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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATIONAL WILDLIFE FEDERATION,

Plaintiff,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY,

Defendant,

THE CITIES OF ARLINGTON,
AUBURN, BURLINGTON, EVERETT,
FEDERAL WAY, KENT, LAKE
FOREST PARK, MOUNT VERNON,
NORTH BEND, ORTIN, PORT
ANGELES, PUYALLUP, RENTON,
SNOQUALMIE, SULTAN, and
TUKWILA,

Defendant-Intervenors,

PROPERTY OWNERS FOR SENSIBLE
FLOODPLAIN REGULATION,

Defendant-Intervenor.

CASE NO. C11-2044-RSM

ORDER DENYING PLAINTIFF'S
MOTION FOR A PRELIMINARY
INJUNCTION

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I. INTRODUCTION

This matter comes before the Court upon Plaintiff National Wildlife Federation’s motion for a preliminary injunction. Dkt. # 10. For the reasons set forth below, the motion is DENIED.

II. BACKGROUND

A. Statutory Framework

This case involves the interaction of two congressional mandates: the National Flood Insurance Act (“NFIA”) of 1968, 42 U.S.C. §§ 4001-4129, and the Endangered Species Act (“ESA”) of 1973, 16 U.S.C. §§ 1531-1544.

1. The National Flood Insurance Act

Prior to 1968, there was a growing concern that the private insurance industry was unable to offer reasonably priced flood insurance on a national basis. See 42 U.S.C. § 4001(a), (b); *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 388 (9th Cir. 2000). Congress passed the National Flood Insurance Act to address this concern. The purposes of the NFIA were to provide affordable flood insurance throughout the nation, encourage appropriate land use that would minimize the exposure of property to flood damage and loss, and thereby reduce federal expenditures for flood losses and disaster assistance. 42 U.S.C. § 4001(d)-(f); *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1136 (11th Cir. 2008); *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 388 (9th Cir. 2000). To that end, the NFIA authorized the Federal Emergency Management Agency (“FEMA”) to establish and carry out the National Flood Insurance Program (“NFIP”). 42 U.S.C. § 4011.

There are three basic components of the NFIP: (1) the identification and mapping of flood-prone communities, (2) the requirement that communities adopt and enforce floodplain

1 management regulations that meet minimum eligibility criteria in order to qualify for flood
2 insurance, and (3) the provision of flood insurance. *Nat'l Wildlife Federation v. Federal*
3 *Emergency Management Agency*, 345 F.Supp.2d 1151, 1155 (2004). FEMA also implements a
4 Community Rating System ("CRS"), which provides discounts on flood insurance premiums in
5 those communities that establish floodplain management programs that exceed NFIP's minimum
6 eligibility criteria. *Id.* The NFIA encourages community participation in the NFIP by
7 prohibiting federally-regulated banks or lenders, or federal agencies, from providing loans or
8 other financial assistance for acquisition or development within flood hazard areas of non
9 participating communities and by requiring that flood insurance be purchased as a precondition
10 for such financial assistance. Declaration of Jan Hasselman, Dkt. No. 11, Ex. 1 (the "BiOp"), p.
11 2.

12 *a. Mapping*

13 FEMA is tasked with identifying and publishing information regarding "all flood plain
14 areas, including coastal areas located in the United States, which have special flood hazards." 42
15 U.S.C. § 4101. A Special Flood Hazard Area or "SFHA" is "the land within the flood plain
16 within a community subject to a one percent or greater chance of flooding in a given year." 44
17 C.F.R. § 59.1. FEMA puts data regarding the locations of SFHA and regulatory floodways on
18 Flood Insurance Rate Maps ("flood maps"). The flood maps, in turn, provide the basis both for
19 the requirement that a developer obtain flood insurance as well as the calculation of the actual
20 flood insurance rate for any new construction.

21 FEMA is required to assess the need for revisions and updates of flood maps "based on
22 an analysis of all natural hazards affecting flood risks." 42 U.S.C. § 4101(e)-(f). However, state
23 and local governments may request map revisions by submitting sufficient technical data to

1 justify the request. *See* 42 U.S.C. § 4101(f)(2). In addition, FEMA has promulgated regulations
2 that allow individual landowners to request map changes, called Letters of Map Change, de-
3 signating property as within the SFHA. *See* 44 C.F.R. §§ 65.4-65.8, 44 C.F.R. Part 72; 42
4 U.S.C. § 4104. The letters are issued when a physical structure or the placement of earthen fill
5 has raised the property outside the SFHA so that it is no longer subject to the 1% annual chance
6 of flooding. 44 C.F.R. § 72.2. A Letter of Map Change may also be issued when there is an
7 official determination by FEMA that a property has been inadvertently included in the SFHA or
8 regulatory floodway. 44 C.F.R. Part 70. Finally, a community or individual may request
9 FEMA's comments as to whether a proposed project, if built as proposed, would result in a flood
10 map revision. FEMA's comments in response to such a request are issued in the form of a
11 Conditional Letter of Map Change. 44 C.F.R. § 65.8, Part 70, Part 72.

