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THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NATIONAL WILDLIFE FEDERATION,

Plaintiff,

v.

FEDERAL EMERGENCY MANAGEMENT  
AGENCY,

Defendant.

) Case No. 2:11-cv-02044-RSM  
)  
)  
) PLAINTIFF'S MOTION FOR A  
) PRELIMINARY INJUNCTION  
)  
) NOTE ON MOTION CALENDAR:  
) MONDAY, FEBRUARY 6, 2012  
)  
) ORAL ARGUMENT REQUESTED

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## INTRODUCTION

1  
2 Plaintiff National Wildlife Federation (“NWF”) moves the Court for a preliminary  
3 injunction partially limiting implementation of the National Flood Insurance Program (“NFIP”) by  
4 defendant, the Federal Emergency Management Agency (“FEMA”), in Puget Sound. Over seven  
5 years ago, this Court recognized the harm to chinook salmon that FEMA’s implementation of the  
6 NFIP causes. National Wildlife Fed. v. Federal Emergency Management Agency, 345 F. Supp. 2d  
7 1151 (W.D. Wash. 2004) (“NWF v. FEMA”). The Court ordered FEMA to comply with the  
8 Endangered Species Act (“ESA”) by engaging in consultation with the National Marine Fisheries  
9 Service (“NMFS”) to address the impacts of the NFIP, as required by ESA § 7. After an extensive,  
10 multi-year evaluation, NMFS concluded in 2008 that implementation of the NFIP jeopardized the  
11 survival and recovery of chinook salmon, and other ESA-listed species, in Puget Sound. In  
12 accordance with the ESA, NMFS described a comprehensive “reasonable and prudent alternative”  
13 (“RPA”) that would allow FEMA to continue to implement the NFIP without jeopardy to these  
14 species. The RPA called for change in each major element of the NFIP in order to reduce  
15 development-related harm in sensitive floodplain habitats.

16 Three years after NMFS issued its biological opinion, FEMA has failed to implement the  
17 RPA or make other changes to the NFIP that avoid jeopardy. Instead, it continues to implement its  
18 program largely unchanged. The Court should grant NWF a preliminary injunction because NWF  
19 is likely to succeed on the merits of its claim that FEMA is in violation of the ESA, and because  
20 continued implementation of the NFIP is likely to cause irreparable harm to the species in the  
21 absence of an injunction. As described further in this memorandum and accompanying proposed  
22 order, the Court should preliminarily enjoin FEMA from issuing additional floodplain insurance for  
23 new development within key habitat areas in Puget Sound, and from processing certain floodplain  
24 map changes, until the Court resolves this case on the merits.



## BACKGROUND

## I. NMFS HAS CONCLUDED THAT IMPLEMENTATION OF THE NFIP JEOPARDIZES SALMON AND ORCAS.

FEMA initiated the ESA § 7(a)(2) consultation process shortly after this Court found that the agency's failure to do so violated the ESA.<sup>1</sup> After four years of scientific review and inter-agency negotiations, on September 22, 2008, NMFS issued a 226-page biological opinion on the impacts of the NFIP on ESA-listed species in the Puget Sound region. Declaration of Jan Hasselman, Ex. 1 (the "FEMA BiOp" or "BiOp"). In addition to chinook salmon, the FEMA BiOp addressed Hood Canal summer chum, Puget Sound steelhead, and Southern Resident killer whales. The FEMA BiOp determined that the implementation of the NFIP jeopardized the survival of each of these species and adversely modified their critical habitat, a result prohibited by § 7 of the ESA. FEMA BiOp at 149. NMFS's analysis focused on the primary components of the NFIP: mapping, minimum eligibility criteria, the community rating system, and levee maintenance standards, but often emphasized how these elements worked in tandem. *See, e.g., id.* at 83.

A. Mapping

The identification of flood-prone areas through the mapping process lies at the heart of the NFIP. Areas within the 100-year flood zone (i.e. areas that have a 1% chance of flooding in any year, also known as the "special flood hazard area" or "SFHA") are subject both to the obligation to purchase flood insurance and to FEMA's minimum eligibility criteria. *Id.* at 5-12. The primary concern NMFS identified with FEMA's mapping and map revision process is that FEMA's rules effectively encourage the structural modification of floodplains by allowing removal of areas from the SFHA. *Id.* at 8-11. Once removed from the flood zone, parcels are no longer subject to the insurance requirement and other NFIP standards. *Id.* at 9. The FEMA BiOp identified almost 160 instances of fill being placed in floodplains in Puget Sound, and provided several specific examples,

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<sup>1</sup> In *NWF v. FEMA*, the Court extensively discussed the operation of the NFIP and its relationship to activities that degrade salmon habitat in Puget Sound. 345 F. Supp. at 1154-59. NWF will not repeat that background here.

1 in some cases involving hundreds of acres of sensitive salmon habitat. These areas were removed  
2 from the floodplain through map changes. Id. at 10.

3 NFMS also expressed concern that FEMA can take land out of the SFHA based on flood  
4 control structures like levees. Id. at 10. As long as a levee meets FEMA’s standards for design,  
5 operation and maintenance (which generally require it to protect against the 100-year flood), FEMA  
6 will “map out” the area protected by the levee from the flood zone, eliminating FEMA regulation  
7 and the obligation to purchase insurance. While levees offer flood protection, they also impose a  
8 range of environmental harms to aquatic habitat and hence FEMA mapping policies encourage  
9 behavior that harms salmon and other species. NMFS also emphasized how out of date most Puget  
10 Sound maps are and observed that map modernization efforts generally result in identification of a  
11 more expansive floodplain area. Id. at 11.

12 As a result of FEMA’s mapping practices, “there is an inherent incentive for property  
13 owners to place sufficient fill to elevate their buildings above the [base flood elevation]. By  
14 allowing individuals to remove their property from regulation by artificially filling it, FEMA is in  
15 effect encouraging filling . . . .” Id. at 84; id. at 12 (“The usual purpose of placing fill is to enable  
16 construction and property development”). Once property is removed from the floodplain, it  
17 “become[s] available for land use development and construction that might have otherwise been  
18 prohibited or constrained by community floodplain regulations,” which in turn adversely affects  
19 habitat and habitat forming processes. Id. at 83. Moreover, FEMA’s re-categorization of properties  
20 out of the flood zone “creates a false sense of security that results in more floodplain development.”  
21 Id. The FEMA BiOp also concludes that FEMA’s mapping creates an incentive to build, expand,  
22 and replace levees and other flood control structures. Id. at 83. All of these actions damage salmon  
23 habitat, by decreasing important off-channel habitat, impairing natural floodplain processes,  
24 reducing flood water storage, and increasing downstream water velocities and erosion. Id. at 85.

1           B.       Levee Maintenance Criteria

2           A related issue identified in the FEMA BiOp is a set of requirements and incentives that  
3 result in the removal of vegetation from levees. BiOp at 13-14. Removal of trees and other large  
4 vegetation has a variety of adverse impacts to salmon, including loss of shade that keeps streams  
5 cool, loss of nutrients, and reduced woody debris necessary to maintain complex habitat features.  
6 Id. at 85-87. The BiOp documents a close relationship between FEMA and the U.S. Army Corps of  
7 Engineers (“Corps”), which oversees levee maintenance as part of its own regulatory and funding  
8 programs. Id. at 13-14. Under the Corps’ criteria, any vegetation over a certain diameter on levees  
9 must be removed, or eligibility for federal repair funding from the Corps is lost. Id. (documenting  
10 “combined fiscal incentives” to remove vegetation and harming rivers). FEMA does not have its  
11 own levee vegetation standards and hence uses the Corps’ criteria, i.e., a deficiency in meeting the  
12 Corps’ maintenance standards is treated as a deficiency for FEMA’s purposes. Id. at 14. Thus,  
13 where a levee sponsor elects to leave vegetation in place on its levees, it would not only become  
14 ineligible for Corps’ funding to repair that structure, but FEMA would decline to “recognize” that  
15 levee and would consider land behind it as remaining in the floodplain. The FEMA BiOp  
16 documented just such a situation where the City of Bothell removed 800 trees in the riparian zone of  
17 a salmon-bearing stream to avoid FEMA “re-designating” land behind its levee as subject to  
18 flooding. Id. at 11. The BiOp concludes that FEMA’s practices create incentives to remove  
19 vegetation from levees. Id. at 87. If FEMA did not rely on the Corps’ vegetation removal standard,  
20 the BiOp states that “it is likely that at least some levee sponsors would opt to retain riparian  
21 vegetation to protect fish habitat.” Id. at 86.

22           C.       Minimum Eligibility Criteria

23           The most significant aspect of the NFIP is the minimum criteria that communities need to  
24 meet in order to participate in the NFIP. Id. at 14-16. The FEMA BiOp notes the “strong  
25 incentive” to participate in the NFIP to ensure the availability of flood insurance and disaster  
26 assistance. Failure to comply with the minimum criteria can result in suspension from the program,

1 which means existing insurance policies cannot be renewed or new policies sold. Id. at 19. The  
 2 existing criteria do not prevent substantial development in the floodplain, and in fact often require  
 3 additional fill to bring construction above the base flood elevation. Id. at 15. “The NFIP minimum  
 4 criteria, like the mapping process described above, leads to land use change and construction in the  
 5 floodplain, as guided by the criteria.” Id. at 19.<sup>2</sup> Additional fill and development in the floodplain,  
 6 as allowed and even encouraged by the minimum criteria, displaces habitat, increases pollution, and  
 7 has other adverse effects on salmon. Id. at 88. Between 2000 and December of 2010, FEMA’s data  
 8 reveals that is has insured over 7,600 new development projects in Puget Sound communities  
 9 subject to the minimum eligibility criteria. Hasselman Decl., Ex. 2. Around 800 of those projects  
 10 were constructed between the time that the FEMA BiOp was issued in September 2008, and  
 11 December 2010. Id., Hasselman Decl., Ex. 3.

#### 12 D. Community Rating System

13 The last element of the NFIP discussed in the FEMA BiOp is the community rating system  
 14 (“CRS”). The CRS is a voluntary program under which FEMA rewards communities with lower  
 15 flood insurance premiums for adopting land-use controls that are more protective than FEMA’s  
 16 minimum criteria. Id. at 20. While some CRS elements help protect salmon habitat, other elements  
 17 incentivize harmful behavior like structural modification of floodplains, removal of wood from  
 18 rivers, and elimination of levee vegetation. Id. at 20, 89-91. NMFS also noted a failure to “reward”  
 19 beneficial floodplain management activities that don’t meet the CRS criteria, for example,  
 20 innovative programs that help restore “normative” flows. Id. at 90.

21 According to the BiOp, the combined effect of these components of the NFIP, which  
 22 collectively encourage development in the floodplain, is “stream channelization, habitat instability,  
 23 vegetation removal, and point and nonpoint source pollution, all of which contribute to degraded  
 24

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25 <sup>2</sup> The BiOp observed that in 2002 FEMA adopted a voluntary approach to encourage use of more fish-  
 26 friendly minimum criteria. FEMA BiOp at 88. To date, not a single jurisdiction in Puget Sound has  
 adopted those voluntary standards. Id.

