludes that ninety percent of the local jurisdictions “have adopted only
3 the minimum standards of the NFIP as their regulatory requirements for floodplain
4 construction.” NFIP BiOp at 56.

5 Correspondingly, the NFIP BiOp evaluates and analyzes only the NFIP minimum
6 criteria expressly set forth in the Code of Federal Regulations (“CFR”) and does not consider
7 those state or local regulations protecting floodplain functions that are incorporated by
8 reference through 44 C.F.R. § 60.3(a)(2). NFIP BiOp at 57 (“Although multiple levels of
9 regulatory authorities affect floodplain function and development, the analysis of effects that
10 will be presented at the effects section . . . is limited to the direct and indirect effects of
11 FEMA’s implementation of the NFIP’s minimum criteria, CRS, Mapping Program, and any
12 activities interrelated and interdependent with those components.”). At the same time, the
13 NFIP BiOp acknowledges that these local regulations could fundamentally affect the impact of
14 floodplain development on the ESA-listed species. *See* NFIP BiOp at 145 (“Where the NFIP
15 is in effect, barring local regulations that preserve floodplain function, the eventual effect . . .
16 is to allow more development to be ‘safely’ placed in the floodplain.”)(emphasis added).
17 Thus, the NFIP BiOp both acknowledges that local regulations could protect floodplain
18 functions, and at the same time neglects to analyze those regulations.⁵ As the discussion of
19 these state and local programs below shows, the NFIP minimum standards set forth in the CFR
20 are just one component of a much larger collection of federal, state and local statutes and
21 regulations that combine to regulate floodplain development and protect ESA-listed species
22 and their habitat from harm. While NMFS may have neglected to consider these regulations in
23

24 ⁵ FEMA’s Programmatic Biological Evaluation, by comparison, included a lengthy discussion of these programs
25 as part of its review of Existing Conditions. *NFIP Programmatic Biological Evaluation for Listed Anadromous
26 Salmonids in Washington State* (Feb. 2006) at 3-46 to-53. *See* AR 232-512.

1 its NFIP BiOp, this information is relevant to the Court’s consideration of Plaintiff’s Motion,
2 particularly Plaintiff’s effort to demonstrate irreparable harm.

3 POSFR begins by identifying several state statutes that prioritize protecting species’
4 habitat, including Washington’s Growth Management Act (“GMA”), Washington’s Shoreline
5 Management Act (“SMA”), and Washington’s hydraulic code. Both the GMA and the SMA
6 provide the foundation for local programs, plans and development regulations that control
7 floodplain development projects at the local level. POSFR then reviews more closely a
8 sampling of city and county regulations, identifying how those local regulations currently
9 operate to protect ESA-listed species and their habitat from harm.⁶

10 **1. Washington’s Growth Management Act.**

11 The Washington Legislature adopted the GMA in 1990. Key amongst its mandates is
12 the obligation that local governments designate and protect “critical areas,” which include both
13 floodplains, known as “frequently flooded areas,” and “fish and wildlife habitat conservation
14 areas.” RCW 36.70A.030(5), .060(2), .170. Frequently flooded areas are defined as “lands in
15 the flood plain subject to at least a one percent or greater chance of flooding in any given year,
16 or within areas subject to flooding due to high groundwater,” including, but not limited to,
17 “streams, rivers, lakes, coastal areas, wetlands, and areas where high groundwater forms ponds
18 on the ground surface.” WAC 365-190-030(8). Fish and wildlife habitat conservation areas
19 are defined as “[a]reas that serve a critical role in sustaining needed habitats and species for the
20 functional integrity of the ecosystem, and which, if altered, may reduce the likelihood that the
21 species will persist over the long term.” WAC 365-190-030(6)(a). “These areas may include,
22 but are not limited to, rare or vulnerable ecological systems, communities, and habitat or
23

24 ⁶ Notably, these State and local programs are in addition to several other federal programs, including the
25 Sections 401 and 404 of the Clean Water Act, and Section 9 and 10 of the Rivers and Harbors Act, that can also
26 apply to floodplain development projects. The federal programs are more fully discussed in FEMA’s
Programmatic Biological Evaluation. *NFIP Programmatic Biological Evaluation* at 3-43 to -47. See AR 232-
512.

1 habitat elements including seasonal ranges, breeding habitat, winter range, and movement
2 corridors; and areas with high relative population density or species richness.” WAC 365-190-
3 030(6)(a). *See also* WAC 365-190-110 (minimum criteria for designating frequently flooded
4 areas); WAC 365-190-130 (minimum criteria for designating fish and wildlife habitat
5 conservation areas).

6 Pursuant to the GMA, local governments must adopt development regulations that
7 “protect the functions and values of [these] critical areas.” RCW 30.70A.172(1). As part of
8 this critical area mandate, the GMA requires “counties and cities [to] give special
9 consideration to conservation or protection measures necessary to preserve or enhance
10 anadromous fisheries.” *Id.* As the GMA’s implementing regulations explain:

11 Conservation or protection measures necessary to preserve or enhance
12 anadromous fisheries include measures that protect habitat important for all
13 life stages of anadromous fish, including, but not limited to, spawning and
14 incubation, juvenile rearing and adult residence, juvenile migration
15 downstream to the sea, and adult migration upstream to spawning areas.
16 Special consideration should be given to habitat protection measures based on
17 the best available science relevant to stream flows, water quality and
18 temperature, spawning substrates, instream structural diversity, migratory
19 access, estuary and nearshore marine habitat quality, and the maintenance of
20 salmon prey species. Conservation or protection measures can include the
21 adoption of interim actions and long-term strategies to protect and enhance
22 fisheries resources.

23 WAC 365-195-925(3) (emphasis added).

24 By statute, each local jurisdiction must integrate these requirements into their
25 comprehensive plans and local development regulations. RCW 36.70A.060, .170. Moreover,
26 these regulations are not static. By statute, each local jurisdiction must regularly update their
GMA planning documents and development regulations to consider changing circumstances
and information. RCW 36.70A.130. Through these GMA mandates, each of the Puget Sound
cities and counties participating in the NFIP are already obligated – irrespective of the NFIP

1 BiOp – to address and manage the very concerns regarding ESA-listed species’ and their
2 habitat raised in the NFIP BiOp.

3 **2. Washington’s Shoreline Management Act.**

4 The Washington Legislature adopted the SMA in 1971 with the express intent to
5 “prevent the inherent harm in an uncoordinated and piecemeal development of the state’s
6 shorelines.” RCW 90.58.020. The SMA applies to all “shorelines” within the state.
7 “Shorelines” are defined broadly as encompassing “all of the water areas of the state and their
8 associated shorelands.”⁷ Shorelands are also broadly defined, comprising lands extending
9 landward for two hundred feet in all directions from the ordinary high water mark, floodways
10 and contiguous floodplain areas and all wetlands and river deltas associated with SMA water
11 areas.” RCW 90.58.030(d). Regarding floodplains, local jurisdictions may include all or a
12 portion of their floodplain within their shoreline jurisdiction; provided that, they must each
13 include “as a minimum, the floodway and the adjacent land extending landward two hundred
14 feet therefrom.” RCW 90.58.030(d)(i).

15 The SMA requires each of the NFIP participating cities and counties in the Puget
16 Sound region to prepare and adopt a Shoreline Master Program (“SMP”) governing use and
17 development of the shorelines within their jurisdictions. Each SMP must address three basic
18 policy areas: shoreline use, environmental protection, and public access. The SMA prevents
19 development within the shorelines unless the development is consistent with both the SMA
20 policies and the local SMP.⁸ RCW 90.58.140(1). SMA regulations require that all local SMPs
21 ensure “that each permitted development will not cause a net loss of ecological functions of
22

23 ⁷ The SMA does not apply to smaller streams and lakes, i.e., “shorelines on segments of streams upstream of a
24 point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such
upstream segments; and shorelines on lakes less than twenty acres in size and wetlands associated with such small
lakes.” RCW 90.58.030(2)(d).

25 ⁸ While all development within the shoreline jurisdiction must be consistent with the local SMP, only
26 developments deemed substantial is subject to shoreline permit requirement. RCW 90.58.140(2).

1 the shoreline.” WAC 173-26-186(8)(b)(i) (emphasis added). “Development” is broadly
2 defined and encompasses the range of activities addressed in RPA Element 3. *Compare* RCW
3 90.58.030(3)(a) *with* NFIP BiOp at 22 n.23. In sum, although the SMA does not require the
4 prohibition of all development within this area, it does require that local jurisdictions ensure
5 “no net loss” of ecological functions within the shoreline jurisdiction.

6 Further, the SMA regulations require counties and cities “containing any shorelines
7 with impaired ecological functions” to “include goals and policies that provide for restoration
8 of such impaired ecological functions” in their SMPs, and require consideration of cumulative
9 effects. WAC 173-26-186(8)(c)-(d). Finally, like the GMA, the SMA requires that local
10 jurisdictions update their SMPs and corresponding development regulations to account for
11 “changing local circumstances, new information or improved data.” WAC 173-26-090. *See*
12 *also* RCW 90.58.080.

13 Thus, like the GMA, the SMA addresses the concerns raised in the NFIP BiOp and
14 requires local governments to take action to address these concerns as part of their local
15 planning and regulation of development.