12 *b. Minimum Eligibility Requirements*

13 To qualify for the program, communities must adopt land use controls at least as
14 restrictive as the minimum criteria established by FEMA. *See* 42 U.S.C. § 4102(c). FEMA
15 promulgated regulations setting forth the minimum floodplain management criteria required by
16 the NFIA in 1976. 42 U.S.C. § 4129; 41 Fed. R.eg. 46,975 (Oct. 26, 1976). Under these
17 regulations, in order to qualify for insurance under the NFIP, a participating community must
18 adopt and enforce a floodplain management ordinance that meets or exceeds regulatory criteria.
19 44 C.F.R. §§59.2(b), 59.22(a)(3), 60.1. The criteria apply to all areas within a community that
20 are mapped as within the SFHA. A community that fails to adequately enforce its flood plain
21 management ordinance may be put on probation or suspended from the NFIP. 44 C.F.R.
22 §59.24(b)-(c).

1 *c. Provision of Flood Insurance*

2 FEMA must provide flood insurance to communities which have “evidenced a positive
3 interest in securing flood insurance coverage under the flood insurance program” and have
4 “given satisfactory assurance that ... adequate land use and control measures will have been
5 adopted ... which are consistent with the comprehensive criteria for land management and use
6 developed” under 42 U.S.C. § 4102. 42 U.S.C. § 4012(c).

7 *d. Community Rating System*

8 FEMA is authorized “to carry out a community rating system program, under which
9 communities participate voluntarily ... to encourage adoption of more effective measures that
10 protect natural and beneficial floodplain functions,” among other goals. 42 U.S.C. § 4022(b)(1).
11 FEMA’s community rating system (“CRS”) provides discounts on flood insurance premiums in
12 communities that establish floodplain management programs that go beyond the NFIP’s
13 minimum eligibility criteria.

14 2. The Endangered Species Act

15 Section 7(a)(2) of the ESA requires federal agencies to “ensure” that their actions do not
16 cause “jeopardy” to endangered or threatened species. 16 U.S.C. § 1536(a)(2). To cause
17 jeopardy is to “reduce appreciably the likelihood of both the survival and recovery of a listed
18 species in the wild.” 50 C.F.R. § 402.02. The federal agency undertaking such an activity must
19 consult the service having jurisdiction over the relevant endangered species. The U.S. Fish and
20 Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), are jointly
21 responsible for administering the ESA and the scope of their respective jurisdictions is set forth
22 in 50 C.F.R. § 402.01(b) (1987). Here, the service involved is the NMFS.

1 Under the Act, following consultation, the service must issue a biological opinion that
2 details how the proposed action “affects the species or its critical habitat,” including the impact
3 of “incidental takings” of the species. An incidental taking “refers to takings that result from, but
4 are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency
5 or applicant.” 50 C.F.R. § 402.02. If a species might be endangered by the agency action, the
6 service suggests a “reasonable and prudent alternative” (“RPA”) to the agency's proposal. 16
7 U.S.C. at § 1536(b)(3)(A). “The agency is not required to adopt the alternatives suggested in the
8 biological opinion; however, if the Secretary deviates from them, he does so subject to the risk
9 that he has not satisfied the standard of section 7(a)(2).” *Tribal Village of Akutan v. Hodel*, 869
10 F.2d 1185, 1193 (9th Cir. 1988) (citing *Village of False Pass v. Watt*, 565 F.Supp. 1123, 1160-61
11 (D. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir.1984)). Thus, “section 7(a)(2) imposes two
12 obligations upon federal agencies. The first is procedural and requires that agencies consult with
13 the FWS to determine the effects of their actions on endangered or threatened species and their
14 critical habitat. The second is substantive and requires that agencies insure that their actions not
15 jeopardize endangered or threatened species or their critical habitat.” *Florida Key Deer v.*
16 *Paulison*, 522 F.3d 1133, 1138 (11th Cir. 2008) (citing 16 U.S.C. § 1536(b) & (a)(2)).