1 salmon habitat.” Id. at 91. NMFS analyzed each of these impacts in considerable detail, at both the  
 2 Puget Sound scale and at the individual species population scale. Id. at 91-138. The FEMA BiOp  
 3 concludes that the NFIP jeopardizes the survival and recovery of chinook, chum, steelhead and  
 4 killer whales, as well as adversely modifying designated critical habitat. Id. at 149.

5 II. TO AVOID JEOPARDY, NMFS RECOMMENDED SIGNIFICANT CHANGES TO  
 6 EVERY MAJOR ELEMENT OF THE NFIP.

7 As directed by the ESA, the FEMA BiOp articulates a comprehensive RPA that would  
 8 avoid jeopardy to listed species and adverse modification of critical habitat.<sup>3</sup> 16 U.S.C.  
 9 § 1536(b)(4); 50 C.F.R. § 402.14(h), § 402.02; FEMA BiOp at 150-68. The RPA calls for changes  
 10 in multiple aspects of the NFIP that must be implemented together. Implementation of these  
 11 changes is most urgent where the NFIP affects “Tier 1” salmon populations, e.g., those populations  
 12 that are so crucial to the species as a whole that the loss of one of them would reduce the species’  
 13 chance of survival. FEMA BiOp at 218. “Categorization of a population as Tier One means that  
 14 steps must be taken more immediately to reduce its risk of extirpation.” Id.; see also id. at 219  
 15 (“These salmon populations are already at high risk of extirpation, with critically low population  
 16 numbers.”) A brief description of the RPA’s various elements follows.

17 RPA #1 (Notification): RPA #1 directs FEMA to notify all 122 NFIP communities in Puget  
 18 Sound within 30 days that “development consistent with the NFIP jeopardizes the listed species and  
 19 adversely modifies their critical habitat.” Id. at 151. It directs FEMA to recommend communities  
 20 “implement a temporary moratorium on floodplain development” and explains that adoption of the  
 21 revised development criteria in RPA #3 would exempt them from potential ESA liability.

22 RPA #2 (Mapping): The RPA directs FEMA to make multiple changes to its “mapping  
 23 program” within six months, with annual reporting thereafter. Id. at 152-53. Most significantly, the  
 24 RPA directs that letters of map change be processed only when the proponent has demonstrated

25 <sup>3</sup> Although the jeopardy and adverse modification standards are legally distinct, for the sake of brevity  
 26 this memo will hereinafter generally refer to “jeopardy” to encompass both.

1 “that the alteration avoids habitat functional changes, or that the proponent has mitigated” for such  
 2 changes. FEMA must ensure that mitigation occurs for indirect effects that could occur later in  
 3 time. *Id.* Additional RPA components include: prioritizing mapping activities based on the  
 4 presence of salmon; ensuring more accurate mapping through on-the-ground data, and greater  
 5 consideration of “future conditions,” e.g., future development, climate change, and other conditions  
 6 that affect future flood risk.<sup>4</sup>

7 RPA #3 (Minimum Criteria): RPA #3 calls for multiple changes to FEMA’s minimum  
 8 development criteria. *Id.* at 219. Under this RPA element, NMFS describes a two tier structure  
 9 under which a core “protected area” alongside rivers is protected from any adverse effects, and  
 10 development in the remainder of the floodplain must comply with a number of detailed standards  
 11 intended to minimize habitat degradation. *Id.* at 153-58 & 222-26. FEMA was directed to ensure  
 12 that all participating NFIP communities implement these standards on a phased three-year schedule  
 13 with Tier 1 jurisdictions complying first. Most of the RPA #3 criteria were drawn from FEMA’s  
 14 own voluntary guidance “designed to safeguard aquatic habitat conditions for fish.” *Id.* at 168.  
 15 Prior to full implementation of these changes, NMFS directed FEMA to keep track of new  
 16 floodplain development permits so that their effects could be mitigated. *Id.* at 155.

17 RPA #4 (Community Rating System): This RPA directs FEMA in considerable detail to  
 18 change the CRS to increase points for salmon-friendly measures and decrease points for measures  
 19 that reduce flood risk but harm habitat (i.e., structural features like levees). *Id.* at 158-59.

20 RPA #5 (Levee vegetation and construction): To avoid habitat-related harm associated with  
 21 levees, RPA #5 calls for four specific changes within one year. *Id.* at 160-62. A) FEMA is  
 22 prohibited from recognizing levees that are certified by the Corps unless FEMA demonstrates that it  
 23 will not adversely affect species; B) FEMA is required to revise its procedures so that levee owners  
 24 that opt out of the Corps’ funding program and maintain vegetation remain eligible for emergency

25 <sup>4</sup> The FEMA BiOp documents how climate change “has the potential to profoundly alter aquatic habitat”  
 26 and “make recovery targets... more difficult to achieve.” BiOp at 143.

1 funding; C) FEMA is required to use, and encourage grantees to use, specific funding sources for  
2 projects that benefit salmon; D) FEMA is required to only recognize new levees and floodwalls if  
3 they include various habitat-protecting features.

4 RPA #6 (Mitigation): For any development activity in floodplains that occurs “prior to full  
5 implementation of RPA elements 2, 3, and 5,” FEMA is directed to “ensure” that appropriate  
6 mitigation occurs. Id. at 162. An example offered in the RPA is the contribution of financial,  
7 technical, or physical support to floodplain restoration projects.

8 RPA #7 (Reporting/Monitoring): Finally, FEMA is directed to undertake regular  
9 monitoring and reporting of progress towards each of the other RPA elements. The purpose of this  
10 reporting is to determine whether additional actions are needed to avoid jeopardy, which is  
11 “particularly important in assessing on-the-ground NFIP effects that are occurring, such as  
12 continued development in the floodplain, through either issuance of [map changes] or floodplain  
13 development permits.” Id. at 162. A key focus of this reporting is to determine whether “additional  
14 or alternate actions are needed” and to ensure mitigation for development that occurs while other  
15 RPA elements are being implemented. Id. at 163; see also id. at 155 (additional measures to ensure  
16 mitigation occurs for interim development).

17 The FEMA BiOp includes an incidental take statement that insulates both FEMA and NFIP  
18 communities from liability for harm to listed species, provided they comply with the RPA and  
19 provided that the rate of floodplain development does not exceed historic rates. Id. at 168. Take is  
20 only exempt from ESA liability once communities have adopted the more protective floodplain  
21 management criteria contained in RPA #3, and only after full mitigation has occurred for any  
22 development approved after NMFS issued the FEMA BiOp. Id. at 173.

23 On April 24, 2009, a senior FEMA official sent a letter to NMFS outlining how the agency  
24 intended to respond to the FEMA BiOp. Hasselman Decl., Ex. 4 (“Buckley Letter”). Where the  
25 RPA articulated detailed standards and explicit accountability, the Buckley Letter laid out an  
26



1 alternative path that ignored key elements of the RPA and shifted the burden of compliance to NFIP  
 2 communities. The letter triggered a public reaction of surprise from NMFS officials who believed  
 3 that FEMA had agreed to the elements of the RPA.<sup>5</sup> A follow-up letter in June sought to provide  
 4 “greater elaboration and amplification” of FEMA’s response. Hasselman Decl., Ex. 5 (“Carey  
 5 Letter”). FEMA’s position on implementation of the RPA, and the results of its efforts, are further  
 6 described in its two Annual Reports to NOAA. Hasselman Decl., Ex. 6 (“2009 Annual Report”)  
 7 and Ex. 7 (“2010 Annual Report”). As of the date of this motion, all deadlines contained in the  
 8 FEMA BiOp have passed.

#### 9 STANDARD OF REVIEW

10 Under the conventional test governing preliminary injunctions, plaintiffs must show that:  
 11 a) they are likely to succeed on the merits; b) they are likely to suffer irreparable harm in the  
 12 absence of relief; c) the balance of equities tips in their favor; and d) an injunction is in the public  
 13 interest. NRDC v. Winter, 129 S. Ct. 365, 374 (2008).<sup>6</sup> In ESA cases, however, the conventional  
 14 test does not apply. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 193-95 (1978); Sierra Club v.  
 15 Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987). In enacting the ESA, Congress “foreclosed the  
 16 exercise of the usual discretion possessed by a court of equity.” Weinberger v. Romero-Barcelo,  
 17 456 U.S. 305, 313 (1982). Under the ESA, once a plaintiff establishes a probability of success on  
 18 the merits and likely harm, the balance of hardships and the public interest require an injunction.  
 19 National Wildlife Fed. v. National Marine Fisheries Service, 422 F.3d 782, 793-794 (9th Cir. 2005).

20 This case arises under the citizen-suit provision of the ESA. 16 U.S.C. § 1540(g). Courts  
 21

22 <sup>5</sup> See Craig Welch, Feds: New Floodplain Rules to Go Unenforced, Seattle Times (April 28, 2009)  
 (available at [http://seattletimes.nwsourc.com/html/localnews/2009134725\\_fema28m.html](http://seattletimes.nwsourc.com/html/localnews/2009134725_fema28m.html)).

23 <sup>6</sup> The Winter majority affirmed that irreparable harm had to be “likely” as opposed to just “possible.” Id.  
 24 at 375. However, Winter did not overrule a long-standing “sliding scale” approach to preliminary  
 25 injunctions under which “the elements of the preliminary injunction are balanced, so that a stronger  
 26 showing of one element may offset a weaker showing of another.” Alliance for the Wild Rockies v.  
Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (holding that injunction could issue post-Winter where  
 balance of harms tips sharply in plaintiff’s favor and there were “serious questions” as to the merits).



1 have found that since the ESA does not contain an express standard of review, the appropriate  
 2 standard of review is whether the agency's actions are arbitrary and capricious, an abuse of  
 3 discretion, or contrary to law. See Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1193 (9th Cir.  
 4 1989). However, ESA citizen suits do not involve review of "final agency action" under the  
 5 Administrative Procedures Act ("APA"). Washington Toxics Coalition v. EPA, 413 F.3d 1024 (9th  
 6 Cir. 2005); Oregon Nat'l Desert Assoc. v. Kimbell, 593 F. Supp. 2d 1217 (D. Or. 2009) (ESA  
 7 citizen suit claims "do not challenge specific administrative decisions. Instead, they advance an  
 8 enforcement action and require proof of harm and causation."). Accordingly, judicial review of  
 9 ESA citizen-suit claims is not limited to the administrative record. See Western Watersheds Project  
 10 v. Kraayenbrink, 632 F.3d 472 (9th Cir. 2011) ("we may consider evidence outside the  
 11 administrative record for the limited purposes of reviewing Plaintiffs' ESA claim"); Oregon Nat'l  
 12 Desert Assoc. v. Tidwell, 716 F. Supp. 2d 982 (D. Or. 2010); Defenders of Wildlife v. Martin, 454  
 13 F. Supp. 2d 1085, 1094 (E.D. Wash. 2006). Additionally, there is no limitation to the record when  
 14 considering the likelihood of irreparable harm. See, e.g., NWF v. NMFS, 422 F.3d 797; Esch v.  
 15 Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989).