16 **3. Washington’s Hydraulic Code.**

17 Washington has also adopted a series of statutes and regulations that require any project
18 to “use, divert, obstruct, or change the natural flow or bed of any salt or freshwater of the state”
19 to obtain a Hydraulic Project Approval (“HPA”) permit from Washington’s Department of Fish
20 and Wildlife (“WDFW”). WAC 220-110-010. *See* Chapter 77.55 RCW; Chapter 220-110
21 WAC. While there are separate regulations for different types of projects (e.g., bank
22 protection, culvert placements, bridge crossing, channel modifications, etc.), all are subject to a
23 uniform requirement to “achieve no-net loss of productive capacity of fish and shellfish
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25
26

1 habitat.” *See* WAC 220-110-050 to -224, -280 to -330.⁹ “No net loss” requires avoidance or
2 mitigation of: (a) “adverse impacts to fish life”; (b) “loss of habitat functions necessary to
3 sustain fish life”; and (c) “loss of area by habitat type.” WAC 220-110-020(68). Mitigation is
4 defined as “actions to avoid or compensate for impacts to fish life resulting from the proposed
5 project activity.” WAC 220-110-020(66). Further, the regulations require “[m]itigation to
6 achieve no-net-loss should benefit those organisms being impacted.” WAC 220-110-020(68).

7 By regulation, “[a]n HPA shall be denied when, in the judgment of the department, the
8 project will result in direct or indirect harm to fish life, unless adequate mitigation can be
9 assured by condition the HPA or modifying the proposal.” WAC 220-110-030(14) (emphasis
10 added). With regard to channel modification/realignment projects, the regulations provide,
11 amongst other requirements:

12 Permanent new channels shall, at a minimum, be similar in length, width, depth,
13 flood plain configuration, and gradient, as the old channel. The new channel shall
14 incorporate new fish habitat components, bed materials, meander configuration,
15 and native or other approved vegetation equivalent to or greater than that which
16 previously existed in the old channel.

17 WAC 220-110-080(1). Overall, like the SMA, although these regulations do not prohibit all
18 in-water work (recognizing the infeasibility of such a prohibition), they do address the
19 concerns raised in the NFIP BiOp by ensuring that in-water projects avoid or mitigate for direct
20 and indirect effects on fish and their habitat.

21 **4. City and County Regulations Implementing State Law Requirements.**

22 Based on the GMA and SMA state mandates, as well as their own local policy choices,
23 all NFIP participating cities and counties have adopted development regulations that protect
24 ESA-listed species’ habitat above and beyond the minimum standards in the NFIP. To
25

26 ⁹ Additional restrictions apply to certain saltwater areas and activities. *See* WAC 220-110-230 to -271.

1 demonstrate this, POSFR selected a sampling of six cities and counties and reviewed how
2 those local jurisdictions regulate floodplain development. POSFR used a two-step process to
3 select the sample jurisdictions. First, using the information provided by Plaintiff, POSFR
4 identified those jurisdictions where the largest number of new flood insurance policies had
5 been issued since the NFIP BiOp. Hasselman Decl., Ex. 3. POSFR then culled that list to six
6 jurisdictions (due to space limitation) with a focus on Tier 1 and Tier 2 jurisdictions and
7 achieving geographical and form (city or county) diversity. Using this process, POSFR
8 identified the following jurisdictions for review: King County, Pierce County, Snohomish
9 County, and the cities of Kent, Burlington and Auburn. The following summarizes each
10 jurisdiction's development regulations¹⁰ applicable to floodplain development projects, with a
11 particular emphasis on the three key areas of concern in the NFIP BiOp: (i) river
12 channelization, including levees and dikes; (ii) loss of off-channel habitat (e.g., oxbows, back
13 waters, areas inundated with floodwaters every year or few years); and (iii) development in the
14 balance of the floodplain, including fill, loss of flood storage, increased floodwater velocities
15 and stormwater impact.

16 **a. King County**

17 King County has developed an exemplary suite of floodplain protections that
18 "minimize the effects of floodplain development on fish habitat and habitat forming
19 processes." NFIP BiOp at 172. King County's regulatory environment includes critical areas
20 regulations that protect Flood Hazard Areas, Channel Migration Zones, and Aquatic Areas, as
21 set forth in chapter 21A.24 of the King County Code ("KCC"), and the King County Surface
22 Water Design Manual ("Surface Water Manual"), as established pursuant to chapter 9.04

23 _____
24 ¹⁰ POSFR only received the Index to the Administrative Record as of the time of filing. Consequently, where
25 available, POSFR has provided the relevant AR cites by bates number. To efficiently aid the Court, POSFR also
26 attaches the Declaration of Molly Lawrence which provides hyperlinks to each jurisdiction's publicly available
development regulations cited within Section II.A.4 of this Amicus brief. POSFR can provide more specific
citations to the Administrative Record, once received, should the Court require.

1 KCC. Lawrence Decl. ¶¶ 2-4. Additionally, the King County’s SMP, chapter 21A.25 KCC,
2 applies to the entirety of the 100-year floodplain, regulating the types of activities that may
3 occur based on designated shoreline environments. KCC 21A.25.050; Lawrence Decl. ¶ 2.
4 These regulations, together with an extensive programmatic habitat assessment, are all part of
5 King County’s Door 2 submittal to FEMA demonstrating compliance with RPA Element 3.
6 AR 9293-9868.

7 Turning to the key areas of concern identified in the NFIP BiOp, channelization and
8 flood control projects such as levees and dikes, are heavily regulated by King County to ensure
9 habitat preservation.¹¹ King County’s SMP requires any new flood protection facility be
10 designed consistent with the King County Flood Hazard Management Plan, which requires the
11 design to consider impacts on fish and wildlife habitat, and with the Integrated Stream
12 Protection Guidelines, developed by the WDFW. KCC 21A.25.160.C.2. *See King County*
13 *Flood Hazard Management Plan* Ch. 2. Policy PROJ-6 (Jan. 15, 2007) (Lawrence Decl., Att.
14 A). King County’s critical areas regulations prohibit all channelization projects in fish-bearing
15 waters, unless part of a habitat restoration project conducted by a natural resource public
16 agency or a federally recognized tribe. KCC 21A.24.045.C. Critical areas regulations further
17 restrict flood protection facilities in Severe Channel Migration Hazard Areas and Aquatic Area
18 buffers (115-feet in urban areas or 165-feet in rural areas) only allowing such facilities in
19 limited instances to prevent bank erosion. KCC 21A.24.045.D.42.

20 Outside of the regulatory context, the King County Flood Control Zone District
21 (“KCFCZD”) provides funding, maintenance, restoration, and policy oversight for the
22 County’s extensive river basin system. Further, KCFCZD has undertaken numerous levee
23 setback projects designed to improve habitat. *See generally* KCFCZD, *Scope of Services 2010*
24

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26 ¹¹ Any channelization project also requires an HPA approved by WDFW, as described above.

1 *Annual Report and 2011 First Quarter Performance Report* (April 2011) (Lawrence Decl.,
2 Att. B).

3 Regarding near shore areas, King County limits the loss of near shore habitat through
4 its critical areas regulations. Regulations for the Flood Hazard Area prohibit new development
5 or substantial improvements in the FEMA floodway, with limited exceptions for specific pre-
6 existing structures, which are evaluated for impacts on flood depth, velocity, and erosion by
7 the Washington State Department of Ecology. KCC 21A.24.260. Residential development
8 within the Severe Channel Migration Zone is limited to existing structures, allowing a total
9 area of 1,000 square feet. KCC 21A.24.045. Further, the Aquatic Areas regulations for fish
10 bearing waters impose a 115-foot buffer in urban areas and a 165-foot buffer in rural areas,
11 that have been established based on best-available science for King County. KCC
12 21A.24.358; King County, *Programmatic Habitat Assessment* App. A (Dec. 2011). *See* AR
13 9293-9868. Clearing is generally not allowed in Aquatic Areas, while very limited residential
14 construction is allowed, again subject to critical area review and mitigation sequencing. KCC
15 21A.24.045.D.

16 Regarding the balance of the floodplain, King County further regulates areas mapped
17 zero-rise floodway and zero-rise floodway fringe. In the zero-rise floodway, development is
18 not permitted to proceed that would result in any rise in the floodwaters and compensatory
19 storage is not permitted. KCC 21A.24.250. In the zero-rise floodway fringe, no rise is also
20 required; however, compensatory storage is permitted to offset any rise for projects in this
21 zone. KCC 21A.24.240. Except as noted, critical area regulations require a 15-foot building
22 setback from Aquatic Areas buffers, Severe Channel Migration Zone, and the FEMA
23 floodway. KCC 21A.24.200. The SMP requires that all uses and modifications within the
24 100-year floodplain ensure no net loss of ecological functions, by complying with mitigation
25 sequencing to avoid, minimize, and mitigate for any impacts to the floodplain. KCC
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1 21A.25.080-.090. Commercial development is only allowed within shorelines, or floodplains,
2 designated High Intensity, Residential, or Rural, with further restrictions on non-water
3 dependent uses. KCC 21A.25.100.B.

4 Finally, King County requires critical area review for any development proposal in the
5 Flood Hazard Area (the 100-year floodplain). KCC 21A.24.100, 21A.24.230. This review
6 includes an assessment of all probable impacts to critical areas and their buffers, mitigation
7 sequencing for avoiding impacts, and a monitoring plan. KCC 21A.24.100-.130.