17 **B. Procedural History**

18 1. The 2004 Litigation

19 In 2004, Plaintiff National Wildlife Federation (“NWF”) brought suit against FEMA,
20 alleging that FEMA was in violation of the Endangered Species Act for failing to comply with its
21 procedural obligation under 16 U.S.C. § 1536(a)(2) to consult with the NMFS on impacts of the
22 NFIP to the Puget Sound chinook salmon, a threatened species. *See NWF v. FEMA*, 345
23 F.Supp.2d 1151. Section 7 requires every federal agency to engage in consultation to “insure
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1 that any action authorized, funded or carried out by such agency ... is not likely to jeopardize the
2 continued existence of any endangered species or threatened species or result in the destruction
3 or adverse modification of habitat of such species.” 16 U.S.C.A. § 1536(a)(2).

4 Although FEMA did not have discretion to deny insurance to a person in an otherwise
5 eligible community, the court concluded that FEMA did have discretion in its mapping activities,
6 discretion to amend its regulations establishing the minimum eligibility criteria to qualify for
7 flood insurance, and discretion to promote conservation measures through the CRS. *NWF v.*
8 *FEMA*, 345 F.Supp.2d at 1168-1174. In addition, the court found substantial evidence that
9 FEMA’s implementation of NFIP in the Puget Sound region “may affect” chinook salmon. As a
10 result, FEMA was held in violation of the ESA and was ordered to initiate consultation with
11 NMFS within sixty days.

12 2. The Biological Opinion

13 Pursuant to the Court’s order, FEMA initiated consultation with NMFS in 2004. After
14 four years of scientific review and inter-agency negotiations, on September 22, 2008, NMFS
15 issued a 226-page biological opinion on the impacts of the NFIP on ESA-listed species in the
16 Puget Sound region. *See BiOp*. The BiOp concluded that implementation of the NFIP
17 jeopardized the survival of not only Puget Sound chinook salmon, but also Puget Sound
18 steelhead, Hood Canal chum salmon, and southern resident killer whales. BiOp at 150. The
19 BiOp also concluded that continued implementation of the NFIP would destroy or adversely
20 modify critical habitat for Puget Sound chinook salmon, Hood Canal chum salmon, and southern
21 resident killer whales. *Id.*

22 Pursuant to its obligations under the ESA, NMFS presented FEMA with a Reasonable
23 and Prudent Alternative to the NFIP to ensure that the action did not cause jeopardy to the listed
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1 species or adversely modify their critical habitat. The RPA consists of seven elements, briefly
2 outlined here:

- 3 1) **Notification.** FEMA was instructed to notify all 122 NFIP communities in the Puget
4 Sound region within 30 days that “development consistent with the NFIP jeopardizes
5 the listed species and adversely modifies their critical habitat.” BiOp at 151. The
6 notification was to suggest measures for avoiding and minimizing take
- 7 2) **Mapping.** This element directed FEMA to make multiple changes to its mapping
8 program. Most significantly, FEMA was instructed to process Letters of Map Change
9 only when the proponent has demonstrated “that the alteration avoids habitat
10 functional changes, or that the proponent has mitigated” for such changes. BiOp at
11 152-53. FEMA was also directed to address effects that could occur later in time; to
12 prioritize mapping activities based on the presence of salmon; and to increase the
13 accuracy of maps through use of on-the-ground data and consideration of “future
14 conditions,” including climate change. *Id.*
- 15 3) **Floodplain Management Criteria.** This element directed FEMA to revise its
16 floodplain management criteria. BiOp at 154. The BiOp identifies two types of areas
17 within the SFHA: the “protected area” and the remainder of the floodplain. *Id.* The
18 protected area consists of the floodway, the Channel Migration Zone plus 50 feet, and
19 the Riparian Buffer Zone. FEMA is directed to *either* allow no development in the
20 protected area, or require the local jurisdiction with permitting authority to
21 demonstrate to FEMA that proposed development in the protected area “does not
22 adversely affect water quality, water quantity, flood volumes, flood velocities,
23 spawning substrate, and/or floodplain refugia for listed salmonids.” *Id.* In addition,

1 for development within the SFHA but outside the protected area, loss of floodplain
2 storage must be avoided, rectified or compensated for and Low Impact Development
3 methods must be used to avoid stormwater effects. *Id.* The remainder of this element
4 focuses on the three-year period in which FEMA is required to complete this element
5 and reporting requirements for the interim period. *Id.*¹

6 4) **Community Rating System.** This element directed FEMA to change the CRS to
7 increase points for salmon-friendly measures and decrease points for measures that
8 reduce flood risk but harm habitat, such as through the use of levees. *Id.* at 158-59.