## 16 ARGUMENT

17 I. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM THAT  
 18 FEMA IS VIOLATING § 7 AND § 9 OF THE ESA.

19 A. The ESA Strictly Prohibits Actions That Cause Jeopardy to Listed Species or That  
 20 Result in Unlawful Take.

21 The U.S. Supreme Court has declared the ESA to be "the most comprehensive legislation  
 22 for the preservation of endangered species ever enacted by any nation." TVA v. Hill, 437 U.S. at  
 23 174, 180 ("Congress intended endangered species to be afforded the highest of priorities.") "The  
 24 plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species  
 25 extinction, whatever the cost." Id. at 184. To accomplish this purpose, the ESA includes both  
 26 substantive and procedural requirements that take "priority over the 'primary missions' of federal

1 agencies.” Id. at 185.

2 Section 7 of the ESA imposes a strict substantive duty on federal agencies to “ensure” that  
 3 their actions do not cause jeopardy to endangered or threatened species.<sup>7</sup> 16 U.S.C. § 1536(a)(2).  
 4 Jeopardy is defined as any action that “reduce[s] appreciably the likelihood of both the survival and  
 5 recovery of a listed species in the wild.” 50 C.F.R. § 402.02; see also id. (adverse modification  
 6 defined as “direct or indirect alteration that appreciably diminishes the value of the critical habitat  
 7 for both the survival and recovery of a listed species.”); National Wildlife Fed. v. National Marine  
 8 Fisheries Service, 524 F.2d 917, 931-33 (9<sup>th</sup> Cir. 2008) (discussing importance of “recovery” in § 7  
 9 standard). Section 7 also establishes an interagency consultation process to assist agencies in  
 10 complying with this substantive duty. 50 C.F.R. §§ 402.14(a), (b). During the consultation process,  
 11 the expert wildlife agency (NMFS for anadromous and marine species) must formulate a “biological  
 12 opinion” as to whether the action under review will cause jeopardy. 50 C.F.R. § 402.14(g). If the  
 13 agency’s opinion is that jeopardy will occur, it must formulate, if possible, a “reasonable and  
 14 prudent alternative” (“RPA”) to the proposed action that will avoid jeopardy. Id. §§ 402.14(g), (h).  
 15 An RPA must be consistent with the intended purpose of the proposed action and within the action  
 16 agency’s authority, that is economically and technologically feasible. Id. § 402.03. If the agency  
 17 cannot identify an RPA or if the action agency is unwilling to implement it, the proposed action is  
 18 prohibited without authorization from a cabinet-level committee. 16 U.S.C. § 1536(e).

19 A separate provision, § 9 of the ESA, strictly prohibits activities that “take” endangered  
 20 species. 16 U.S.C. § 1538(a)(1)(B). While § 7 imposes a duty on federal agencies, § 9 applies to  
 21 “any person.” Id. The “take” prohibition is typically extended to threatened species by regulation.  
 22 Id. § 1533(d). The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap,  
 23 capture, or collect, or to attempt to engage in any such conduct.” Id. § 1532(19). Congress intended

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 25 <sup>7</sup> The ESA defines two categories of imperiled species. “Endangered” species are those that are in danger  
 26 of extinction in all or a significant portion of their range. 16 U.S.C. § 1532. “Threatened” species are  
 those that are likely to become an endangered species in the foreseeable future. Id.

1 the term “take” to be defined in the “broadest possible manner to include every conceivable way” in  
 2 which a person could harm or kill fish or wildlife. S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973).  
 3 NMFS has defined “harm” to include “significant habitat modification or degradation which  
 4 actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns,  
 5 including, breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.  
 6 When a federal agency consults pursuant to § 7(a)(2), and the biological opinion either finds no  
 7 jeopardy or finds jeopardy but identifies an RPA, the opinion also will include a statement  
 8 concerning “incidental” take. This statement provides a limited exemption from § 9 liability if take  
 9 occurs in the course of implementing the no-jeopardy action or RPA. *Id.* § 402.14(i). The failure to  
 10 comply with the conditions in a BiOp negates this exemption. *See infra* at 35-36.

11 B. To Comply With § 7, Federal Agencies Must Either Implement RPAs as Written  
 12 or Bear the Burden of Proving That Their Actions Avoid Jeopardy.

13 Although the RPA in a jeopardy BiOp outlines a path that will avoid jeopardy, departure  
 14 from the terms of an RPA is not, in itself, a violation of the ESA. *See Tribal Village of Akutan*, 869  
 15 F.2d at 1193. As the Ninth Circuit has explained, an agency can depart from an RPA, and still meet  
 16 its § 7(a)(2) obligation, if it takes “alternative, reasonably adequate steps to insure the continued  
 17 existence of any endangered or threatened species.” *Id.* (emphasis added); *see also Village of False*  
 18 *Pass*, 565 F. Supp. at 1154 (“the decision whether or not to proceed with the project rests ultimately  
 19 with the Secretary. He must insure that agency actions are not likely to jeopardize the continued  
 20 existence of the species”). As a practical matter, however, the RPA in a jeopardy biological opinion  
 21 has a “virtually determinative effect” on agencies, because the burden of showing that another  
 22 course of action will avoid jeopardy is so high. As the U.S. Supreme Court has observed:

23 [T]he action agency must not only articulate its reasons for disagreement (which  
 24 ordinarily requires species and habitat investigations that are not within the action  
 25 agency’s expertise), but that it runs a substantial risk if its (inexpert) reasons turn  
 26 out to be wrong.... The action agency is technically free to disregard the  
 27 Biological Opinion and proceed with its proposed action, but it does so at its own  
 28 peril....

1 Bennett v. Spear, 520 U.S. 154, 169-70 (1997) (emphasis added); 16 U.S.C. § 1536(a)(2) (requiring  
2 use of “best scientific and commercial data available” in complying with § 7); see also Village of  
3 False Pass, 565 F. Supp. at 1160 (“The biological opinion is accorded substantial weight as  
4 evidence of the Secretary’s compliance with the [ESA]”).

5 Accordingly, where an agency departs from an RPA, it bears a heavy burden of justifying its  
6 actions in light of the ESA’s strict prohibitions. Bennett, 520 U.S. at 169-70 (“A federal agency  
7 that chooses to deviate from the recommendations contained in a biological opinion bears the  
8 burden of ‘articulating in its administrative record its reasons for disagreeing with the conclusions of  
9 a biological opinion’”), citing 51 Fed. Reg. 19,926, 19,956 (June 3, 1986); Sierra Club v. Marsh,  
10 816 F.2d 1376, 1389 (9th Cir. 1987) (“Placing the burden on the acting agency to prove the action is  
11 non-jeopardizing is consistent with the purpose of the ESA and what we have termed its  
12 ‘institutionalized caution mandate’.”); Defenders of Wildlife, 454 F. Supp. 2d at 1099.

13 Courts have applied this precautionary mandate strictly. In Village of False Pass v. Watt,  
14 565 F. Supp. 2d 1123 (D. Alas. 1983), for example, the district court found that the Secretary  
15 violated the ESA by failing to fully comply with an RPA element involving noise pollution from  
16 seismic activities associated with oil exploration. While the RPA called for preliminary seismic  
17 activities to only be conducted in a manner that didn’t disturb whales, the Secretary ordered lessees  
18 simply to provide advance notice of such activities. The Court ruled that such an approach fell short  
19 of “insuring” against jeopardy, as it “insures only that the problem will be given attention at a later  
20 date.” Id. at 1162-63. In the absence of an adequate justification for this departure from the RPA,  
21 the Court ruled the secretary in violation of § 7(a)(2). Id. at 1165;<sup>8</sup> see also Sierra Club v. Marsh,  
22 816 F.2d at 1386 (holding agency violated ESA where it failed to implement mitigation actions  
23 required to avoid jeopardy).

24  
25 <sup>8</sup> The Ninth Circuit found this element of the District Court’s decision, appealed by the government, moot  
26 because it had since been rectified. With respect to other RPA elements, the district court upheld the  
agency’s departures from the RPA, and the Ninth Circuit affirmed.

1 In contrast, courts have upheld agency decisions to depart from RPAs only in narrow  
 2 circumstances. In Tribal Village of Akutan, 869 F.2d at 1193-94, the Ninth Circuit addressed an  
 3 agency's decision to not implement some RPA measures in a BiOp for a multi-stage oil leasing sale.  
 4 The court first noted that since the RPA was phrased in "general, rather than specific terms," it was  
 5 not at all clear that the RPA had not been fully implemented. Id. at 1194. Second, the Court  
 6 emphasized the step-wise nature of oil-leasing decisions and the fact that the specific decisions  
 7 under review would not themselves have significant impacts, since the more harmful actions—  
 8 along with additional environmental review—would occur later in the process. Id. ("We once again  
 9 note that the risks to endangered species during the lease sale stage are virtually nonexistent. Only  
 10 limited preliminary activities are permitted during this stage."). Finally, the Court found that while  
 11 the Secretary may have decided not to adopt some RPA elements, he had "adopted other mitigating  
 12 measures" that appeared to have satisfied NMFS. Id. In light of all these factors, the Ninth Circuit  
 13 found that the agency had complied with its duty to "insure" against jeopardy. Id. at 1195; see also  
 14 Village of False Pass, 733 F.2d at 611-12 (upholding agency's § 7 compliance where RPA  
 15 provisions were general and where on-the-ground protections could be deferred until later stages).

16 C. By Not Implementing the RPA or Any Alternative that It Has Demonstrated Will  
 17 Avoid Jeopardy, FEMA is Violating § 7 of the ESA.

18 In light of the NFIP's pervasive contribution to the decline of salmon and orcas in Puget  
 19 Sound, NMFS outlined a comprehensive RPA with multiple, specific elements that, when  
 20 implemented together, would avoid jeopardy. FEMA has not made those changes to the NFIP, nor  
 21 has it implemented any alternative actions that eliminate jeopardy. Instead, seven years after this  
 22 Court found FEMA in violation of the ESA, and three years after NMFS found the NFIP was  
 23 causing jeopardy, FEMA continues to implement the NFIP mostly unchanged. Its continued  
 24 implementation of the NFIP in the face of the FEMA BiOp violates § 7 of the ESA.<sup>9</sup>

25 <sup>9</sup> This Court has already found NWF has standing to sue FEMA regarding ESA compliance for the NFIP.  
 26 NWF v. FEMA, 345 F. Supp. 2d at 1166; Salazar v. Buono, 130 S. Ct. 1803, 1814 (2010) (holding that  
 government cannot challenge standing in second lawsuit where it had not appealed finding of standing in

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*1. FEMA Has Not Implemented RPA #2.*

RPA #2 seeks to alter regulations and practices that authorize changes to floodplain maps based on fill, levee construction, and other landscape modifications. *Supra*, at 6-7; 44 C.F.R. § 72.1-.2; see also *NWF v. FEMA*, 345 F. Supp. 2d at 1164 (“By allowing individuals to remove their property from regulation by artificially filling it, FEMA is in effect encouraging filling”). NMFS found that such changes were within FEMA’s authority. BiOp at 153. Indeed, much of the language in RPA #2 was proposed by FEMA itself. Hasselman Decl., Ex. 8 at 4-7.