8 All floodplain development is also subject to drainage review, pursuant to chapter 9.04
9 KCC and section 1.1.1 of the Surface Water Manual. The Surface Water Manual requires the
10 use of a minimum amount of Low Impact Development (“LID”) Best Management Practices
11 (“BMPs”) on nearly all projects. Surface Water Manual § 1.1.2. Required flow control BMPs
12 include both non-structural BMPs (e.g., native vegetation and reduced footprint) and structural
13 BMPs (e.g., infiltration and dispersion trenches). *Id.* Additionally, Core Requirement #3 of
14 the Surface Water Manual requires mitigation of storm and surface water runoff generated by
15 new impervious surface, where the project exceeds a threshold of 2,000 square feet or more of
16 new plus replaced impervious surface. *Id.* at § 1.2.3.

17 In sum, these existing regulations significantly limit floodplain development and
18 ensure that any floodplain development that is permitted more than accounts for any potential
19 impacts to ESA-listed species or their habitat.

20 **b. Snohomish County**

21 Snohomish County also has a rigorous framework of development restrictions
22 applicable to the floodplain that exceed the NFIP minimum standards and address the concerns
23 raised in the BiOp. As Snohomish has asserted in its Door 2 submittal, the combined effect of
24 its development regulations provide “equivalent” protection to RPA Element 3 for ESA-listed
25 species and their habitat. AR 13759-14510. These regulations include: critical area
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1 regulations governing Wetlands and Fish and Wildlife Habitat (“Fish Habitat Regulations”),
2 chapter 30.62A of the Snohomish County Code (“SCC”), and Flood Hazard Areas, chapter
3 30.65 SCC; shoreline development regulations implementing their SMP, chapter 30.44 SCC;
4 and Drainage Regulations, chapter 30.63A SCC. Lawrence Decl. ¶ 7. *See* AR 13759-14510.
5 Moreover, in response to the NFIP BiOp, the County now provides an additional safety net by
6 requiring all development in the 100-year floodplain to submit a habitat management plan
7 (“HMP”), which is comparable to the habitat assessment model developed by FEMA. *See*
8 SCC 30.62A.010, .140; AR 13759-14510.

9 Related to the NFIP BiOp’s main areas of concern, the County specifically restricts
10 flood control projects, including levees and dikes, through the SMP and critical area
11 regulations. The SMP prohibits any flood control project that results in a net loss to ecological
12 functions, impairs migration, spawning or rearing of anadromous fish, or is located in a salmon
13 and trout spawning areas. SCC 30.67.540. Where allowed, such projects cannot result in
14 channelization of normal stream flows and are subject to an HMP and drainage requirements
15 set forth in SCC 30.65.220. Flood Hazard Regulations prohibit removal of rock, sand, or
16 gravel within the floodway unless an applicant can provide “clear and convincing evidence”
17 such uses will not divert flood flows causing channel shift or erosion. SCC 30.65.220(5).

18 In areas equivalent to the Riparian Buffer Zone (“RBZ”) in the NFIP BiOp, Snohomish
19 County either prohibits development or requires an HMP prior to development. The Flood
20 Hazard Regulations prohibit new development or substantial improvements in the floodways,
21 with limited exceptions for existing farmhouses and replacement residences that have been
22 evaluated for impacts on flood depth, velocity, and erosion by the Washington State
23 Department of Ecology. SCC 30.65.220. Fish Habitat Regulations require a riparian buffer,
24 150-foot on average for fish-bearing waters, which prohibits all buildings, restricts
25 development to a narrow list of activities, and requires all native vegetation be preserved. SCC
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1 30.62A.320(1), .330. Additionally, Fish Habitat Regulations restrict new impervious surfaces,
2 to 0% within the 150-foot buffer and to 10% within the remaining of area lying between 150
3 and 300-feet from the water. SCC 30.62A.320(1)(c). The County’s critical areas regulations
4 prohibit development and clearing in the Channel Migration Zone. SCC 30.62B.330.

5 Snohomish County provides additional regulatory overlays throughout the balance of
6 the floodplain. Again, the County now requires a HMP for all development in the floodplain.
7 Further, Snohomish County has developed a separate floodplain category (used in few
8 jurisdictions across the United States) known as the “density fringe floodway,” which applies
9 to many of the County’s floodplains. The uses permitted in the density fringe are strictly
10 limited, and development that will displace floodwaters is limited to no more than two percent
11 (2%) of the floodplain portion of the lot. SCC 30.65.250, .280. In addition, the County’s
12 flood hazard permitting regulations applicable throughout the floodplain limit development
13 that results in increased flood levels or impact natural rates of flow or absorption. SCC
14 30.43C.100(4).

15 Also, like King County, Snohomish County’s SMP encompasses the entire floodplain,
16 regulating the types of uses that can occur within the floodplain and requiring that any use,
17 modification, development, or clearing achieve “no net loss” of shoreline ecological functions.
18 For example, non-water dependent commercial uses are only allowed where the use provides
19 restoration of wetlands or fish and wildlife habitat, or occurs at least 200 feet from the ordinary
20 high water mark (“OHWM”). SCC 30.67.525. Additionally, the SMP prohibits certain uses
21 prone to adverse affects on water quality. *See* SCC 30.67.420.

22 The County’s Drainage Regulations require a stormwater pollution prevention plan for
23 all development. SCC 30.63A.300, .445. For any development resulting in 2,000 square feet
24 of impervious surface, the regulations also require use of onsite stormwater management (i.e.,
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1 LID BMPs) to the maximum extent feasible. SCC 30.63A.300, .525. Use of LID techniques
2 is required in the Little Bear Creek watershed. SCC 30.63C.040.

3 In addition to these numerous regulatory protections, Snohomish County has also
4 adopted a significant shoreline and floodplain restoration plan. Specifically, the recently
5 updated SMP includes an extensive shoreline, Restoration Element, which includes the
6 ecological functions necessary to support healthy salmon habitat. *See generally*, Snohomish
7 County, *SMP Restoration Element* (August 2010) (Lawrence Decl. ¶ 8). The goal and purpose
8 of the plan is to achieve no net loss of ecological functions. *Id.* at 5.

9 Like King County, these regulations are designed to ensure that development in the
10 floodplain and elsewhere will not further degrade existing floodplain habitat or harm ESA-
11 listed species.

12 **c. Pierce County**

13 Pierce County has also adopted very restrictive regulations on floodplain development
14 that far exceed the NFIP minimum standards. Pierce County provides habitat and floodplain
15 protections collectively through its critical area regulations governing Regulated Fish and
16 Wildlife Species and Habitat Conservation Areas (“Fish Habitat Regulations”), chapter 18E.40
17 of the Pierce County Code (“PCC”), and Flood Hazard Areas, chapter 18E.70 PCC; its SMP,
18 chapter 20 PCC; and its Stormwater Management and Site Development Manual (“Stormwater
19 Manual”). Lawrence Decl. ¶¶ 9-11. These regulations are also cataloged in Pierce County’s
20 Door 2 submittal. AR 12961-13597.

21 Regarding river in-stream impacts, the Pierce County SMP prohibits straightening or
22 channelizing of rivers in all shoreline environments, with limited exception in shorelines
23 designated Urban Environment when demonstrated public benefit outweighs harm to the
24 environment. PCC 20.66.030. In these limited instances, the County’s Fish Habitat
25 Regulations require submission of a habitat assessment and prohibit any alteration or
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1 relocation of a watercourse that degrades fish habitat.¹² PCC 18E.40.030, .040.B.16. The
2 SMP requires dikes, levees, and berms to be shaped and planted with vegetation suitable for
3 wildlife habitat and calls for retention of trees shading streams and rivers for certain bank
4 protection activities. PCC 20.66.020.

5 Pierce County's framework of near river habitat protection goes beyond NFIP BiOp's
6 standards for the RBZ. Pierce County's Flood Hazard Regulations establish a wider
7 regulatory floodway than NFIP standards, recognizing three distinct floodways: the FEMA-
8 designated floodway, areas of Deep and/or Fast Flowing ("DFF") waters, and Channel
9 Migration Zones for seven watercourses. PCC 18E.70.020.B. New development and
10 substantial improvements are prohibited in all three of the County's floodways, with narrow
11 exceptions for existing agricultural, recreational and residential structures. PCC
12 18E.70.040.B. Further, the County generally assumes that the entire 100-year floodplain lies
13 within the DFF floodway until a DFF water analysis has been completed in a proposed project
14 area for a regulatory activity. PCC 18E.70.030.D.

15 The County's critical areas regulations provide an additional overlay of protections.
16 As a general matter, buildings and structures are prohibited within critical areas including fish
17 and habitat conservation areas and regulated floodways. PCC 18E.10.080.H. Critical area
18 buffers for fish and habitat conservation areas are typically 150 feet wide from the OHWM for
19 fish bearing streams. PCC 18E.10.060. In those limited instances where development
20 activities are allowed within fish and habitat conservation areas, such as clearing or grading,
21 the Fish Habitat Regulations require habitat assessments and mitigation for any identified
22 impacts. PCC 18E.40.030, .040. Outside critical areas and their buffers, an additional 15-foot
23 building setback applies. PCC 18E.10.080.H.

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26 ¹² These provisions are in addition to the required HPA under Washington's hydraulic code, Ch. 77.55 RCW.