9 5) **Levee Vegetation and Construction.** This element called for four specific changes,
10 to be implemented within one year. *Id.* at 160-62. A) FEMA was prohibited from
11 recognizing levees that are certified by the Army Corps of Engineers unless it is
12 demonstrated that the standard will not adversely affect species or habitat. B) FEMA

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14 ¹ It is worth noting, with respect to this element, that the parties fundamentally disagree about
15 what the BiOp requires in the protected zone. Plaintiff argues that “NMFS conceived of the
16 protected area primarily as a ‘no disturbance’ zone, except for a narrow list of permissible
17 activities that includes repair of existing structures, maintenance of utilities, and restoration
18 projects.” Dkt. # 10, p. 18. (citing BiOp at 222-223). FEMA interprets this element as
19 requiring that FEMA “either allow no development in the protected area *or* require communities
20 to ‘demonstrate to FEMA that any proposed development in the [Protected Area] does not
21 adversely affect water quality, water quantity, flood volumes, flood velocities, spawning
22 substrate, and/or floodplain refugia for listed salmonids.” Dkt. # 16, p. 23 (citing BiOp at 154)
(emphasis added). The Court need not interpret the BiOp for the purposes of this motion.
23 However, the Court does note that the BiOp does not appear to support Plaintiff’s strict
24 interpretation. For example, the BiOp provides that “[t]he [protected area] is a no-disturbance
zone, *other than for activities that will not adversely affect habitat function*” and that “new
buildings, including accessory buildings; new impervious surfaces; removal of native vegetation;
new clearing, grading, filling, land-disturbing activity or other ‘development’” is “not permitted
unless shown not to adversely affect water quality, water quantity, flood volumes, flood
velocities, spawning substrate, and/or floodplain refugia for listed salmonids.” BiOp at 222-223
(emphasis added).

1 was directed to revise its procedures so that levee owners that opt out of the Corps'
2 funding program and maintain vegetation remain eligible for emergency funding. C)
3 FEMA was directed to use, and encourage grantees to use, Hazard Mitigation grant
4 funding and the Flood Mitigation Assistance Program for projects that reduce flood
5 risk and also benefit salmon. D) FEMA was instructed to recognize new levees and
6 floodwalls only if they include certain habitat-protecting features.

7 6) **Mitigation.** For development in floodplains that degrade habitat during the period
8 prior to full implementation of the RPA, FEMA was instructed to “ensure” that
9 appropriate mitigation occurs. *Id.* at 162.

10 7) **Monitoring and Adaptive Management.** FEMA was directed to undertake regular
11 monitoring and reporting of progress towards each of the other RPA elements. *Id.*

12 In addition to the seven-element RPA outlined above, the BiOp also includes an
13 Incidental Take Statement, which insulated FEMA and participating communities from liability
14 under Section 9 of the ESA if they complied with the RPA. *Id.* at 168-175.

15 3. The new litigation

16 Now before the Court is a second lawsuit between the same parties. There is no dispute
17 that FEMA has complied with its obligations under the ESA and the court’s 2004 order to
18 consult with the NMFS regarding its implementation of the NFIP. However, more than three
19 years after the NMFS issued the BiOp, the parties now dispute whether FEMA has properly
20 implemented the 7-element RPA contained in the BiOp such that it is no longer jeopardizing the
21 continued existence of ESA-listed species or causing the destruction of their critical habitat.
22 NWF claims that FEMA has failed to implement critical aspects of the RPA and is therefore
23 violating the ESA by (1) jeopardizing listed species and adversely modifying critical habitat; (2)

1 making irretrievable and irreversible commitments of resources which have the effect of
2 foreclosing the formulation or implementation of any reasonable and prudent alternative
3 measures; and (3) implementing the NFIP in a manner that results in “take” of listed species.
4 See Complaint, Dkt. No. 1. NWF now moves the Court to enjoin FEMA from providing flood
5 insurance, either directly or through third-party entities, for any new development project in Tier
6 1 or Tier 2 jurisdictions (the jurisdictions with the most critical habitat) until the case is resolved
7 on the merits. The proposed injunction would also prevent FEMA from processing certain
8 floodplain map changes. The cities of Arlington, Auburn, Burlington, Everett, Federal Way,
9 Kent, Lake Forest Park, Mount Vernon, North Bend, Orting, Port Angeles, Puyallup, Renton,
10 Snoqualmie, Sultan, and Tukwila, as well as the non-profit organization Owners for Sensible
11 Floodplain Regulation (“POSFR”), oppose Plaintiff’s motion as intervenor defendants.