FEMA, however, has not changed its approach to map amendments to remove these incentives. Instead, it has stated that it will simply “continue its practice of requiring applicants to obtain the applicable ESA permits” before issuing most letters of map change. Buckley Letter at 2. But if FEMA’s existing “practice” had been adequate, the FEMA BiOp would not have found jeopardy and recommended changes. Moreover, FEMA’s proposal to require map change proponents to “obtain applicable ESA permits” is misleading. Unless there is a federal permit or funding involved, there is no “ESA permit” to obtain. 16 U.S.C. § 1536. While parties may choose to enter into a “habitat conservation plan” with NMFS to ensure they are not subject to potential § 9 liability, 16 U.S.C. § 1539(a), this is a voluntary process, not a regulatory one. Moreover, individual fills often degrade habitat and can contribute to jeopardy without violating the § 9 “take” prohibition. Declaration of Alan Wald, ¶ 29.<sup>10</sup> Fill, like many other floodplain development activities, is a cumulative problem that may look relatively benign for one individual project but, across a watershed and over time, it pushes a species towards extinction, i.e., causes

earlier case). Additional materials in support of NWF’s standing will be filed at an appropriate stage of this litigation in any event.

<sup>10</sup> NWF is offering the expert testimony of hydrogeologist and floodplain manager Alan Wald in support of this motion. NWF had also planned to support this motion with fact testimony from DeeAnn Kirkpatrick, a former NMFS biologist who led the team that developed the FEMA BiOp. Ms. Kirkpatrick’s former employer has sought to prohibit her from providing testimony in this case, and the parties have not yet been able to resolve the issue. Unless the dispute can be resolved between the parties, NWF intends to seek an appropriate order from this Court allowing Ms. Kirkpatrick’s testimony. NWF has already provided FEMA and its counsel with a draft of the testimony, so no prejudice will arise to FEMA if her declaration in support of this motion is filed subsequent to date of this motion.



1 jeopardy. Id. Focusing only on individual actions that, standing alone, could cause take misses the  
2 cumulative degradation of habitat and the point of RPA #2. Id.

3 FEMA seeks to sidestep RPA #2 because it considers map revisions “actions with outcomes  
4 that it lacks the ability to influence, i.e., actions that have already taken place.” Hasselman Decl.,  
5 Ex. 9 at 2. As such, “any changes to a floodplain resulting in a change in the floodplain mapping  
6 will not be evaluated for ESA compliance . . .” Hasselman Decl., Ex. 10 at 10. But FEMA still  
7 completely misses the point. NWF v. FEMA, 345 F. Supp. at 1173 (“There is nothing in the NFIA  
8 authorizing, let alone requiring, FEMA to authorize filling activities to change the contours of the  
9 natural floodplain. Indeed, such regulations may be counterproductive to the enabling statute’s  
10 purpose of discouraging development in areas threatened by flood hazards.”). Fill and habitat  
11 degradation occur because FEMA’s regulations provide tangible benefits for altering the floodplain:  
12 once altered and “mapped out” of the floodplain, NFIP insurance and other requirements disappear.  
13 FEMA has discretion to modify its mapping practices to remove this incentive to fill in the  
14 floodplain, which is what the RPA directed it to do. Yet it has refused, still claiming erroneously  
15 that it “lacks the ability to influence” fills.

16 For conditional letters of map revision (“CLOMRs”), FEMA has indicated it will consult  
17 individually with NMFS prior to issuing them. Buckley Letter at 2.<sup>11</sup> Unlike regular letters of map  
18 revision (“LOMRs”), conditional letters are sought prior to the actual placement of fill and, in  
19 FEMA’s view, allow FEMA to “influence the project’s outcome.” Carey Letter at 2.<sup>12</sup> However,  
20 consultation on individual CLOMRs is not an adequate substitute for changes to the mapping  
21 regulations and practices at a programmatic level because the effects of a single project, standing  
22 alone, are often difficult to ascertain and unlikely to trigger full ESA protections. Wald Decl., ¶ 13.

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24 <sup>11</sup> FEMA’s actions in this regard were adopted as a national policy on August 18, 2010, applicable to  
letter or map change submittals received after October 1, 2010. Ex. 9.

25 <sup>12</sup> FEMA staff recently appeared to reverse course, stating that “FEMA is not obligated to proceed with a  
26 Section 7 consultation on any requested CLOMR,” and would consider factors such as the availability of  
resources in making its decision as to whether to consult. Ex. 10 at 9.

1 And if consultation on conditional letters proves to be a barrier, parties can simply proceed with  
2 their project and obtain a map revision after the fact, thereby avoiding any ESA review.

3 FEMA also appears to have largely sidestepped RPA directives intended to require  
4 additional actions that increase the accuracy of flood maps in salmon habitat. BiOp at 152. For  
5 example, the BiOp called on FEMA to “revise map modeling methods to consider future conditions  
6 and the cumulative effects from future land use-change,” including climate change. BiOp at 152-  
7 53.<sup>13</sup> Even though FEMA itself drafted this RPA provision, Ex. 8 at 4-5, it now claims it lacks  
8 authority to address these factors and has proposed a purely voluntary approach that allows  
9 communities to develop better maps for their own floodplain management goals. Carey Letter at 3  
10 (“FEMA cannot produce [FIRMs] based on future conditions”); Hasselman Decl., Ex. 11 (voluntary  
11 mapping guidance). Similarly, the BiOp calls for FEMA to “ensure that floodplain modeling  
12 incorporates on-the-ground data to increase the accuracy of maps,” and to prioritize mapping  
13 activities based on Tier 1 salmon populations. BiOp at 152. But FEMA has only pledged to “work  
14 with” communities to prioritize flood maps, and proposed voluntary measures that can be adopted,  
15 or ignored, by communities. Buckley Letter at 2; Ex. 11. While FEMA claims to have changed the  
16 “algorithm” by which it establishes flood mapping priorities, the results are not evident: only one  
17 Puget Sound jurisdiction has been prioritized for updated maps. Wald Decl., ¶ 14. FEMA’s  
18 approach may allow communities to develop their own more accurate maps for informational  
19 purposes, but this does nothing to change the flood insurance requirement and other regulatory  
20 consequences of FEMA’s maps, and little to “ensure” more accurate maps that help avoid jeopardy.

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22 <sup>13</sup> Considering such “future conditions” is crucial, as studies predict a significant expansion of floodplain  
23 size over the next century due to climate change. BiOp at 143-44 (science predicts “a large negative  
24 impact of climate change on freshwater salmon habitat”); Wald Decl., ¶ 15. A draft national study  
25 conducted by FEMA confirmed this prediction but has never been finalized. See id.; Evan Lehman,  
26 Flood Prone Land Likely to Increase by 45% - A Major Challenge to Federal Flood Insurance Program,  
N.Y. Times, July 22, 2011 (<http://www.nytimes.com/cwire/2011/07/22/22climatewire-flood-prone-land-likely-to-increase-by-45-a-19117.html>). Despite this, FEMA’s voluntary mapping guidance includes no  
“specific consideration of changes in peak flow due to climate change.” Ex. 11 at 4.



2. *FEMA Has Not Implemented RPA #3.*

RPA #3, which calls for changes to FEMA’s eligibility criteria, is arguably the most important of the RPA elements. NWF v. FEMA, 345 F. Supp. at 1164, 1174 (describing relationship between eligibility criteria and harm to salmon). The RPA outlines an integrated and highly specific set of changes to the NFIP eligibility criteria aimed at eliminating the adverse impacts of new development in floodplains. It articulates a two-tiered structure under which the greatest level of protection would be given to a “protected area” comprised of (a) the floodway, (b) the channel migration zone (“CMZ”) plus 50 feet, and (c) a riparian buffer zone (“RBZ”).<sup>14</sup> NMFS conceived of the protected area primarily as a “no disturbance” zone, except for a narrow list of permissible activities that includes repair of existing structures, maintenance of utilities, and restoration projects. BiOp at 222-23. In the rest of the floodplain outside the protected area, the RPA establishes somewhat more flexible protections under which new development is permissible as long as the loss of floodplain storage is “avoided, rectified, or compensated for,” and any indirect adverse impacts to habitat values are mitigated “such that equivalent or better salmon habitat protection would be provided.” RPA #3, which includes a five-page appendix, provides extensive direction on how to implement these standards, including a number of specific directives pertaining to density levels, vegetation removal and impervious area, roads, levees, stormwater, redevelopment, and other issues. Id. at 153-58, 223-24.

The RPA directed FEMA to “ensure” that all NFIP communities implement these floodplain management measures “as soon as practicable” but in no event later than a phased schedule under which all jurisdictions would be in compliance by the end of three years.<sup>15</sup> During this

<sup>14</sup> The “floodway” is the portion of the stream channel that must be reserved in order to carry the baseflood without increasing the surface elevation by more than a designated height. BiOp at 6. The size of the RBZ, which is determined through a state Department of Natural Resources 2007 stream typing system, is not static but depends on the specifics of the stream. Id. at 154; Second Errata Notice at 5.

<sup>15</sup> The RPA, issued in September of 2008, required that a third of all NFIP jurisdictions, including all “Tier 1” jurisdictions, come into compliance within two years, and another third within two and a half years. Id. at 155. By letter, NMFS later extended these deadlines so that all jurisdictions were to be in compliance at the end of three years, or Sept. 22, 2011. Hasselman Decl., Ex. 12.

1 implementation phase, NMFS required FEMA to collect data on development activities to ensure  
2 that any adverse impacts are known, assessed, and subsequently mitigated. *Id.* at 155.

3 After NMFS issued its BiOp, FEMA decided it would not make changes to its eligibility  
4 regulations. Carey Letter at 4-5. Instead, it developed an alternative strategy that relies primarily on  
5 existing regulations that require communities to show that “all necessary permits have been  
6 received” for individual development projects. 44 C.F.R. § 60.3(a)(2); Carey Letter at 4.  
7 According to FEMA, this requirement can be applied to implement RPA #3 on a project-by-project  
8 basis either through direct compliance with the ESA (i.e., via a § 7 consultation or other ESA-  
9 approved process), or through an individual habitat assessment that shows “no adverse effect or  
10 modification will occur with the project or that appropriate mitigation has taken place to have no net  
11 effect.” Carey Letter at 5. Additionally, FEMA proposed two related programmatic approaches  
12 that individual NFIP communities may voluntarily pursue, one through adoption of a “model  
13 ordinance,” and the second through a “checklist” (based on the model ordinance) documenting that  
14 the community’s development criteria are equally as protective as the RPA. *Id.* These three options  
15 have been labeled by FEMA as the three “doors” to ESA compliance: Door 1 (model ordinance),  
16 Door 2 (checklist), and Door 3 (permit-by-permit showing of no net adverse effects). FEMA allows  
17 NFIP communities to choose which “compliance pathway” to pursue.