1 The SMP also regulates use and development within 200 feet of the OHWM for all
2 watercourse. PCC 20.04.575. Commercial and residential development is entirely prohibited
3 in shorelines designated Natural Environment, which includes undeveloped areas. PCC
4 20.30.030, 20.62.040. In all other shoreline environments, the SMP requires a 50-foot setback
5 for residential development and a minimum 30-foot setback for commercial development from
6 the OHWM. *Id.* Further, Pierce County's Flood Hazard Regulations require a zero-rise
7 analysis for all proposed development in the floodplain. PCC 18E.70.030.E. This zero-rise
8 analysis ensures that any proposed development will not increase the base food elevation,
9 displace flood volume, or reduce flow conveyance. *Id.* Where any development might trigger
10 a rise, the County requires equivalent compensatory storage when filling or grading in the
11 floodplain. PCC 18E.70.040.C.4. Further, the Flood Hazard Regulations include siting
12 restrictions on development, requiring applicants to demonstrate that there are no other
13 feasible alternatives that would allow the proposed development to occur completely outside
14 the flood hazard area due to physical limitations. PCC 18E.70.040.C.2.

15 Finally, the County addresses stormwater impacts through several regulatory programs.
16 The County's SMP requires new developments within the shoreline jurisdiction to control
17 stormwater on site so that runoff entering surface waters is no greater than it would be if land
18 were left undeveloped. PCC 20.66.020. Additionally, the County regulates stormwater
19 through its Stormwater Manual. The Stormwater Manual mandates LID on lands designated
20 Rural Sensitive Resource zone. PCC 18A.17.030.B.3(62) (Lawrence Decl ¶ 12). Minimum
21 Requirement #5 of the Stormwater Manual additionally requires onsite stormwater
22 management BMPs to infiltrate, disperse, and retain stormwater runoff onsite to the maximum
23 extent feasible. Stormwater Manual, vol. I, 2-12 to 2-13.

24 Like King County and Snohomish County, these regulations are designed to
25 collectively protect ESA-listed species and their habitat from harm caused by development.
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d. City of Kent

Kent is different than the three counties reviewed above, namely because it is a highly developed urban area. Still, Kent has adopted significant development regulations above and beyond the NFIP minimum criteria to protect floodplains and riparian habitat. NFIP BiOp at 21. *See* AR 1-224. In submitting a Door 2 package to FEMA, Kent identified the following regulations and standards that adequately protect these areas: Critical Area Regulations, chapter 11.06 of the Kent Municipal Code (“KMC”), the SMP, and the Surface Water Design Manual, as well as the Flood Hazard Regulations, chapter 14.09 KMC, which exceed the NFIP minimum criteria. Lawrence Decl. ¶¶ 13-16. In addition, the submittal package highlights several environmental restoration projects that Kent has led to improve habitat within its jurisdiction.

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Starting with channelization projects, Kent’s Critical Areas Regulations only allow alteration to riparian stream or buffers where the alteration does not degrade stream values and functions. KMC 11.06.690. Any activity located in riparian waters must give special consideration to preservation and enhancement of fish habitat. KMC 11.06.690. Moreover, Kent requires a critical areas report addressing existing habitat functions and mitigation of any adverse impacts. KMC 11.06.040.A, .070, .550.

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The SMP, which regulates the first 200-feet of floodplain contiguous to the floodway, requires a conditional use permit for any new dikes and levees, which requires Department of Ecology approval. In addition, the City Code prohibits such projects from restricting natural channel movement, and requires protection or restoration of shoreline vegetation, as well as consistency with the 2006 King County Flood Hazard Management Plan. SMP ch. 3, C.5.c.; ch. 4, C.7.c.

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Kent’s near river habitat is protected by a combination of shoreline and critical areas standards. The City recently updated its SMP and established aquatic setbacks that vary based on shoreline designation and intensity of proposed use. SMP ch. 5, B. Commercial

1 development is prohibited in natural wetlands and aquatic environments. In “High Intensity”
2 and “Urban Environments” development must generally be set back 70 to 100 feet.
3 Residential setbacks, where residential uses are allowed, range from 140-feet to 200-feet.
4 SMP ch. 5, C.8.c. Additionally, all shoreline development must avoid or minimize significant
5 ecological impacts, including any increase in surface runoff through control, treatment, and
6 release of surface water runoff, so that water quality and quantity are not adversely affected.
7 SMP ch. 3, B. 12.c.

8 Salmonid bearing streams outside the shoreline jurisdiction are generally subject to a
9 100-foot buffer. KMC 11.06.680.B. No new structures or improvements that increase
10 existing building or structural footprints are permitted within stream buffers. KMC
11 11.06.670.F. Impervious surfaces are prohibited within stream buffers, with limited exception
12 for new public roads when no feasible alternative location exists. KMC 11.06.670.F, .680.
13 Additionally, a 15-foot setback is required from all stream buffers. KMC 11.06.680.A.

14 Within the balance of floodplain, the City’s Flood Hazard Regulations provide more
15 restrictive protections than NFIP minimum criteria. For example, the regulations include a
16 compensatory storage requirement to ensure no net fill in the floodplain and to avoid
17 displacement of floodwaters. KCC 14.09.175. Further, Kent’s Flood Hazard Regulations
18 provide an additional level of review and protection for wetlands within floodplains. KCC
19 14.09.190. In addition, drainage review in compliance with Kent’s Surface Water Design
20 Manual is required for all development proposals within the floodplain. Chapter 7.07 KMC
21 (Lawrence Decl. ¶ 17). This requires review of offsite drainage impacts and mitigation, and
22 depending on site-specific conditions, discharge and flow-control BMPs. Surface Water
23 Design Manual, tbl. 1.1.2.A.

24 In sum, within the context of Kent’s existing urban environment, these regulations also
25 protect existing floodplain functions.

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e. City of Burlington

Burlington regulatory approach is heavily influenced by its history and geography. It is situated along several miles of the lower Skagit River and is located almost entirely within the 100-year floodplain. It is, however, protected from frequent flooding events by a system of levees constructed in the early 20th century, and the majority of the land has previously been significantly modified through draining and clearing for agricultural or urban development since the mid-1800s. City of Burlington, *Shoreline Analysis Report, Draft #2* at 14 (August 2010) (“Shoreline Report”) (Lawrence Decl., Att. C). Consequently, Burlington’s approach to floodplain regulations is different than the other jurisdictions discussed above, although it too emphasizes protecting floodplain habitat and functions where they continue to exist.

Burlington focuses on a combination of regulatory, restoration, and levee improvement programs that address floodplain management and habitat protection as appropriate for existing conditions within its jurisdiction. The City’s overarching strategy to avoid harm to ESA-listed species includes strengthening the City’s levee system, to prevent floodwaters from washing pollution from developed urban areas back into the Skagit River and to prevent fish stranding in degraded areas; and restoring water quality in Gages Slough. *Id.* at 15. The Gages Slough, a 7.3 mile series of wetlands, is the only other waterbody located within the City. It is not fish bearing, but is a polluted system with downstream outfall into the Skagit River. *Id.* at 4.

The City’s regulatory protections for floodplains and habitat protections are primarily found in its critical areas ordinance, chapter 15.15 of the Burlington Municipal Code (“BMC”).¹³ Lawrence Decl. ¶ 19. *See* AR 4838-5056. The City prohibits all development in the floodway, with limited exceptions including federally approved utility outfall structures, levee construction to maintain critical infrastructure, non-residential structures exempt from

¹³ Channelization or any in-water work along the Skagit River is regulated by U.S. Army Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Act. Shoreline Report 7.

1 building permits, and projects including less than 12 cubic yards of fill that do not raise the
2 elevation of surrounding land. BMC 15.15.630. The City has also developed a “special flood
3 risk zone,” encompassing areas: (1) in Gages Slough where ground elevation is three feet or
4 more below the 100-year floodplain elevation and having alignment with other such areas
5 along Gages Slough; or (2) lying within 300 feet of the landward toe of dikes and levees along
6 the Skagit River, excluding floodways. BMC 15.15.025. The floodway restrictions identified
7 above also apply in this special flood risk zone, with exceptions for elevated structures that
8 allow floodwater to flow underneath and subdivisions that result in a positive effect on the
9 special flood risk zone (i.e., moving structures farther outside of the special flood risk zone).
10 BMC 15.15.620.

11 The City also recognizes fish and wildlife habitat conservation areas (“HCA”), which
12 includes areas with which anadromous fish species have a primary association. BMC
13 15.15.510. With limited exception, no alterations are allowed within HCAs and their
14 applicable buffers (either 100-feet or 200-feet wide, depending on stream type). BMC
15 15.15.530.B. A site assessment and habitat management plan is required for projects within
16 200-feet of an HCA. BMC 15.15.510. Habitat management plans must document potential
17 impact on habitat and proposes any necessary mitigation. BMC 15.15.520.

18 Additionally, Burlington requires stormwater controls consistent with the 2005 State
19 Department of Ecology Stormwater Management Manual for Western Washington (“2005
20 Ecology Manual”). BMC 14.802.015. The 2005 Ecology Manual requires a stormwater
21 pollution prevention plan for all development, and for any development resulting in 2,000
22 square feet of impervious surface, use of onsite stormwater management BMPs to the
23 maximum extent feasible. 2005 Ecology Manual vol. I, ch. 2 (Lawrence Decl. ¶ 20).

24 Beyond regulatory measures, the City improves habitat within its jurisdiction through
25 affirmative projects. In 1999, the City developed the Gages Slough Management Plan as a
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1 comprehensive program designed to gradually improve deteriorated conditions in Gages
2 Slough. Shoreline Report 3. By 2010, two wetland restoration projects had been completed.
3 *Id.* A total of 15 sites in the Gages Slough corridor have been identified with a reconnaissance
4 level plan has been prepared for each one, including locations for installation of bioswales
5 adjacent to the wetlands for water quality enhancement. *Id.* at 21. Additionally, the City is
6 actively working with a local diking district to improve flood protection measures. The City
7 has acquired at least 200 acres of land to preclude development for other than recreation and
8 flood hazard mitigation and to accommodate setback levees and levee enlargement. *Id.* at 9.