12 **III. MOTION FOR PRELIMINARY INJUNCTION**

13 NWF contends that all of the deadlines in the BiOp have passed and FEMA has yet to
14 fully implement the RPA. Since the BiOp concluded that the NFIP would cause jeopardy to
15 listed species unless FEMA implemented the RPA, NWF argues that FEMA, in failing to do so,
16 is causing jeopardy to listed species in violation of Section 7 of the ESA. Furthermore, since
17 FEMA has not implemented the RPA, the “safe harbor” from Section 9 liability under the
18 Incidental Take Statement does not apply. FEMA disputes that it is not in compliance with the
19 RPA.² FEMA and intervenor Defendants also argue that Plaintiff has failed to show that the
20 NFIP as it is currently run is likely to cause irreparable harm.

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22 ² FEMA contends that, of the sixteen sub-elements identified in the RPA, it is in compliance with
23 ten of them. With respect to four of the sub-elements, it expects to be in compliance within the
24 year. As to the remaining two sub-elements, FEMA argues that it lacks the statutory authority to

1 **A. Standard**

2 “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter*
3 *v. Natural Resources Defense Council*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)
4 (citing *Munaf v. Geren*, 553 U.S. 674, 689-690, 128 S.Ct. 2207, 2218-2219, 171 L.Ed.2d 1
5 (2008)). In most cases, a plaintiff seeking a preliminary injunction must show: (a) a likelihood
6 of success on the merits; (b) likelihood of irreparable harm in the absence of relief; (c) the
7 balance of hardships tips in their favor; and (d) the injunction is in the public interest. *Id.*
8 However, in cases under the Endangered Species Act (“ESA”), the traditional test for a
9 preliminary injunction does not apply. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 193-95
10 (1978). In *TVA v. Hill*, the Supreme Court held that Congress had explicitly foreclosed the
11 exercise of traditional equitable discretion by courts faced with a violation of section 7 of the
12 ESA. *Id.* Thus, under the ESA, once a plaintiff establishes a probability of success on the
13 merits and likely harm, the balance of hardship and the public interest require an injunction.
14 *National Wildlife Fed. v. National Marine Fisheries Service*, 422 F.3d 782, 793-794 (9th Cir.
15 2005).

16 “When a plaintiff challenges a final agency action, judicial review normally is limited to
17 the administrative record in existence at the time of the agency’s decision.” *Friends of the*
18 *Clearwater v. Dombek*, 222 F.3d 552, 560 (9th Cir. 2000). However, where a plaintiff’s claims
19 are brought under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), rather than the
20 APA’s authorization to review final agency action, 5 U.S.C. §706, the APA’s evidentiary

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22 comply with the RPA as written, but that it has had no occasion since 2008 to apply those
23 requirements. *See* Dkt. # 16 pp. 17-18.

1 restrictions do not apply. *See Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472,
2 497 (9th Cir. 2011) (“The APA applies only where there is “no other adequate remedy in a
3 court,” 5 U.S.C. § 704, and—because the ESA provides a citizen suit remedy—the APA does not
4 apply in such actions. Therefore, ... we may consider evidence outside the administrative record
5 for the limited purposes of reviewing Plaintiffs' ESA claim.”) Here, NWF’s lawsuit is brought
6 pursuant to the citizen provision suit of the ESA. *See* Dkt. No. 1, ¶7. Accordingly, the
7 evidentiary restrictions under the APA do not apply and the Court may consider evidence outside
8 the administrative record, including the numerous declarations filed thus far in this litigation.³

9 **B. Likelihood of Irreparable Harm**

10 To succeed on its motion for a preliminary injunction, NWF must “demonstrate that
11 irreparable injury is *likely* in the absence of an injunction.” *Winter v. Natural Resources Defense*
12 *Council*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (emphasis in the original).
13 “Environmental injury, by its nature, can seldom be adequately remedied by money damages and
14 is often permanent or at least of long duration, i.e., irreparable.” *Amoco Prod. Co. v. Village of*
15 *Gambell*, 480 U.S. 531, 545 (1987). However, “a preliminary injunction will not be issued