18 FEMA has developed guidance documents to implement these options, including a Door 1  
19 “Model Ordinance” (Hasselman Decl., Ex. 13), a Door 2 “checklist” (Hasselman Decl., Ex. 14), and  
20 guidance on how to prepare habitat assessments and conduct mitigation for individual projects  
21 (Hasselman Decl., Ex. 15, hereinafter, “Habitat Assessment Guidance”). To date, FEMA has  
22 approved four jurisdictions as having adopted the model ordinance and an additional six  
23 jurisdictions via the “Door #2” checklist. Hasselman Decl., Ex. 16; Wald Decl., ¶ 38. Three dozen  
24 more communities have requested approval under Door 2. All other NFIP communities, including  
25 virtually all “Tier 1” jurisdictions, are considered by FEMA to have defaulted to Door 3. For the  
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1 reasons discussed below, FEMA’s approach to implementing RPA #3 is fundamentally flawed.

2 i. Inadequate and untimely compliance.

3 The RPA directed FEMA to implement the revised eligibility criteria “as soon as  
4 practicable,” and no later than two years from the date of the FEMA BiOp for Tier 1 jurisdictions.  
5 BiOp at 219 (“Adopting revised floodplain ordinances as soon as possible in these Tier One areas is  
6 necessary to prevent jeopardy and adverse modification of critical habitat...”). Over three years  
7 later, however, very little has changed. Only a handful of jurisdictions have voluntarily adopted one  
8 of the programmatic options (Door 1 or Door 2), and FEMA has never actually laid out any explicit  
9 directive to the Door 3 communities that makes compliance with Door 3 obligatory, or defines with  
10 any precision what that obligation is. Adherence to the Habitat Assessment Guidance appears to be  
11 optional. Not surprisingly, there is little evidence that Door 3 jurisdictions have committed to make  
12 any changes, or taken any steps to revise their practices to require full consideration of the habitat  
13 effects of their floodplain permitting. Wald Decl., ¶ 41. At this point, it is all but impossible to  
14 assess what Door 3 requires communities to do, and whether communities are actually doing it.<sup>16</sup>

15 There is, however, abundant evidence that NFIP communities are either ignoring these  
16 requirements completely or fundamentally misapplying them to continue with a “business as usual”  
17 approach to development. In its 2010 report, FEMA admitted that only 24 communities (out of  
18 122) had even announced an intention to select any RPA compliance option. 2010 Annual Report at  
19 3. The majority of communities have also failed to provide information on development activities,  
20 as required by RPA #3. *Id.* at 5-6 (32 communities out of 122 complying in 2010); 2009 Annual  
21 Report at 6 (37 communities complying in 2009); Hasselman Decl., Ex. 17 at 6-7 (NMFS finding  
22 that number of jurisdictions providing necessary information “was very low”). FEMA has imposed  
23 no consequences on any community as a result of its failure to comply, to NWF’s knowledge.

24 <sup>16</sup> Moreover, many of the most important Tier 1 jurisdictions—including King, Snohomish, Whatcom,  
25 Jefferson, and Skagit Counties—have submitted applications for approval under “Door 2” but have not  
26 yet been approved. Hasselman Decl., Ex. 16. There is no indication that they are implementing Door 3  
requirements in the meantime.

1           Moreover, FEMA has sought to shift the ESA burden to communities without specific  
 2 direction or guidance, with the predictable result that compliance is scattershot and haphazard. For  
 3 example, out of 280 records of individual floodplain development permits identified in the 2010  
 4 Annual Report, only 13 triggered a “habitat assessment” at all—even though many projects  
 5 involved in-water work, vegetation removal, and other serious habitat impacts. 2010 Annual Report  
 6 at 6; see also 2009 Annual Report at 6 (12 out of 567 permits conducted a habitat assessment); Wald  
 7 Decl., ¶ 28. Of the 13 projects in the 2010 report that claimed to have conducted habitat  
 8 assessments, every one of them concluded that the project would have no adverse effects on salmon.  
 9 2010 Annual Report at 6. An internal NMFS review of the annual report noted serious concerns  
 10 with the lack of information and identified numerous projects that likely harmed salmon habitat.  
 11 Hasselman Decl., Ex. 18 (Attachment 1). If even a single project was prevented from being  
 12 permitted in the protected area or remainder of the floodplain as a result of FEMA’s efforts to date,  
 13 it is not apparent from the available information.

14                           ii.       Omission of RPA development standards.

15           RPA #3 lays out several highly specific proscriptions that all floodplain development  
 16 outside the protected area needs to meet to avoid jeopardy. BiOp at 154-57; 222-26. Most of these  
 17 criteria aren’t intended to apply within the protected area, where most development is prohibited  
 18 altogether. Id. at 225. The specific standards and directives are not framed as optional, and refine  
 19 the BiOp’s general prohibition on adverse effects. The list goes on for over two and a half pages but  
 20 includes a broad range of detailed standards, including in part:

- 21           • Use “low impact development” techniques, per specific state guidance, to infiltrate
- 22           generally “all” stormwater runoff onsite, BiOp at 154 and 223;
- 23           • Maintain equivalent “area, diversity, and function” of riparian vegetation (again per
- 24           specific state guidance), id. at 224;
- 25           • Limit bank stabilization and use specific design requirements on all projects, id.;
- 26           • Prohibit any interference with “hyporheic zone” (i.e., area of floodplain where surface
- 27           and shallow groundwater are exchanged), id.;
- 28           • Protect large woody debris, id.;

- 1 • Site projects outside the floodplain if possible, or at the point in the parcel farthest from any stream if not, id.;
- 2 • Maintain low density of five-acre lots or greater, id.;
- 3 • Limit new impervious surfaces to no more than 10% of site, and limit clearing of native vegetation to 35%, id. at 225;
- 4 • Design and locate projects so that they will not need new structural protection, id.;
- 5 • Prohibit new road crossings, id., and;
- 6 • Employ concepts of “cluster development, density transfer, credits and bonuses, planned unit development and transfer of development rights” wherever possible, id.

7 Not a single one of these standards exists under the Door 3 “permit-by-permit” approach  
 8 applicable to most communities. They are not incorporated into any requirement or directive. They  
 9 are either not mentioned in the vague Habitat Assessment Guidance, or are made optional. Under  
 10 Door 3, a project that violates every single one of these specific proscriptions could be authorized.  
 11 At best, all that is required would be an “assessment” and mitigation package, prepared by the  
 12 project proponent and reviewed by the community, claiming that no net adverse effects would  
 13 occur. Id.; Wald Decl., ¶ 26.

14 The other two compliance pathways are not notably better. Some of these directives are  
 15 absent altogether from the Model Ordinance and checklist. For example, these make no mention of  
 16 requirements relating to large woody debris, or the tracking and reporting that is emphasized so  
 17 heavily throughout the FEMA BiOp. The Ordinance makes voluntary many RPA standards, for  
 18 example the delineation of CMZs, use of stricter variance criteria and cluster development, and  
 19 adoption of “low impact development” criteria to eliminate stormwater. Id. at 7 (“All language is  
 20 optional unless noted in the commentary as an NFIP requirement[], an ESA requirement [], or  
 21 Washington state law...”) (emphasis in original). Crucially, while the Ordinance includes a  
 22 provision that appears to prohibit compensatory mitigation in the protected area (a critical protection  
 23 of the BiOp), it is identified as optional. Id. at 53.<sup>17</sup> And for standards identified as mandatory, the  
 24 Ordinance allows them to be waived as long as there is an individual habitat assessment and

25 <sup>17</sup> Not surprisingly, some jurisdictions approved by FEMA as compliant have not adopted this “optional”  
 26 proposed language from the Model Ordinance. Wald Decl., ¶ 18. In other words, FEMA allows them to  
 27 use compensatory mitigation in the protected area, in clear violation of RPA standards.

1 mitigation, adopted consistent with their flawed guidance, to achieve a poorly defined no adverse  
2 effect standard. See infra § C(2)(iii). Thus, even under the model ordinance, a project could violate  
3 every one of the RPA's standards as long as there is a habitat assessment finding no net adverse  
4 effects. Model Ordinance at 27-28, 49, 53.

5 Similarly, FEMA has been approving jurisdictions as compliant under "Door 2" despite  
6 significant departures from the Model Ordinance language. Wald Decl., ¶ 18-19. For example,  
7 jurisdictions have been "approved" despite a much reduced "protected area" from that required by  
8 the RPA. Id.; Hasselman Decl., Ex. 19 (letter from Northwest Indian Fisheries Commission,  
9 hereinafter, "NWIFC Letter") at 6 ("Rubberstamping the existing riparian management regime will  
10 perpetuate the decline of salmon to extinction."). Simply put, NMFS's careful and detailed list of  
11 development standards contained in RPA #3 is all but eviscerated in the model ordinance, checklist  
12 and permit-by-permit options.

13 iii. FEMA's habitat assessment guidance lacks substantive standards  
14 or clear definitions.

15 At the heart of each of FEMA's three "doors" is a duty to assess whether individual projects  
16 have adverse effects to salmon habitat. Where a "habitat assessment" shows that there will be no  
17 adverse effects, the project is allowed; otherwise, effects must be mitigated. Carey Letter at 5. The  
18 Model Ordinance directs that such habitat assessments be prepared consistent with FEMA's Habitat  
19 Assessment Guidance, and some Door 2 jurisdictions have adopted this guidance as well. It  
20 remains unclear whether and how "Door 3" requires use of this guidance. Whether mandatory or  
21 not, because individual communities are left to determine for themselves whether a project rises to  
22 the level of impermissible harm, it is crucial that the guidance be as objective, specific, and  
23 mandatory as possible if it is even arguably to meet the RPA standards.

24 FEMA's guidance falls far short of providing such direction. Most of the guidance is  
25 advisory and framed as suggestions rather than as clear mandatory standards. See, e.g., Habitat  
26 Assessment Guidance at 5 ("a step-by-step assessment process is recommended in this guidance").



1 Nowhere does the guidance actually define in a scientifically useful manner what constitutes an  
 2 “adverse effect” on salmon habitat. *Id.* at 23. It provides few, if any, clear, substantive standards as  
 3 to what kinds of effects are permissible in the protected area or remainder of the floodplain. Wald  
 4 Decl., ¶ 22; see also Ex. 17 (NMFS guidance states that any vegetation removal, bank armoring,  
 5 placement of fill, creation of impervious surface, straightening of stream channels “should always  
 6 be assumed to have adverse effects”). Without mandatory standards, and clear definitions of critical  
 7 terms, it is highly likely that project proponents will be able to prepare an assessment that finds no  
 8 adverse impact, and that jurisdictions will accept those conclusions. Wald Decl., ¶ 26. It is notable  
 9 that this guidance (like the Model Ordinance and checklist) has never been approved by NMFS.