9 Recognizing its geography and historic development, Burlington's development
10 regulations also demonstrate a purpose and intent to protect species' habitat from harm.

11 **f. City of Auburn**

12 The City of Auburn is unique amongst the six sample jurisdictions. It actually took the
13 most immediate and concrete action in response to the NFIP BiOp. It was the first and only
14 jurisdiction to adopt an immediate moratorium on all development within the floodplain after
15 receiving FEMA's October 2008 notice letter implementing Element 1 of the RPA. Auburn,
16 Wash. Resolution 4416 (Nov. 18, 2008) (Lawrence Decl., Att. D).

17 Auburn did not lift this moratorium until, in March 2010, it officially adopted the
18 Model Ordinance offered by FEMA to comply with the NFIP BiOp. Auburn, Wash.
19 Ordinance 6295 (Mar. 31, 2010) (Lawrence Decl., Att. E). Auburn continues to operate under
20 the Model Ordinance. Consequently, although Plaintiff may assert that the Model Ordinance
21 does not exactly replicate every element of RPA Element 3, Auburn has taken significant
22 action to ensure against harm to ESA-listed species and their habitat in the interim period.

23 In sum, these State and local regulations demonstrate a significant commitment – far
24 above and beyond FEMA's existing NFIP minimum criteria – to protect and restore species'
25 and their habitat.

5. Difficulties and Defects in RPA Element 3.

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Plaintiff focuses a significant amount of its effort arguing that FEMA has not properly or fully implemented RPA Element 3. This Element of the RPA, and FEMA’s efforts to implement it, have faced significant criticism from local governments, as well as property owners. Amicus POSFR acknowledges that this lawsuit does not currently include a challenge to the NFIP BiOp itself. Nevertheless, understanding the validity and advisability of the RPA is relevant to the Court’s consideration of the first element of the injunction standard – whether Plaintiff is likely to prevail on the merits.

RPA Element 3 attempts to impose a set of “one size fits all” regulations on a very diverse set of floodplain landscapes in the Puget Sound region. *See* NFIP BiOp, App. 4. Although the NFIP BiOp itself acknowledges that the majority of floodplains in the Puget Sound region have been modified and are in poor condition, NFIP BiOp at 58-59, RPA Element 3 starts from the premise that all floodplains are pristine, undeveloped areas with intact floodplain habitat functions. This monolithic approach makes RPA Element 3 dysfunctional in the Puget Sound, which includes diverse floodplain environments. As one example, it is unreasonable to apply a 250-foot “no adverse effect” buffer to the Green River as it runs through the Kent Valley. *See* NFIP BiOp, Second Errata, at 5 (applying a 250-foot buffer to shorelines of the State). The Green River through the Kent Valley has been levied for more than 50 years, and the property immediately landward of the levees has been developed into one of the largest industrial districts in the country. Few floodplain functions continue to exist within the NFIP BiOp’s RBZ of the Green River in this area. *See* NFIP BiOp at 59.¹⁴ Although it is worthwhile to protect the floodplain functions that may remain within this RBZ (e.g., water quality or quantity functions) it is nonsensical to pretend that this area is a pristine floodplain with intact functions that may be protected and preserved through the

¹⁴ The NFIP BiOp rates the condition of the Green River as follows: floodplain – poor; streambank and bed – poor; riparian condition – poor; degree of impervious surface – poor; and hydrology – poor. NFIP BiOp at 59.

1 application of a 250-foot “no adverse effect” buffer. In another example, it is unreasonable to
2 apply all of the standards of RPA Element 3 to the City of Snoqualmie, which is upstream of
3 an impassible fish barrier called the Snoqualmie Falls. Anderson Decl. ¶ 4.

4 In response to this dissonance between RPA Element 3 and local floodplain conditions,
5 a team of technical consultants, funded by the State of Washington and the National Fish and
6 Wildlife Foundation, together with five local jurisdictions, conducted an extensive analysis of
7 the feasibility of implementing RPA Element 3 as written. Kramer Consulting, Inc.,
8 *Floodplain Technical Assistance Project: Issues and Strategies Paper* (July 2011) (“Technical
9 Assistance Paper”) (Lawrence Decl., Att. F). See AR 3251-3316. In summary, they
10 concluded that many provision of RPA Element 3 are unworkable and should not apply to
11 large portions of the Puget Sound region’s floodplains (namely areas that are partially or
12 largely developed). Consequently, this “Technical Team” prepared a series of suggested
13 modifications to RPA Element 3 to make it more appropriate for the Puget Sound’s diverse
14 landscape. For example, with regard to the RBZ, the Technical Team suggested that “local
15 jurisdictions should require protection of existing riparian functions occurring within the
16 Protected Area.” Technical Assistance Paper at iii (emphasis added). But rather than applying
17 “one size fits all” buffers to these areas, the Technical Team suggested a variety of buffer
18 widths depending on the relative condition of the floodplain. *Id.* Further, the Technical Team
19 also recognized that a blanket requirement to use LID techniques to manage stormwater was
20 not feasible in many floodplains “because LID techniques “rely on infiltration which may not
21 be possible due to typical high groundwater levels.” *Id.* at iv. Consequently, they
22 recommended that local governments be permitted to use the Washington Department of
23 Ecology’s “Stormwater Manual and comply with NPDES stormwater permits (where
24 applicable) to protect existing infiltration and drainage patterns.” *Id.* at iii. These are just two
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1 of the recommendations contained in the Technical Team’s final report – all of which are
2 aimed at creating a revised RPA that *is feasible* in the Puget Sound region.

3 As a result of these criticisms of RPA Element 3, FEMA and NMFS have been
4 working to modify RPA Element 3 through administrative interpretations. NMFS issued the
5 first of these administrative interpretations by letter dated September 26, 2011. Hasselman
6 Decl., Ex. 17. That letter begins by explaining:

7 The RPA was written as a programmatic consultation that applies to the entire
8 geographic region, and the applicability of each element of the RPA may vary
9 from place to place since differing jurisdictions have different floodplain
10 conditions and requirements. . . . some components of the RPA may not apply to
11 every jurisdiction, because in some jurisdictions the floodplain no longer contains
12 essential habitat features. *The NMFS believes that it is contingent upon local
governments to determine which functions are present in their floodplains, and
how they will maintain and restore floodplain functions*

13 *Id.* (emphasis added). The letter goes on to modify through “clarification” several of the most
14 confounding provisions of RPA Element 3 (e.g., the letter recognizes that any analysis should
15 start from existing conditions, not an assumed pristine floodplain; permits alternative buffer
16 widths depending on floodplain conditions; etc.). *Id.* Despite this clarifying guidance,
17 Plaintiff advocates in its Motion for a strict interpretation of RPA Element 3.

18 III. STANDARD OF REVIEW

19 A. Issuance of Preliminary Injunction.

20 It is well established that “[a] preliminary injunction is an extraordinary remedy never
21 awarded as of right.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 9 (2008). In general, a
22 plaintiff seeking a preliminary injunction must establish that: (1) it is likely to succeed on the
23 merits; (2) it is likely to suffer irreparable harm absent injunctive relief; (3) the balance of
24 equities tips in its favor; and (4) an injunction serves the public interest. *Id.* at 20.¹⁵ An

25 ¹⁵ As Plaintiff notes, the Ninth Circuit has determined that *Winter* did not overrule its long-standing “sliding
26 scale” approach to preliminary injunctive relief. Pl.’s Mot. for Prelim. Inj. at 9 n.6. However, under this

1 injunction should issue only when the plaintiff makes a “clear showing” and presents
2 “substantial proof” that it is entitled to such an extraordinary and drastic remedy. *Mazurek v.*
3 *Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); *Earth Island Inst. v. Carlton*, 626 F.3d
4 462, 469 (9th Cir. 2010) (“plaintiffs seeking a preliminary injunction face a difficult task in
5 proving that they are entitled to this ‘extraordinary remedy.’”).

6 Within the Ninth Circuit, the courts have modified this preliminary injunction analysis
7 for cases brought under the ESA to largely eliminate the third and fourth elements. *Nat’l*
8 *Wildlife Fed’n. v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 793-94 (9th Cir. 2005). For
9 ESA cases, “Congress removed from the courts their traditional equitable discretion in
10 injunction proceedings of balancing the parties’ competing interests.” *Nat’l Wildlife Fed’n v.*
11 *Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994). Accordingly, to prevail on a
12 request for preliminary injunction in an ESA action, the plaintiff bears the burden to
13 demonstrate: (1) a likelihood of success on the merits, and (2) a reasonable likelihood of
14 irreparable harm. *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Gutierrez*, 606 F.Supp.2d 1195,
15 1205 (E.D. Cal. 2008); *Nat’l Wildlife Fed’n. v. Nat’l Marine Fisheries Serv.*, 422 F.3d at 796
16 (likelihood of success on the merits and finding of irreparable harm “are precisely the
17 circumstances in which our precedent indicates that the issuance of an injunction is
18 appropriate”).

19 Further, in the event a plaintiff succeeds in demonstrating the elements required for a
20 preliminary injunction, the plaintiff’s proposed injunction order “must be narrowly tailored . . .
21 to remedy only the specific harms shown by the plaintiffs, rather than ‘to enjoin all possible
22

23 approach, “‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the
24 plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a
25 likelihood of irreparable injury and that the injunction is in the public interest.” *Alliance for the Wild Rockies v.*
26 *Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis added). “[S]erious questions going to the merits”
requires a plaintiff to demonstrate a “substantial case for relief on the merits.” *Leiva-Perez v. Holder*, 640 F.3d
962, 968 (9th Cir. 2011).