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18 ³ Further, the Court finds it unnecessary to address the motions to strike the Wald, Kirkpatrick,
19 and Sterbank declarations at this time. *See also* *South Yuba River Citizens League v. National*
20 *Marine Fisheries Service* 257 F.R.D. 607, 615 (E.D.Cal.,2009) (“evidence submitted in support
21 of a motion for a preliminary injunction need not be admissible”) (citing *Cobell v. Norton*, 391
22 F.3d 251, 261 (D.C.Cir.2004), *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th
23 Cir.1993); 11A Wright, Miller and Marcus, Fed. Practice & Procedure Civ.2d. § 2949); *see also*
24 *Wild Equity Institute v. City and County of San Francisco*, 2011 WL 5975029, *7-9 (N.D. Cal.
Nov. 29, 2011) (making no ruling on the merits to objections to expert testimony at the
preliminary injunction stage).

1 simply to prevent the possibility of some remote future injury.” *O’Shea v. Littleton*, 414 U.S.
2 488, 502, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974).

3 Since environmental injury is “by its nature” irreparable, Plaintiff must show that the
4 NFIP is likely to cause environmental injury. *See Amoco Prod. Co*, 480 U.S. at 545. Plaintiffs
5 argue that “[t]he touchstone for evaluating Plaintiff’s harm is the FEMA BiOp itself, which
6 describes in detail how ongoing implementation of the NFIP is causing jeopardy to listed
7 species, adverse modification to their habitat, and take.” Dkt. # 10, p. 37. Plaintiffs also point to
8 the Wald declaration as support for their argument that they are likely to suffer irreparable harm
9 in the absence of an injunction. The Wald declaration, however, is also based on the premise
10 that FEMA has failed to fully implement the RPA. *See* Dkt. # 12, ¶52 (“[T]o the best of my
11 knowledge, no Puget Sound jurisdiction has development regulations that meet the BiOp’s
12 standards of ensuring no habitat harm within the protected area and remainder of the
13 floodplain.”). Finally, Plaintiff points to data demonstrating the number of flood insurance
14 policies that have been issued since Jan 1, 2000 – slightly after the date on which chinook
15 salmon were listed as threatened under the ESA, and the number of policies that have been
16 issued since September 22, 2008 – the date on which the BiOp was issued. *See* Hasselman Dec.,
17 Exs. 2 & 3.

18 The Court first addresses the extrinsic evidence regarding the issuance of new flood
19 insurance policies. Evidence that new flood insurance policies have been issued does not
20 constitute proof that listed species are likely to suffer harm. The BiOp includes an RPA “that the
21 Director believes would avoid the likelihood of jeopardizing the continued existence of listed
22 species or resulting in the destruction or adverse modification of critical habitat.” BiOp at 150
23 (citing 50 CFR 402.02). The inclusion of the RPA signifies that the NWFS contemplated that

1 the NFIP could be implemented in Puget Sound in a manner that would not cause jeopardy to
2 listed species. In other words, the issuance of flood policies by itself does not cause jeopardy to
3 listed species; it is the issuance of such policies in the context of a program that is implemented
4 in a certain way that causes jeopardy. In addition, the issuance of flood insurance policies in the
5 past – even if they were issued in the context of a program that causes jeopardy – does not shed
6 light on whether future flood insurance policies will cause similar jeopardy. The evidence that
7 several flood insurance policies have been issued since the BiOp was published fails to establish
8 the likelihood of irreparable harm.

9 Nonetheless, Plaintiff’s central argument with respect to proving irreparable harm is the
10 “simple logic” that (a) NFIP was causing jeopardy to listed species; (b) the RPA was devised to
11 eliminate that jeopardy; (c) FEMA has failed to fully implement the RPA; and (d) therefore the
12 NFIP continues to cause jeopardy to listed species. *See* Dkt. # 32, p. 18. Plaintiff’s logic fails to
13 demonstrate a likelihood of irreparable harm.

14 First, the RPA is not the only method by which an agency can fulfill its substantive duties
15 to ensure that an action does not cause jeopardy. *See Tribal Village of Akutan v. Hodel*, 869 F.2d
16 1185, 1193 (9th Cir. 1988) (“The agency is not required to adopt the alternatives suggested in the
17 biological opinion...”). Second, the program that the NMFS found to be causing jeopardy in
18 2008 is not the same program that FEMA implements today. FEMA contends that it has
19 satisfied most of the elements of the RPA. Whether this is true is contested by the parties.
20 However, even if FEMA has not fully implemented the RPA, it has made significant changes to
21 the NFIP since 2008.