10 Moreover, under the guidance, virtually any impact can be offset using “compensatory”  
 11 actions even though there are a number of serious, well-recognized problems with the concept.  
 12 Habitat Assessment Guidance at 23; Carey Letter at 5 (focusing on “net effect with mitigation”);  
 13 Wald Decl., ¶ 23-24. The guidance provides virtually no direction or oversight on how to conduct  
 14 and assess compensatory mitigation, other than offering suggestions for applicants to “keep in  
 15 mind” in developing mitigation plans (e.g., increasing mitigation ratios). Habitat Assessment  
 16 Guidance at 26. The guidance also contains no discussion, let alone binding obligations, related to  
 17 monitoring or adaptive management, which are crucial for any mitigation project. Wald Decl., ¶ 25.  
 18 Not surprisingly, Door 3 jurisdictions have embraced FEMA’s invitation to use mitigation to offset  
 19 additional harm, even in the protected area. See, e.g., Hasselman Decl., Ex. 20.<sup>18</sup>

20 iv. Failure to consider cumulative effects.

21 The BiOp documents how floodplain development causes jeopardy through the cumulative  
 22 effects of many individual projects—the effects of which are minor when looked at in isolation—  
 23 across the landscape and over time. BiOp at 95 (“Impacts of even small scale developments in  
 24

25 <sup>18</sup> The BiOp does not allow compensatory mitigation in the protected area. BiOp, at 154. The Guidance  
 26 is not been entirely clear on this point, raising the risk that compensatory mitigation would be allowed in  
 the protected area. Habitat Assessment Guidance at 27.

1 floodplains have cumulative effects. Imprecision in modeling supports assertions that each  
2 incremental increase in flood levels will be negligible.”); *id.* at 138 (“NMFS’ review indicates  
3 systemic, aggregate degradation of [habitat features] that in most watersheds are already impaired to  
4 the point that they limit productivity.”); Wald Decl., ¶ 29. Consideration of these cumulative effects  
5 under the ESA is crucial. Pacific Coast Fed. of Fishermen’s Assoc. v. NMFS, 265 F.3d 1028, 1035-  
6 36 (9th Cir. 2001) (setting aside ESA consultation that ignored cumulative effects of multiple minor  
7 habitat-altering actions); Preserve our Island v. U.S. Army Corps of Engineers, 2009 WL 2511953  
8 (W.D. Wash. 2009) (“No single project or human activity has caused the depletion of the salmon  
9 runs, the near-extinction of the SR Orca, or the general degradation of the marine environment of  
10 Puget Sound. Yet every project has the potential to incrementally increase the burden upon the  
11 species and the Sound.”); see also NWF v. NMFS, 524 F.3d at 930 (setting aside ESA consultation  
12 analysis under which “a listed species could be gradually destroyed, so long as each step on the path  
13 to destruction is sufficiently modest”).

14       Implementing RPA #3 based on an individual, permit-by-permit habitat assessment  
15 approach cannot “ensure” against jeopardy because it is largely blind to the problem of cumulative  
16 effects. Wald Decl., ¶ 29; Ex. 17 at 3 (NMFS guidance) (“If any adverse effects were allowed at the  
17 site level it would be difficult to avoid adverse effects at the reach scale.”). FEMA’s habitat  
18 assessment guidance does not prohibit actions that could cumulatively contribute to jeopardy, nor  
19 does it provide any guidance at all on how to assess potential cumulative effects. *Id.*; Habitat  
20 Assessment Guidance at 21. Instead, it notes only that cumulative effects should be considered  
21 wherever there are “measurable or observable negative effects,” thereby likely sidestepping the  
22 entire problem altogether. It also notes that cumulative effects assessment is “often a challenge,”  
23 uselessly suggesting that such effects must be estimated “in some manner.” *Id.* The guidance  
24 provides no substantive standards to follow—i.e., a particular level of effect that is prohibited—or  
25 even authorities to consult as to how to perform the assessment.



1 In some places, FEMA appears to conflate the “no adverse effect” threshold with one that  
2 would avoid “take” of listed salmon under ESA’s § 9. Ex. 10 at 12; see also Model Ordinance at 3  
3 (under Door 3, applicants must “demonstrate compliance with the ESA” in order to receive permit).  
4 FEMA’s approach thus would allow individual developments, even in the protected area, as long as  
5 the proponent shows that the project will not by itself kill or injure salmon. Id. But applying the  
6 “take” standard to an individual development does not prevent adverse effects that cumulatively  
7 degrade habitat at the landscape level and cause jeopardy. Wald Decl., ¶ 29. In the case of  
8 floodplain development, it will typically be difficult to establish that a single project results in  
9 “take” of listed salmonids, or causes other effects that would be “significant” under this guidance,  
10 even though it would contribute to cumulative habitat degradation. Id. But that does not mean the  
11 project isn’t harmful or has no adverse effects. Id. The RPA is not framed in terms of avoiding take  
12 of individual fish, but in terms of eliminating specific habitat impacts on multiple values like water  
13 quality and quantity, flood volumes and velocities, spawning substrate and/or floodplain refugia.  
14 BiOp at 154. NMFS has discouraged the use of “Door 3” to implement the RPA for this very  
15 reason, noting that “the traditional project-by-project strategy often fails to capture the full range of  
16 effects, allowing incremental, systemic loss of essential ecosystem features to occur.” Hasselman  
17 Decl., Ex. 17 at 6. Yet under all three doors, FEMA relies almost entirely on assessments of  
18 individual project impacts and allows projects as long as they do not, by themselves, cause  
19 identifiable harm to salmon.

20 v. Inadequate development tracking and oversight.

21 Compounding these shortcomings in FEMA’s three-door approach to implementing RPA  
22 #3 is a near-total lack of oversight by FEMA or NMFS. Wald Decl., ¶ 30. Under all three “Doors,”  
23 jurisdictions oversee habitat assessments and make permitting decisions in floodplains by  
24 themselves, without approval or oversight from FEMA. However, most (if not all) jurisdictions  
25 lack the expertise, funding, and the incentives to implement these requirements properly. Id.; see  
26

1 also NWIFC Letter, at 1.<sup>19</sup> Neither FEMA nor NMFS is required to review or approve individual  
 2 projects. Instead FEMA has stated that it will review community compliance as part of its ongoing  
 3 enforcement of the NFIP. There is no schedule for such efforts and no assurance that any effort that  
 4 does occur will result in changes where the habitat assessment process has been flawed. But history  
 5 provides ample reason to be skeptical that FEMA will oversee Puget Sound communities  
 6 aggressively to avoid jeopardy. Wald Decl., ¶¶ 32-33.

7 Tracking and oversight of development permits is a crucial part of the RPA, both during the  
 8 implementation period and once new standards are adopted. BiOp at 155-57.<sup>20</sup> This information  
 9 collecting and reporting is emphasized in multiple places in the FEMA BiOp. Surprisingly,  
 10 however, these duties appear to have evaporated completely. Neither the Model Ordinance nor the  
 11 checklist requires the tracking and reporting of development permits, and, of course, there is no  
 12 obligation on Door 3 jurisdictions to comply either. If there is any doubt as to FEMA's failure to  
 13 collect the information required to properly implement RPA #3, it can be resolved by reviewing  
 14 FEMA's reporting to date. See 2009 Annual Report, 2010 Annual Report. As noted above, most  
 15 jurisdictions have simply ignored FEMA's ambiguous request for data without consequence, and  
 16 those that did comply provided largely useless information indicating that nothing has changed.  
 17 Ex. 18 (NMFS review notes that "most of the reports are silent or cryptic on what the project was,"  
 18 making it impossible to determine whether the "no adverse effect" determinations were adequate).

19 Plainly, FEMA's approach of shifting the burden to NFIP communities, with no direction or  
 20 oversight, is neither functional nor permitted by the ESA. Courts have rejected approaches for  
 21 delegating ESA compliance to others with far greater agency involvement than exists here. See,  
 22 e.g., Wash. Toxics Coalition v. Interior, 457 F. Supp. 2d 1158, 1179 (W.D. Wash. 2006) (striking

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24 <sup>19</sup> FEMA's habitat assessment guidance attempts to solve this problem by suggesting that communities  
 25 "request assistance from their neighboring jurisdictions" in reviewing habitat assessments. Habitat  
 Assessment Guidance at 5.

26 <sup>20</sup> This duty is closely related to RPA #7, but appears in many places under RPA #3 as well.

1 down ESA regulation that allowed action agency to make its own effects determinations); National  
 2 Wildlife Fed. v. National Marine Fisheries Service, 254 F. Supp. 2d 1196, 1213 (D. Or. 2003)  
 3 (agency cannot rely on third party to implement conservation measures that are not reasonably  
 4 certain to occur). Moreover, FEMA’s failure to identify and implement a reasonable reporting and  
 5 oversight process undercuts any claim that it can intervene to assure ESA compliance. Such an  
 6 approach fails to ensure that jeopardy does not occur.

7 vi. Failure to protect Channel Migration Zones (“CMZs”).

8 A crucial element of the FEMA BiOp and RPA #3 is protection for the CMZ:

9 FEMA’s mapping program fails to identify and protect the channel migration  
 10 zone (CMZ) which provides important functions for salmonids. A confined river  
 11 can no longer move across the floodplain and support natural processes of channel  
 12 migration that create the side channels and off-channel areas that shelter juvenile  
 13 salmon (Montgomery, 2003). In contrast, functioning CMZs are capable of  
 14 meandering and braiding, leading to increased side and off channel habitat which  
 15 supports rearing juvenile salmonids as mentioned above.

16 BiOp at 85, 96. The CMZ, plus 50 feet, is part of the “protected area” that serves as a “no  
 17 disturbance” zone with the highest level of habitat protection. Id. at 154, 222; Wald Decl., ¶¶ 42-43  
 18 (discussing importance of CMZ to salmon habitat). In places where the CMZ has not yet been  
 19 mapped, NMFS recommends that the CMZ be assumed to be co-extensive with the entire 100-year  
 20 floodplain. Ex. 17 at 5. Alternatively, NMFS provides options for jurisdictions to designate CMZs  
 21 or show how channels are prevented from migration due to shoreline modification. Id.

22 FEMA has not provided CMZs with any of the protection directed by the RPA. Most  
 23 obviously, the Door 3 approach does nothing to identify or protect CMZs. Wald Decl., ¶ 43. There  
 24 is no requirement to designate, identify, or protect CMZs under a permit-by-permit habitat  
 25 assessment. Moreover, while the Door 2 checklist identifies protection of CMZs, it does not include  
 26 any requirement that they be identified if not already mapped, and FEMA has approved  
 27 jurisdictions that have explicitly stated that they have not identified CMZs and don’t intend to.  
 28 Wald, ¶ 43. Even under the Model Ordinance the issue is muddled. While the Ordinance does

1 identify the option of designating the entire floodplain, it also offers communities the option of  
 2 identifying a CMZ in accordance with “Regional Guidance for NFIP-ESA Floodplain Mapping,  
 3 published by FEMA Region X and dated \_\_\_\_\_”. Model Ordinance at 25. However, no such  
 4 guidance exists. A separate guidance document issued by FEMA observes that FEMA does not  
 5 require CMZ mapping but that if a community “chooses” to do so, it “should” be consistent with the  
 6 guidance. Ex. 11 at 13-14. It also recognizes that communities “have, and will, implement variable  
 7 regulations within the CMZ.” *Id.* Contrary to RPA requirements, FEMA fails to “ensure” that  
 8 CMZs will be protected from new development.