1 breaches of the law.” *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (citation
2 omitted). As explained herein, Plaintiff has failed to meet its burden in this case.

3 **B. Irreparable Harm Must Be Shown On a Species Level.**

4 With regard to the second element of the standard for a preliminary injunction, the
5 plaintiff “must establish that irreparable harm is likely, not just possible.” *Alliance for the*
6 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *see also Pac. Coast Fed’n of*
7 *Fishermen’s Ass’ns*, 606 F.Supp.2d at 1206 (rejecting plaintiffs’ contention that an ESA
8 violation automatically, *a fortiori*, requires injunctive relief). This is “[p]erhaps the single
9 most important prerequisite for the issuance of a preliminary injunction.” 11A C. Wright, A.
10 Miller, M. Kane & R. Marcus, Fed. Prac. & Proc. Civ. § 2948.1 (2d ed. 2011). In doing so,
11 the plaintiff must demonstrate “a definitive threat of future harm to protected species, not mere
12 speculation.” *Nat’l Wildlife Fed’n v. Burlington N. R.R., Inc.*, 23 F.3d at 1512 n.8. Should a
13 plaintiff fail to show that it is “‘likely to suffer irreparable harm in the absence of preliminary
14 relief,’ . . . [the court] need not address . . . the remaining elements of the preliminary
15 injunction standard.” *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1174 (9th Cir. 2011)
16 (citation omitted).

17 When evaluating whether there is irreparable harm to an ESA-listed species for
18 purposes of an injunction, the courts consistently hold that such harm must be assessed at the
19 species level. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d at 793 (holding
20 that preliminary injunction is appropriate upon a showing of “irreparable harm to a threatened
21 species”); *Pac. Coast Fed’n of Fishermen’s Ass’ns*, 606 F.Supp.2d at 1210 (identifying
22 “‘irreparable harm’ as ‘significant’ vis-a-vis the overall population.”) (citation omitted). *See*
23 *also Defenders of Wildlife v. Salazar*, No. 09-cv-00077, 2009 WL 8162144, at *4 (D. Mt. Sept.
24
25
26

1 8, 2009); *Humane Soc’y v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008).¹⁶ Furthermore,
 2 Plaintiff must demonstrate that such harm will occur during the interim period between the
 3 decision on the request for a preliminary injunction and the court’s ruling on the merits. *Pac.*
 4 *Coast Fed’n of Fishermen’s Ass’ns*, 606 F.Supp.2d at 1249.

5 IV. ARGUMENT

6 As explained above, stringent standards govern the issuance of the extraordinary relief
 7 sought by the Plaintiff in this case. For the reasons explained below, Plaintiff has failed to
 8 make the requisite showing of irreparable harm and, therefore, the Court should deny its
 9 request for a preliminary injunction.

10 A. Plaintiff’s Motion Must Be Denied Because Plaintiff Has Failed to Demonstrate 11 Any Irreparable Harm.

12 Plaintiff has failed to present any evidence of irreparable harm to the subject ESA-
 13 listed species or their habitat caused by the effects of FEMA’s current implementation of the
 14 NFIP. Plaintiff dedicated less than one page of its Motion to making its case for likelihood of
 15 irreparable harm. Pl.’s Mot. for Prelim. Inj. at 37. Within that single page, Plaintiff merely
 16 points to the NFIP BiOp and the issuance of new flood insurance policies since September
 17 2008 as its evidence of alleged harm.¹⁷ *Id.* By focusing on the NFIP BiOp, NWF disregards

18
 19 ¹⁶ Other Circuits are also in agreement with this approach. *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 29 (1st
 20 Cir. 2010) (upholding denial of an injunction when harm would have “only a negligible impact on the species as a
 21 whole”) (quotations omitted); *Water Keeper Alliance v. U.S. Dep’t of Defense*, 271 F.3d 21, 34 (1st Cir. 2001)
 (rejecting contention that the “death of even a single member of an endangered species” constituted irreparable
 harm and requiring a more “concrete showing of probable deaths during the interim period and of how these
 deaths may impact the species”).

22 ¹⁷ Plaintiff’s reliance on *Key Deer* is unavailing. See Pl.’s Mot. for Prelim. Inj. at 37. In *Key Deer*, the court
 23 entered an injunction following the invalidation of the applicable biological opinion and RPAs concerning
 24 FEMA’s administration of the NFIP in Florida. *Florida Key Deer v. Brown*, 386 F.Supp.2d 1281, 1284 (S.D. Fla.
 25 2005). Arguably, in *Key Deer*, reliance upon the analysis contained in the biological opinion was appropriate to
 26 assess irreparable harm because the court was considering the status quo implementation of the NFIP. In the
 instant case, FEMA has abandoned the status quo as analyzed by the BiOp and has implemented measures that
 significantly revise the administration of the NFIP in Washington. Accordingly, to satisfy its burden of proof,
 plaintiff cannot merely rely upon the BiOp, but must present scientific evidence demonstrating that the current
 iteration of the NFIP is irreparably harming listed species. See *Defenders of Wildlife*, 2009 WL 8162144, at *5.

1 the measures that FEMA – and NFIP participating jurisdictions – have taken in response to the
2 NFIP BiOp, including significant efforts to implement the RPA. Given that it is the adequacy
3 of this implementation that is being challenged (not FEMA’s pre-BiOp implementation of the
4 NFIP), Plaintiff must analyze the effects of those actions that FEMA is currently taking to
5 demonstrate irreparable harm. *See Audubon Soc’y of Portland v. Nat’l Marine Fisheries Serv.*,
6 No. 11–cv–00494, 2011 WL 3273139, at *32 (D. Or. July 29, 2011) (merely referencing the
7 prior biological opinion, without more, is not sufficient to support finding of irreparable harm).

8 Even where Plaintiff has provided extrinsic evidence beyond the NFIP BiOp,
9 Plaintiff’s evidence does not satisfy the threshold required to sustain a preliminary injunction.
10 The mere issuance of flood insurance policies does not demonstrate harm. Hasselman Decl.,
11 Ex. 2 & 3. As a preliminary matter, Plaintiff significantly overstates the number of policies
12 that have been issued for “new development” since the NFIP BiOp. While Plaintiff identifies
13 more than 800 new NFIP flood insurance policies issued since September 2008 in the Puget
14 Sound region, Hasselman Decl., Ex. 3, which Plaintiff asserts relate to “new development,”
15 Pl.’s Mot. for Prelim. Inj. at 37, in fact, only about twenty-five percent of those policies relate
16 to new development within the floodplain. AR 16721 (identifying the 220 NFIP policies
17 issued since September 2008 related to new development in the floodplain). Even considering
18 these 220 policies, Plaintiff makes no effort to link any of those policies to actual development
19 projects, much less to harm from those development projects.

20 Instead, Plaintiff’s Declarations are replete with abject speculation about what could be
21 occurring unsubstantiated by any factual information or actual analysis. *See* Wald Decl. ¶¶ 52-
22 54. Merely pointing to the fact that FEMA has not collected comprehensive data is not
23 adequate to satisfy Plaintiff’s burden to prove likelihood of irreparable harm. *See* Wald Decl.
24 ¶ 28; Kirkpatrick Decl. ¶¶ 52 & 65. Similarly, an “expert’s statement” that he or she does not
25 know what local governments are doing to respond to RPA Element 3 does not demonstrate
26

1 irreparable harm – it demonstrates lack of information or analysis.¹⁸ *See* Wald Decl. ¶¶ 41 &
2 52.

3 Also, although Plaintiff expresses concern about cumulative effects, Wald Decl. ¶ 54,
4 Plaintiff similarly has made no showing of cumulative impacts based on the activities that
5 FEMA and/or local jurisdictions have been taking since NMFS issued the NFIP BiOp. Based
6 on Plaintiff's acknowledgment that most individual projects are unlikely to harm an ESA-
7 listed species, and instead that its concern is really cumulative effects, Plaintiff would need to
8 look not only at the specific projects (which it has not done), but also provide an analysis of
9 how those project *cumulatively* caused irreparable harm. Kirkpatrick Decl. ¶ 48; Wald Decl. ¶
10 29. Plaintiff has made no effort to make this showing. Again, Plaintiff merely speculates
11 about the cumulative harm that could be occurring – but has not investigated or provided any
12 concrete evidence to demonstrate that harm. Such speculation is not adequate affirmative
13 proof to support a finding of likelihood of irreparable harm.

14 Finally, while Plaintiff spends very little effort on demonstrating irreparable harm, it
15 spends considerable effort analyzing and criticizing FEMA's efforts to implement the RPA.
16 Pl.'s Mot. for Prelim. Inj. at 14-35. Consequently, Plaintiff will likely respond to the assertion
17 that it has not yet demonstrated irreparable harm by pointing back to its analysis of FEMA's
18 alleged non-compliance with the RPA. But likelihood of success on the merits may not be
19 conflated with demonstrating the likelihood of irreparable harm. *See Defenders of Wildlife*,
20 No. 09-cv-00077, 2009 WL 8162144, at *4. Plaintiff has a separate and independent burden to
21 show an actual and concrete impact to the species. *Id.*; *Pac. Coast Fed'n of Fishermen's*
22 *Ass'ns*, 606 F.Supp.2d at 1206. Merely arguing that FEMA has not fully implemented the

23
24 ¹⁸ To the extent that Plaintiff's Declarants have conducted any review of NFIP participating cities and counties
25 have been doing to respond to FEMA's efforts to implement the NFIP BiOp, their review is very limited.
26 Further, the jurisdictions identified have been responsible for almost no new NFIP-policies since the issuance of
the NFIP BiOp: Orting, 3 policies; Lake Stevens, 0 policies; Ferndale, 0 policies; Granite Falls, 0 policies; Roy,
no policies identified. Hasselman Decl., Ex. 3.