22 Most notably, in consultation with NMFS and the communities, FEMA has modified its
23 implementation of the NFIP minimum criteria in NFIP communities in the Puget Sound Region

1 so that each community must choose one of three “doors” to demonstrate compliance with the
2 BiOp.

3 Under Door 1, a participating community must adopt and enforce a Model Ordinance
4 developed by FEMA that incorporates the development standards set out in RPA Element 3 and
5 Appendix 4 of the Biological Opinion. *See* AR 1161-1247. FEMA contends that “adoption and
6 implementation of the Model Ordinance ensures that any development will not adversely affect
7 salmon or their habitat.” Declaration of Mark Carey (“Carey Dec”), Dkt. No. 17, ¶73.

8 Under Door 2, the community uses a Programmatic Compliance Checklist to show that
9 the ordinance and regulations it already has in place meets the development standards set out in
10 RPA Element 3 and Appendix 4. *See* AR 1248-1271. “A community choosing to use the
11 checklist must show FEMA the location of each of the performance standards in their body of
12 regulations ... and explain in narrative how those regulations fully address the performance
13 standards of element 3 of the RPA.” Carey Dec. at ¶ 74.

14 Door 3 is a permit by permit compliance option where a community must show that
15 proposed development would have no adverse effect on endangered species or critical habitat or
16 the project cannot proceed. A community choosing this option must require the completion of a
17 habitat assessment for almost any permit that is requested (with the exception of certain small
18 projects listed in the Model Ordinance Section 7.1 and 7.2). The Habitat Assessment must
19 account for direct, indirect, and cumulative effect and demonstrate that the project has no adverse
20 effects. Carey Dec. at ¶80. A project that is assessed to have an adverse effect must be
21 abandoned or redesigned or the project proponent must enter into consultation with the NMFS
22 under Section 4(d), 7, or 10 of the ESA. *Id.* at ¶ 81.

1 On June 23, 2011, FEMA mailed a letter to Puget Sound participating communities
2 informing them that they were required to provide a commitment regarding which compliance
3 option their community would choose. All 122 communities have responded. *See* AR 17933-
4 18081. Four communities chose to adopt the Model Ordinance and thirty-seven communities
5 chose to use the Checklist approach. FEMA is still in the process of approving communities
6 under the Door 2 approach. Until a community is qualified as a Door 2 community, it defaults to
7 the Door 3 option. Of the remaining eighty-two communities that have chosen the Door 3
8 approach, seventeen have indicated they will be using the Door 2 approach once they have
9 completed regulatory updates required by the State of Washington. Thirteen of the Door 3
10 communities do not have an SFHA; the BiOp standards will only apply to them when and if they
11 annex an area that contains mapped SFHA. *Id.*

12 The parties contest whether FEMA's 3-Door approach complies with RPA Element 3.
13 Plaintiff contends that compliance with certain requirements under Door 3 is optional, whereas
14 FEMA states that it is obligatory and will be enforced. Plaintiff takes issue with the fact that the
15 habitat assessments conducted to date for projects that have been issued permits have all found
16 no adverse effects. FEMA argues that such a result is logical, since a permit would not issue
17 unless no adverse effects were found. Ultimately, however, whether or not the three-door
18 approach complies with Element 3 of the RPA, the approach constitutes a significant change to
19 the minimum eligibility requirements for participation in the NFIP in the Puget Sound region.⁴

21 ⁴ And the three door approach is not the only change that FEMA has made to the NFIP since the
22 NWFS issued the BiOp. *See, e.g.,* Carey Dec., ¶¶ 11-24 (outlining "robust compliance efforts
23 include[ing] ... extensive modifications to FEMA's floodplain mapping program, including
24 implementing procedures to ensure that all map changes are ESA-compliant; ... prioritizing
remapping for biologically sensitive areas; the incorporation of ESA compliance into the process

1 Since FEMA has significantly altered the manner in which it implements the NFIP in the
2 Puget Sound region, the BiOp's conclusion that the 2008 version of the NFIP caused jeopardy to
3 listed species is insufficient to demonstrate that the current implementation of the NFIP also is
4 likely to cause jeopardy. *See Winter* 555 U.S. at 22-23 (overturning issuance of preliminary
5 injunction and finding "significant" that the District Court failed to reconsider the likelihood of
6 irreparable harm in light of four restrictions the Defendant agreed to implement); *see also*
7 *Northwest Environmental Defense Ctr. v. United States Army Corps of Engineers*, 817 F.Supp.2d
8 1290 (D. Or. 2011) ("Although the BiOp acknowledges that gravel mining may harm listed
9 species, NEDC has not produced any evidence that Tidewaters' *specific* proposal will likely
10 cause irreparable harm to the environment or ESA-listed salmon in the absence of a preliminary
11 injunction.") (emphasis added).