9                   vii. Failure to address state vesting loophole.

10           An additional flaw common to all three “Doors” is the failure to address state vesting law.  
 11 Under Washington law, subdivision and building permits are generally considered under the “land  
 12 use control ordinances” in effect at the time a complete application is filed. RCW 58.17.033,  
 13 19.27.095; West Main Assoc. v. City of Bellevue, 106 Wn.2d 47, 50-51 (1986). Moreover, where a  
 14 use for property is disclosed in a subdivision application, all of the permits required in the future—  
 15 which can be years into the future—vest at the time of the subdivision application. Noble Manor  
 16 Co. v. Pierce Co., 133 Wn.2d 269, 278 (1997). Washington’s vesting rule “runs counter to the  
 17 overwhelming majority rule” that subsequently enacted regulations apply to projects already in the  
 18 permitting process. Erickson v. McLerran, 123 Wn. 864 (1994).

19           NMFS developed the RPA standards to meet the requirements of the ESA, not land use law,  
 20 based on the biological needs of the species and the federal duty to ensure against jeopardy. As  
 21 such, state vesting law simply doesn’t apply to, and cannot override, RPA standards. See Rosemere  
 22 Neighborhood Assoc. v. Clark County, 2010 WL 3420570 (Wash. Pol. Ctrl. Hearings Bd., Aug. 26,  
 23 2010) at \*8 (state vesting law does not apply to Clean Water Act). Moreover, to the extent that  
 24 there is any conflict between state vesting law and the ESA, it is the latter that controls. Sayles v.  
 25 Maugham, 985 F.2d 451, 455 (9th Cir. 1993); Northern Plains Resource Council v. Fidelity Exp.,

1 325 F.3d 1155, 1164 (9th Cir. 2003) (state cannot create “exemption” to federal Clean Water Act).

2 FEMA, however, has completely failed to “ensure” that implementation of the RPA is not  
 3 undermined through application of state vesting law by Puget Sound jurisdictions covered by the  
 4 RPA. The RPA directs FEMA to ensure that new standards are applied “as soon as practicable” and  
 5 no later than three years after the BiOp’s issuance. BiOp at 155. Nothing in the model ordinance,  
 6 checklist or habitat guidance, however, addresses the effects of state vesting law on RPA  
 7 implementation. By allowing communities to enact and apply their own standards without adequate  
 8 direction, it is highly likely that many, if not all, of them will continue to use state vesting standards  
 9 to allow vested projects to move forward under their pre-BiOp regulations long after the RPA’s  
 10 deadlines, thus avoiding even the inadequate new standards FEMA has announced. Even a  
 11 community that has adopted FEMA’s Model Ordinance would not be required under state law to  
 12 apply those updated standards to projects that submit a complete development application prior to  
 13 the Ordinance’s effective date. This means that communities can continue issuing permits for new  
 14 floodplain development for years into the future—even in the protected area—that meet none of the  
 15 RPA’s substantive standards, or even require procedural steps like a habitat assessment. FEMA’s  
 16 failure to recognize and address the effects of state vesting law on RPA implementation and  
 17 floodplain development is a further factor that contributes to jeopardy.

18                   viii. Permit-by-permit review was rejected as inadequate in the Key  
 19                   Deer case.

20 A permit-by-permit approach to reviewing impacts under the NFIP has already been  
 21 invalidated as inadequate to meet the ESA’s strict precautionary mandate. In Florida Key Deer v.  
 22 Brown, the district court struck down the RPA of a jeopardy BiOp for the NFIP in Florida that  
 23 called for permit-by-permit review of impacts.<sup>21</sup> 364 F. Supp. 2d 1345, 1355-1360 (S.D. Fla. 2005),

24 <sup>21</sup> The situation in Key Deer departed somewhat from the one in Puget Sound, in that in Key Deer the  
 25 RPA itself called for a permit-by-permit analysis of habitat effects, and the Court was reviewing the  
 26 adequacy of that BiOp. Here, in contrast, the question is whether FEMA’s permit-by-permit alternative to  
 the RPA complies with the ESA’s prohibition on jeopardy.

1 aff'd, 522 F.2d 1133 (11th Cir. 2008). First, the Court held that such an approach unlawfully relied  
2 on “voluntary” measures, noting that “mitigation measures under the ESA must be reasonably  
3 specific, certain to occur, and subject to deadlines and other forcible obligations.” Id. at 1355. The  
4 court explicitly rejected as “disingenuous at best” FEMA’s argument that it “may” enforce against  
5 jurisdictions using its NFIP oversight. Id. It further noted that the approach did not provide for  
6 “restoration of habitats that are destroyed nor does it provide for any consequences to landowners  
7 that destroy habitat without consultation.” Second, the court ruled that permit-by-permit review  
8 unlawfully failed to take into account the cumulative effects of multiple development projects, even  
9 though jeopardy was arising from cumulative habitat loss and fragmentation. Id. at 1357-8 (“By  
10 providing for project by project review, it is unlikely that FWS will conclude under the 2003 RPA  
11 that a single project will cause jeopardy.”).

12 The court’s reasoning in Florida Key Deer is entirely applicable here. Even though the RPA  
13 calls on FEMA to “ensure” that its minimum criteria are implemented to prevent harm to salmon,  
14 FEMA has simply shifted that burden to the communities to avoid harm from individual permits,  
15 with no clear standards and no oversight. Wald Decl., ¶ 30. While FEMA will presumably claim  
16 that it can enforce against such jurisdictions that fail to follow its (vague and inadequate) guidance  
17 under its NFIP authority at some undefined point in the future, the existence of such unexercised  
18 authority fails to “ensure” against jeopardy. Florida Key Deer, 364 F. Supp. 2d at 1355; see also  
19 NWF v. NMFS, 254 F. Supp. at 1215 (rejecting ESA plan for relying on mitigation that was not  
20 “reasonably certain to occur”). Moreover, as discussed above, FEMA’s approach completely fails  
21 to address the problem of cumulative effects, which lie at the heart of the BiOp’s jeopardy finding.  
22 Supra at 24-26. The evidence demonstrates that FEMA’s habitat assessment and mitigation process  
23 is, at best, a paper-shuffling exercise rather than a substantive prohibition on harm: out of hundreds  
24 of development projects reported to NMFS, the number that have been changed or rejected because  
25 of the new requirements appears to be zero. Supra at 21.



3. *FEMA Has Not Implemented RPA #4.*

RPA #4 included a clear, directive list of specific changes that needed to be made to the community rating system, within nine months, to increase the incentives for salmon-habitat-enhancing activities and to reduce the incentives for activities that harm salmon habitat. BiOp at 185-86. Even though FEMA itself proposed most of the language in RPA #4, Ex. 8 at 18-19, it has yet to comply. Wald Decl., ¶ 47. FEMA has provided guidance outlining where the existing point system provides benefits to salmon, but has not yet made changes to the CRS manual that determines points. *Id.*; 2009 Annual Report at 3; Ex. 21. FEMA has also explicitly declined to change the CRS points related to levees, as directed by the RPA. 2009 Annual Report at 4.

4. *FEMA Has Not Implemented RPA #5.*

FEMA has explicitly refused to implement most elements of RPA #5, claiming they are outside its “authority and discretion.” Buckley Letter at 4-5; Carey Letter at 6. Whether FEMA has correctly interpreted its authorities is beside the point, as FEMA bears the burden of implementing some alternative to the RPA that would address the effects of FEMA’s programs on streamside vegetation and new levees. Tribal Village of Akutan, 869 F.2d at 1193. Outside of an offer to “collaborate” with the Corps and other agencies, it has not implemented any alternative action, or demonstrated that such alternative action will avoid jeopardy.<sup>22</sup>

FEMA’s assessment that RPA #5 is outside its authority is particularly surprising because FEMA wrote major portions of it. Ex. 8 at 20-21. Indeed, a number of agency counsel were on the email chain, but did not raise concerns about the BiOp’s explicit conclusion that this RPA is “within FEMA’s authority under the NFIP.” *Id.*; BiOp at 161. FEMA has never released a legal analysis supporting its position, making its conclusion difficult to understand. But no statute prohibits implementation of this RPA, and to the extent that FEMA’s discretion is constrained by its own

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<sup>22</sup> NWF is unaware of any actual efforts to collaborate on this issue, and no changes in the Corps’ policies have been proposed, let alone adopted. To the contrary, the Corps recently proposed changes to its national vegetation maintenance policies that would make it harder, rather than easier, to leave riparian vegetation in place. 75 Fed. Reg. 6364 (Feb 9. 2010).

1 regulations, it has authority to change those. NWF v. FEMA, 345 F. Supp. 2d at 1173-74 (“FEMA  
2 has discretion to amend its regulations.... Those regulations have an ongoing impact on the use of  
3 floodplains”). FEMA must either implement the RPA as written, or bear the burden of defending  
4 an alternative that avoids the harm to species identified in the FEMA BiOp. It has done neither.

5           5.       *FEMA Has Not Implemented RPA #6.*

6           The story is largely the same for RPA #6, which requires FEMA to “ensure” appropriate  
7 mitigation for activities that occur during the time it takes to come into compliance with RPA  
8 elements 2, 3, and 5. BiOp at 162. Mitigation to offset these actions is, in fact, a key theme of  
9 various RPA elements and the incidental take statement. See, e.g., BiOp at 175. The importance of  
10 RPA #6 has only grown over time, as the implementation period is now longer than the BiOp  
11 anticipated. However, FEMA has completely failed to implement this RPA. Ex. 18 at 6 (NMFS’  
12 internal analysis finds FEMA “noncompliant”). Instead, it has asserted that the RPA is satisfied by  
13 “writing regional guidance on implementing elements of the RPA and continuing to speak at  
14 outreach events.” Ex. 7 at 5; Ex. 4 at 3 (announcing intention to provide “outreach and technical  
15 assistance to communities during the interim period... includ[ing] providing guidance documents  
16 and educational materials to meet the other RPA elements....”). Contrary to the plain directive of  
17 this RPA, FEMA has not ensured mitigation for any development that has taken place during the  
18 BiOp’s implementation. Indeed, given the failures in reporting, it is impossible for FEMA to know  
19 what projects have occurred during the implementation period that may require mitigation.

20           6.       *FEMA Has Not Implemented RPA #7.*

21           RPA #7 is the critical “monitoring and adaptive management” component tying all of the  
22 other RPA elements together. BiOp at 162-63; Ex. 17 at 6 (describing tracking and evaluation as  
23 “vital”). This component is intended to track FEMA’s progress in meeting other RPA elements,  
24 determine whether additional or alternative measures are necessary, and evaluate whether impacts  
25 from development during the phase-in of new rules have been mitigated. BiOp at 163. The RPA is  
26



1 very specific that data on individual permits should be collected and scrutinized, so any adverse  
2 impacts that take place before full implementation of the RPA can be mitigated under RPA #6.  
3 BiOp at 157. A crucial purpose of this oversight is to evaluate mitigation to ensure that it is  
4 effective; if not, additional mitigation actions would be necessary. Id.