1 RPA does not demonstrate that the actions that FEMA has been taking, in concert with NFIP
2 participating local jurisdictions, are likely to cause irreparable harm. As explained above,
3 Plaintiff must analyze FEMA's actions under the independent requirement that it prove
4 likelihood of irreparable harm. Because Plaintiff has not yet done that analysis or made the
5 requisite showing, its Motion for injunctive relief should be denied. *See Ctr. for Food Safety*,
6 636 F.3d at 1174; *Defenders of Wildlife*, 2009 WL 8162144, at *4-*5.

7 **B. ESA Listed Species Will Not Be Irreparably Harmed Pending the Outcome of**
8 **This Lawsuit Because of the Protections Provided by Existing State and Local**
9 **Laws and Regulations.**

10 Not only is Plaintiff's evidence insufficient to demonstrate irreparable harm, but
11 information and evidence not identified by Plaintiff affirmatively shows that the subject ESA-
12 listed species will not suffer irreparable harm. The combination of state and local programs
13 identified above are more than adequate to ensure no irreparable harm to the species during the
14 interim period. For example, Washington's hydraulic code will ensure that projects, including
15 levees, dikes and channelization projects, occurring within a state water will achieve "no net
16 loss" of fish habitat. *See* Section II.A.3, *supra*.

17 In addition, Washington's SMA, implemented through local SMPs, ensure that
18 floodplain development projects generate "no net loss of shoreline ecological function." *See*
19 Section II.A.2, *supra*. This mandate applies to all shorelines of the state, as well as to
20 adjoining shorelands measured at least 200 feet from the OHWM of the adjoining waterbody.
21 In many local jurisdictions, including King and Snohomish counties identified above, which
22 have chosen to include the entire floodplain in their shoreline jurisdiction, the no net loss
23 standard would apply throughout the floodplain as well. *See* Sections II.A.4.a-b, *supra*.

24 Also, Washington GMA-critical areas regulations, again implemented through local
25 regulations, ensure that there is no loss of critical areas functions. *See* Section II.A.1, *supra*.
26 That includes both floodplain functions and fish and wildlife habitat conservation area

1 functions. Also, the local regulations reviewed above demonstrate that at least some
2 significant local jurisdictions have adopted compensatory storage and/or “zero rise”
3 requirements that respond to the concerns raised in the NFIP BiOp regarding displacing
4 floodwaters to urban areas or increasing channel velocity. *See* Section II.A.a & c, *supra*.
5 Finally, local jurisdictions are applying stormwater requirements to new development that
6 alleviate concerns about water quality and quantity impacts from floodplain developments.
7 *See* Section II.A.a-f, *supra*. The local regulations summarized above catalog the myriad
8 regulations currently in place – above and beyond the NFIP minimum criteria – to ensure that
9 floodplain development will not irreparably harm species or their habitat. *Id.*

10 Further, since nearly all of these state and local programs pre-date the NFIP BiOp,
11 Plaintiff’s speculation that Washington’s vesting doctrine will usurp the benefits of any
12 regulations protecting floodplain habitat is equally unfounded. While existing developments
13 that predate many of these regulatory regimes may continue to cause harm to habitat today,
14 current State and local permitting protocols are adequate to ensure that new development will
15 not irreparably harm ESA-listed species or their habitat.

16 Plaintiff will likely respond by asserting that these state and local regulations do not
17 strictly conform to RPA Element 3, are inadequate to protect the subject ESA-listed species
18 from harm, and have not undergone ESA-review. As explained above, compliance with RPA
19 Element 3 is not the measure for irreparable harm. Further, while Plaintiff may assert that
20 these programs are not adequate, it has provided no evidence or analysis to support such
21 allegations. Pointing to the fact some local regulations allow the use of mitigation is
22 unavailing as mitigation or other offsetting measures is commonly permitted as part of an ESA
23 Section 7 consultation. *See e.g., Rock Creek Alliance v. U.S. Forest Serv.*, 703 F.Supp.2d
24 1152, 1207-08 (D. Mt. 2010). Further, Plaintiff’s assertion that NMFS reached the conclusion
25 in the NFIP BiOp that local regulations are inadequate to protect species from harm is
26

1 incorrect. Wald Decl. ¶ 52. To the contrary, the NFIP BiOp itself explains that NMFS did not
2 review the effect of these myriad state and local regulations on the preservation of floodplain
3 habitat in the Puget Sound region. NFIP BiOp at 56-57. Finally, Plaintiff may not shift the
4 burden from itself to local governments. Plaintiff bears the burden in this Motion to show
5 harm as a result of – or in spite of – those regulations. Ultimately, Plaintiff, has not done the
6 comprehensive study necessary to show any irreparable harm from existing state and local
7 regulatory programs. Instead, review of these regulations show that they are more than
8 adequate to ensure no irreparable harm to the subject ESA-listed species or their habitat during
9 the interim period.

10 **C. Plaintiff’s Requested Injunctive Relief is not Narrowly Tailored to Prevent the**
11 **Alleged Harm to the Species.**

12 Any preliminary injunction “must be narrowly tailored . . . to remedy only the specific
13 harms shown by the plaintiffs, rather than ‘to enjoin all possible breaches of the law.’” *Price*,
14 390 F.3d at 1117. Here, Plaintiff asserts that FEMA’s continuing implementation of the NFIP
15 will continue to decrease high quality floodplain and channel habitat for the subject ESA-listed
16 salmon species. Pl.’s Mot. for Prelim. Inj. at 37. As a result, Plaintiff requests that the Court
17 “enjoin FEMA from issuing flood insurance policies for new development projects in all Tier
18 1 and Tier 2 communities covered by the FEMA BiOp” and enjoin FEMA from “process[ing]
19 map changes that result in a reduction of any floodplain boundary.” *Id.* at 38 (emphasis in
20 original).¹⁹ Even if the Court concludes that Plaintiff has met the standards for a preliminary
21 injunction, Plaintiff’s Proposed Order is not narrowly tailored as required.

22
23 ¹⁹ Plaintiff includes the following proposed exemptions from the scope of the requested injunction: projects that
24 do not need flood insurance; projects that decline flood insurance; jurisdictions that have received an incidental
25 take permit or are covered by an ESA rule 4(d) exemption; projects that are subject to Section 7 consultation; and
26 projects that will have a beneficial effect on the species. Pl.’s Mot. for Prelim. Inj. at 38. Plaintiff also purports
to exempt “existing structures,” *id.*, but Plaintiff’s Proposed Order as currently drafted is not narrowly tailored to
exclude existing structures.

1 **1. “New Development” Is Not Narrowly Defined.**

2 Plaintiff proposes to enjoin the sale of NFIP flood insurance for “new development,”
3 but nowhere does Plaintiff provide a clear or concise definition of what projects constitute
4 “new development.” In fact, Plaintiff implies in its Motion that the 800 plus flood insurance
5 policies issued since the NFIP BiOp in September 2008 all relate to new development in the
6 floodplain. *Id.* at 37. FEMA’s records of new NFIP-policies since the NFIP BiOp, however,
7 indicate that only one quarter of those policies actually relate to new development in the
8 floodplain. AR 16721. Moreover, it seems that even FEMA’s numbers inadvertently capture
9 some projects that, although requiring a building permit and a new flood insurance policy,
10 actually do not and should not qualify as “new development.”

11 For example, when Pat Anderson, the City Attorney for the City of Snoqualmie,
12 reviewed FEMA’s list of flood insurance policies allegedly issued for new development in the
13 floodplain since the NFIP BiOp, he determined that five of the seven policies identified
14 actually related to home elevations – e.g., projects to elevate an existing home above the base
15 flood elevation. Anderson Decl. ¶8. Home elevations are not “new development” and do not
16 create new floodplain habitat impacts. Even if one assumes that these home elevations require
17 new fill, the area where the fill is located was previously displaced by the existing home.
18 Moreover, the City of Snoqualmie is upstream of an impassible fish barrier (the Snoqualmie
19 Falls) so the City contains no fish habitat areas. Anderson Decl. ¶ 4. Despite these facts,
20 Plaintiff’s proposed injunction would prohibit the owners of these homes from purchasing
21 flood insurance to cover their newly elevated homes. The owners of such homes would have
22 to choose between improving their safety without new floodplain habitat impacts, or defaulting
23 on their home mortgages, which require the owners to maintain flood insurance during the
24 duration of the loan. *See* 42 U.S.C. §4012a.

1 Without a clearer and narrower definition of “new development,” Plaintiff’s proposed
2 injunction will capture far more properties and projects than is appropriate or necessary to
3 protect listed species from harm during the interim period.