12 NWF cites *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987) and *NWF v. NMFS*, 2004
13 WL 1698050 (D. Or. July 29, 2004) the proposition that "[t]he failure to fully implement an RPA
14 is, by itself, sufficient grounds for granting an injunction." However, both of these cases were
15 decided prior to *Winter*, in which the Supreme Court expressly struck down the Ninth Circuit's
16 practice of issuing preliminary injunctions where a plaintiff demonstrated a strong likelihood of
17 prevailing on the merits and only on a "possibility" of irreparable harm. *See* 555 U.S. at 22.
18 Moreover, both of these cases present significantly different scenarios than that presently before
19 the court.

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22 for recognizing new levees; insurance premium reductions for projects that benefit listed species;
23 and expenditure of tens of millions of dollars to buy out structures that are currently in the
24 floodplain and return that property to open space in perpetuity").

1 *Sierra Club* is particularly illustrative. *Sierra Club* involved a federal highway and flood
2 control project in the wetlands surrounding the San Diego Bay area, home to the endangered
3 California least tern and light-footed clapper rail. 816 F.2d at 1378. The federal agencies
4 involved consulted with the Fish and Wildlife Service (“FWS”) pursuant to their obligations
5 under the ESA and the Army Corps of Engineers (“COE”) re-initiated consultation after the
6 FWS concluded that the project would jeopardize the continued existence of the rail and tern. In
7 its final BiOp, the FWS concluded that implementation of nine modifications and mitigation
8 measures would “provide the minimally acceptable loss compensation requirements needed to
9 protect and maintain wetland habitat and endangered species.” *Id.* at 1379. One measure the
10 FWS considered vital was the COE’s acquisition and preservation of 188 acres of nearby
11 wetlands. *Id.* at 1378. “In essence, the FWS was recommending a trade: in exchange for the
12 habitat destroyed or adversely modified by the project, the COE would acquire and preserve
13 from destruction 188 acres of marshland.” *Id.* Ultimately, the COE was unable to acquire the
14 mitigation wetlands, but commenced construction on the project anyway. The COE also refused
15 to initiate consultation a third time. *Id.* at 1381.

16 In reviewing the district court’s denial of Plaintiff’s motion for a preliminary injunction,
17 the Ninth Circuit found that “management of a refuge for the birds is the most important of many
18 modifications the FWS considered absolutely necessary to insure that the project was not likely
19 to jeopardize their continued existence.” *Id.* at 1388. As a result, the court held that the COE, by
20 allowing destruction or adverse modification of any part of the birds’ habitat without first
21 insuring the acquisition and preservation of the mitigation lands, and by failing to consult with
22 FWS once it encountered difficulties in acquiring the land, was in violation of both its procedural
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1 and substantive obligations under ESA section 7(a)(2). *Id.* at 1386. The COE was enjoined from
2 all work on the project until the COE re-initiated consultation with the FWS.

3 Unlike *Sierra Club*, the case before the court does not involve a single “vital” RPA
4 element that FEMA has failed to implement. Instead, FEMA has implemented various and wide-
5 ranging changes to its flood insurance program that it contends are sufficient to satisfy its
6 obligations under the ESA. Plaintiff disagrees. However, Plaintiff has not provided any specific
7 evidence that jeopardy to listed species will result from FEMA’s updated NFIP. Plaintiff fails to
8 satisfy its burden of demonstrating a likelihood of irreparable harm in the absence of an
9 injunction.

10 Since a showing of likelihood of irreparable harm is a threshold issue, the Court does not
11 address Plaintiff’s arguments regarding likelihood of success on the merits. *See Winter*, 555 U.S.
12 at 22. Plaintiff’s motion for a preliminary injunction is hereby DENIED.

13 **IV. CONCLUSION**

14 The Court, having considered Plaintiff’s motion for a preliminary injunction (Dkt. # 10),
15 all responses and replies thereto, the exhibits and declarations filed in support thereof, and the
16 remainder of the record, hereby finds and ORDERS:

- 17 (1) Plaintiff’s motion for a preliminary injunction (Dkt. # 10) is hereby DENIED.
18 (2) There Clerk of the Court is directed to forward a copy of this Order to all counsel of
19 record.

20 Dated this 12th day of April 2012.

21 

22 RICARDO S. MARTINEZ
23 UNITED STATES DISTRICT JUDGE