4 **2. In Those Cities and Counties Where Existing Regulations Either Satisfy**
5 **RPA Element 3 or Avoid Irreparable Harm, No Injunction Is Warranted.**

6 As explained in FEMA’s response brief and demonstrated by the sampling of local
7 jurisdictions’ regulations above, all of the Tier 1 and Tier 2 jurisdictions have taken some
8 action to comply with the NFIP BiOp and are already ensuring that floodplain development in
9 their jurisdictions will not cause irreparable harm during the interim period. While Plaintiff
10 asserts that those local efforts are inadequate, as explained above, Plaintiff has done almost no
11 analysis of local regulations or permitting requirements and no analysis of their actual effects
12 on floodplain habitat. Absent an affirmative showing by the Plaintiff that the continuing
13 operation of a jurisdiction’s programs will cause harm, those cities and counties that are
14 already taking action to ensure that floodplain development in their jurisdictions will not harm
15 ESA-listed species should not be subject to the injunction.

16 Plaintiff is likely to respond to this argument by asserting that it need not show that a
17 particular jurisdiction’s actions are causing harm because, under the NFIP BiOp analysis, it is
18 the cumulative effect of the actions of all 122 NFIP participating jurisdictions in the Puget
19 Sound region that generated the “harm.” Yet, as explained above, Plaintiff has failed to
20 demonstrate that the way FEMA and the NFIP participating local jurisdictions are currently
21 implementing their development regulations and permitting floodplain projects is causing
22 harm to the listed species either individually or cumulatively. While Plaintiff attempts to rely
23 upon the NFIP BiOp, the NFIP BiOp did not analyze existing local regulations and could not
24 analyze FEMA’s actions taken after the NFIP BiOp was issued.

25 Plaintiff’s reliance on *Key Deer* to support the scope of its proposed Order is also
26 misplaced. There, the plaintiffs were seeking a permanent injunction, not a preliminary

1 injunction. Thus, the plaintiffs had already prevailed on the merits and received a decision
2 holding that the subject RPA and FEMA's implementation of it was inadequate to protect the
3 subject ESA-listed species from harm. *Florida Key Deer*, 386 F.Supp.2d at 1287. Moreover,
4 there was a recorded history of more than 2000 permits that FEMA and U.S. Fish and Wildlife
5 Service had issued under the RPA that the plaintiffs were able to point to as evidence that the
6 federal agencies were not adequately protecting the relevant species and habitat from harm.
7 *Florida Key Deer v. Brown*, 364 F.Supp.2d 1345, 1356-57 (S.D. Fla. 2005). Here, by
8 comparison, Plaintiff has not prevailed on the merits – in fact, the Court has not yet considered
9 the merits of the case – and Plaintiff has not pointed to any concrete evidence, only abstract
10 speculation, that any harm is currently occurring. Without first showing that the actions of
11 local jurisdictions are actually causing harm, there is no basis for imposing an injunction
12 against the issuance of flood insurance within that jurisdiction.

13 **D. While FEMA Has Sought to Comply with RPA Element 3 to the Extent Possible,
14 RPA Element 3 is Irretrievably Flawed.**

15 Plaintiff's effort to strictly enforce RPA Element 3 is misplaced. As currently drafted,
16 RPA Element 3 itself is irreparably flawed, necessitating reinitiation of consultation on at least
17 this component of the NFIP BiOp. POSFR acknowledges that this lawsuit is not a challenge to
18 the NFIP BiOp itself. Nevertheless, in evaluating whether FEMA is adequately responding to
19 the NFIP BiOp, both FEMA and the Court can and should consider the feasibility of applying
20 RPA Element 3 as written.

21 **1. FEMA Lacks Authority to Implement RPA Element 3 under Its Existing
22 Regulations.**

23 As a preliminary matter, FEMA currently does not have the authority under its existing
24 regulations to enable it to enforce RPA Element 3 against any of the NFIP participating
25 jurisdictions in the Puget Sound region. As the Plaintiff points out, FEMA's only existing
26 regulatory authority to require local governments to act in response to the NFIP BiOp is 44

1 C.F.R. § 60.3(a)(2). Pl.’s Mot. for Prelim. Inj. at 19. Rather than establishing proscriptive
2 development standards similar to those set forth in RPA Element 3, this regulatory provision
3 simply obligates NFIP participating communities to require project applicants to obtain all
4 other necessary federal or state permits. 44 C.F.R. § 60.3(a)(2) (“The community shall review
5 proposed development to assure that all necessary permits have been received from those
6 governmental agencies from which approval is requires by Federal or State law...”). The only
7 “permit” available under the ESA is an incidental take permit (“ITP”) issued in conjunction
8 with a habitat conservation plan under ESA Section 10. *See* Pl.’s Mot. for Prelim. Inj. at 15.
9 An ITP is only required for projects that trigger the ESA Section 9 “take” prohibition. The
10 “take” standard is quite a bit different – and less restrictive – than RPA Element 3’s “no
11 adverse effect” standard.²⁰ In fact, as Plaintiff’s Declarants Kirkpatrick and Wald both
12 concede, few if any individual floodplain developments exceed the “take” threshold under
13 Section 9. Kirkpatrick Decl. ¶ 48; Wald Decl. ¶ 29.

14 As a result, the most that FEMA can require of local jurisdictions under its existing
15 regulations is that they require project proponents to avoid “take” or obtain an ITP if a
16 particular project causes take. FEMA lacks the ability to require local governments to apply
17 the criteria in RPA Element 3, particularly the “no adverse effect” standard allegedly
18 applicable to the “protected area” or RBZ. Before FEMA may impose RPA Element 3 on
19 local jurisdictions it must go through formal ruling making, including public comment and
20 review under the National Environmental Policy Act (“NEPA”). *See* 5 U.S.C. §553. *See, e.g.,*

21
22 ²⁰ As defined in the ESA, the term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture,
23 or collect, a listed species or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). As NMFS has
24 explained, “[t]he term ‘harm’ refers to an act that actually kills or injures a protected species.” Final Rule
25 Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units (ESUs), 65 Fed. Reg.
26 42422, 42426 (July 10, 2000). Further, NMFS has explained “[h]arm can arise from significant habitat
modification or degradation where it actually kills or injures protected species by significantly impairing essential
behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering.” *Id.*; 50 C.F.R. §
17.3 (emphasis added).

1 *Precon Dev. Corp. v. U.S. Army Corps of Eng'r*, 633 F.3d 278 (4th Cir. 2011); *Nat'l Min.*
2 *Ass'n v. Jackson*, 768 F.Supp.2d 34 (D.D.C. 2011); *New Hope Power Co. v. U.S. Army Corps*
3 *of Eng'r*, 746 F.Supp.2d 1272 (D.C. Fla. 2010); *San Luis & Delta-Mendota Water Authl. v.*
4 *Salazar*, 686 F.Supp.2d 1026,1045 (E.D. Cal. 2009).

5 **2. RPA Element 3 Does Not Make Sense In Most Puget Sound Jurisdictions**
6 **and Is Inconsistent With Other Provisions In the ESA.**

7 As explained above, RPA Element 3 has met with significant resistance from local
8 governments and property owners due to its monolithic approach to floodplain regulation. As
9 the Technical Team identified, it does not account for local differences in floodplain character
10 and level of development, and consequently does not fit in many Puget Sound jurisdictions.

11 As explained above, due to these and other criticisms, FEMA and NMFS have been
12 working to modify RPA Element 3 through administrative interpretations. Despite this
13 ongoing clarifying guidance, Plaintiff advocates for a strict interpretation of RPA Element 3. If
14 strictly interpreted, RPA Element 3 would prohibit redevelopment projects that could actually
15 improve conditions for ESA-listed species (e.g., in replacing an aging building, the owner
16 would upgrade the property to current stormwater standards), and actually prohibit critical
17 infrastructure projects and repairs (e.g., replacing a failing bridge or repairing a gas line
18 currently located in the Protected Area). *See* Molly Lawrence, Comment Letter to FEMA 6-7
19 (April 8, 2010) (Lawrence Decl., Att. G). Such a prohibition would cause just those harms
20 that Plaintiff claims to want to avoid.

21 Moreover, that strict interpretation belies other portions of the ESA. Specifically,
22 while the Plaintiff's Declarants assert that RPA Element 3 never permits mitigation within the
23 RBZ, *see* Wald Decl. ¶¶ 18-19, 23, such mitigation would be, and is commonly, permitted as
24 part of a Section 7 ESA consultation process. *See e.g., Rock Creek Alliance v. U.S. Forest*
25 *Serv.*, 703 F.Supp.2d 1152, 1207-08 (D. Mt. 2010). Thus, Plaintiff would apply a more
26 restrictive set of standards to local floodplain development permits than would apply to a

1 comparable project that triggers a Section 7 consultation (e.g., Section 404 Clean Water Act
2 wetland fill permit). This demonstrates the myopic and dysfunctional nature of RPA Element
3 3. Consequently, Amicus POSFR anticipates that FEMA will need to request reinitiation of
4 consultation regarding at least this element of the NFIP BiOp. To the extent FEMA has not
5 yet reinitiated consultation, its current approach of trying to work with its local government
6 partners is an appropriate method to try to implement RPA Element 3 to the extent feasible.

7
8 **V. CONCLUSION**

9 For the foregoing reasons, POSFR requests that this Court deny Plaintiff's request for a
10 preliminary injunction in this case.

11 DATED this 19th day of January, 2012.

12 GORDONDERR LLP

13
14 By /s/Molly A. Lawrence
15 Molly A. Lawrence, WSBA # 28236
16 Ray Liaw, WSBA # 40725
17 Attorneys for Property Owners for Sensible
18 Floodplain Regulation
19
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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington, that on January 19, 2012, I electronically filed the below pleadings with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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