5 FEMA's compliance with RPA #7 has been dismal. After agreeing to this RPA, FEMA  
6 later appeared to conclude that it lacked authority even to collect this information. Carey Letter at 8.  
7 It is, in fact, difficult to identify where FEMA has directed NFIP communities to track and report  
8 permitting information. Ex. 22 (letter to jurisdiction noting that reporting will be required but that  
9 FEMA was still developing a reporting tool); NWIFC Letter, at 8 ("There does not appear to be any  
10 accountability for monitoring and reporting the impacts of development activities and implementing  
11 any course corrections."). NMFS' internal review documented numerous concerns with the  
12 reporting, including inadequate information on development projects and very few actual habitat  
13 assessments. Ex. 18. In other words, FEMA has no idea whatsoever what projects have taken place  
14 in sensitive floodplain habitats since the FEMA BiOp was issued, let alone whether any mitigation  
15 was required or has occurred. The purposes of RPA #7 in helping avoid jeopardy cannot be  
16 fulfilled with scattershot compliance and incomprehensible and incomplete reporting. Ex. 17 at 6-7.

17 7. *Conclusion re. Jeopardy.*

18 In NWF v. NMFS, 524 F.3d at 936, the Ninth Circuit rejected the argument that that "even a  
19 sincere general commitment to future improvements" can offset "immediate negative effects, absent  
20 specific and binding plans." See also Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d  
21 1139 (D. Az. 2002) ("Mitigation measures must be reasonably specific, certain to occur, and  
22 capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations,  
23 and, most important, they must address the threats to the species in a way that satisfies the jeopardy  
24 and adverse modification standards"). FEMA's attempt to comply with the ESA fails this test. It  
25 has discarded outright several elements of the RPA, with nothing to replace them. For others, it has  
26

1 adopted an approach that simply shifts the burden of “ESA compliance” to local communities  
2 without making substantive changes to its own program. Carey Letter at 4 (RPA is “local  
3 community roadmap for compliance with the ESA”); 2010 Annual Report at 1 (FEMA will prepare  
4 mapping guidance to “help communities meet the ESA requirements”). At the same time, FEMA  
5 continues to issue flood insurance for new development in Puget Sound—FEMA records show that  
6 around 800 projects in Puget Sound, constructed after the date of the FEMA BiOp (and before  
7 December 2010), have received new FEMA flood insurance policies. Ex. 3. Floodplain  
8 development standards in the vast majority of Puget Sound jurisdictions remain unchanged, and the  
9 individual “habitat assessment” process that lies at the heart of FEMA’s strategy has already proven  
10 to be a failure. Accordingly, NWF is likely to prevail on its claim that FEMA has failed to “ensure”  
11 against jeopardy and is entitled to a preliminary injunction.

12 D. FEMA Is Violating the ESA’s Prohibition on “Take”.

13 As noted above, § 9 of the ESA is a sweeping prohibition on any action that results in death,  
14 injury, harassment, or harm to listed species. As NMFS clarified in its rule defining “harm” under  
15 the ESA, “any habitat modification that significantly impairs spawning, rearing or migrating does  
16 constitute harm to the species and is a take pursuant to the provisions of the ESA.” 64 Fed Reg.  
17 60727, 60728 (Nov. 8, 1999) (emphasis added). Moreover, “[a]n action which contributes to injury  
18 can be a take even if it is not the only cause of the injury.” Id. NMFS has identified certain  
19 categories of activities that may result in take. Id. at 60730. These include discharge of pollutants  
20 into species habitat, removing plants or other biota that listed species require for essential behaviors,  
21 removing or altering physical structures that are “essential to the integrity and function of the listed  
22 species habitat,” and “conducting land-use activities in riparian areas” that may cause sedimentation  
23 or wasting into species habitat. Id.; see also 65 Fed. Reg. 42422, 42428 (July 10, 2000)  
24 (“Development and other human activities within riparian areas . . . alter the properly functioning  
25 condition of riparian areas. These activities can alter shading (and hence stream temperature),  
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1 sediment transport and supply, organic litter and large wood inputs, bank stability, seasonal  
2 streamflow regimes and flood dynamics.”).

3         There can be no dispute that FEMA’s implementation of the NFIP results in significant take,  
4 as it is documented at length in the FEMA BiOp itself. BiOp at 151, 168 (“Some fish will be  
5 injured by changed habitat conditions and some will die because of habitat change affected by NFIP  
6 implementation.... Take will continue to occur from these sources at a rate generally consistent  
7 with past rates of development-rated adverse effects until the RPA is implemented.”). Indeed, in  
8 estimating the impacts of the NFIP on orcas, NMFS estimated that long-term implementation of the  
9 program would cause all Puget Sound chinook to become unavailable as prey for orcas—i.e., be  
10 taken. Id. at 139-40. NMFS further found that “[t]ake will continue from these sources at a rate  
11 generally consistent with past rates of development-related adverse effects until the RPA is  
12 implemented.” Id.; see also id. at 173-74 (documenting substantial annual loss of floodplain habitat  
13 in Puget Sound jurisdictions). As directed by the ESA, the BiOp provides FEMA with a limited  
14 waiver from the ESA’s prohibition on take, but that waiver is operative only so long as FEMA  
15 complies with the RPA in full. 16 U.S.C. § 1536(b)(4); BiOp at 173-74. The take statement is  
16 further conditioned on FEMA taking a number of additional steps, called reasonable and prudent  
17 measures (“RPMs”), mostly associated with ensuring mitigation for development that occurs during  
18 the BiOp’s implementation. BiOp at 174-75.

19         FEMA is violating § 9 because its actions result in take and because its failure to implement  
20 the RPA negates the protection of the incidental take statement. The description of take in the  
21 FEMA BiOp is, by itself, sufficient evidence to meet plaintiff’s factual burden of proof to establish  
22 a § 9 violation, especially at the preliminary injunction stage. See Swinomish Indian Tribal  
23 Community v. Skagit County Dike District No. 22, 618 F. Supp. 2d 1262 (W.D. Wash. 2008) (in  
24 § 9 case, analysis of take in a draft unsigned biological opinion was sufficient evidence to rule for  
25 plaintiff on summary judgment). Moreover, because FEMA has failed to implement the RPA, the  
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1 take statement is not operative. FEMA BiOp at 175; Second Errata List, at 3. The same is true for  
 2 the RPMs, as FEMA has failed to “ensure” that mitigation has occurred for the development  
 3 approved since 2008. Accordingly, NWF is likely to prevail on the merits of its § 9 claim.<sup>23</sup>

4 II. PLAINTIFF WILL BE IRREPARABLY HARMED WITHOUT AN INJUNCTION.

5 A. Plaintiff Will Be Irreparably Harmed If FEMA Continues Implementing the NFIP  
 6 in Puget Sound.

7 The touchstone for evaluating plaintiff’s harm is the FEMA BiOp itself, which describes in  
 8 detail how ongoing implementation of the NFIP is causing jeopardy to listed species, adverse  
 9 modification to their habitat, and take. BiOp at 55 (“The importance of floodplain habitat to  
 10 salmonids cannot be overstated.”); Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545  
 11 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by money  
 12 damages and is often permanent or at least of long duration, i.e., irreparable.”); Marsh, 816 F.3d at  
 13 1389 (issuing injunction due to substantive ESA violation). These are not abstract legal concepts  
 14 but existential threats to the iconic species of this region. 50 C.F.R. § 402.02. There is no need to  
 15 look for additional, extrinsic evidence that continued implementation of the NFIP is causing  
 16 irreparable harm to these species. Key Deer, 386 F. Supp. 2d at 1286 (relying on BiOp to find that  
 17 “absent an injunction, environmental harm is likely to occur”); BiOp at 147 (“NMFS expects the  
 18 ongoing actions of the NFIP will continue to decrease high quality floodplain and channel habitat”);  
 19 164 (documenting historic rate of floodplain loss in Puget Sound). Even so, extrinsic evidence  
 20 demonstrates that the development that is destroying salmon habitat continues, and supports the  
 21 harm plaintiff will suffer without an injunction. See Ex. 2-3 (showing flood insurance policies for  
 22 new development); Wald Decl., ¶¶ 51-56.<sup>24</sup>

23 <sup>23</sup> NWF’s complaint alleges a third cause of action: violation of ESA § 7(d), which prohibits any  
 24 irreversible or irretrievable commitment of resources pending compliance with the § 7(a)(2) consultation  
 25 process. NWF is not moving for a preliminary injunction on the basis of that claim, but intends to pursue  
 26 it at the appropriate time.

27 <sup>24</sup> NWF is keeping this discussion brief because the relationship between continued implementation of the  
 28 NFIP and harm to Puget Sound salmon is so well documented over such a long time. In NWF v. FEMA,  
 for example, the Court cited a letter NMFS sent to FEMA in 1998 noting that the NFIP was adversely

1 B. Plaintiff Seeks a Narrowly-Tailored Injunction.

2 Plaintiff seeks a “narrowly tailored” injunction to prevent additional irreparable harm  
 3 pending the resolution of this case. See Monsanto v. Geertson Seed Farms, 130 S. Ct. 2743, 2761  
 4 (2010). Specifically, plaintiff asks this Court to enjoin FEMA from issuing flood insurance policies  
 5 for new development projects in all Tier 1 and Tier 2 communities covered by the FEMA BiOp.<sup>25</sup>  
 6 BiOp at 218-29; Ex. 23. Issuance of insurance for existing structures, and projects that do not need  
 7 flood insurance (e.g., habitat restoration projects, minor improvements to existing structures) should  
 8 not be affected. Development projects that do not need or wish to carry flood insurance will also  
 9 not be effected. Moreover, the injunction on issuance of new flood insurance in Tier 1 and 2  
 10 communities should not apply in jurisdictions that adopt an approved habitat conservation plan  
 11 (“HCP”) or § 4(d) rule exemption related to development, for individual projects that have been  
 12 subject to § 7 consultation, or where NWF and FEMA agree that the project’s effects are beneficial.  
 13 This proposed narrowing of the injunction provides an opportunity for communities to negotiate  
 14 their own development standards with NMFS in an ESA-approved process. Communities also  
 15 retain the option to withdraw from the NFIP and implement their own development standards  
 16 without FEMA’s involvement if they wish. NWF further requests an injunction directing FEMA  
 17 not to process map changes that result in a reduction of any floodplain boundary.

18 Plaintiff’s proposed injunction is similar to the one imposed by the district court (and  
 19 affirmed by the 11th Circuit) in the Key Deer litigation. Key Deer, 386 F. Supp. 2d at 1286, 1294  
 20 (enjoining FEMA “from issuing flood insurance for new development in the suitable habitat of the  
 21 listed species”). There, the court found that even if FEMA lacked discretion to deny insurance in a  
 22 particular case, it had ample discretion to implement the NFIP consistent with the ESA. Id. at 1290-

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affecting salmon. 345 F. Supp. at 1176. Another letter from the State Department of Ecology in 2000  
 24 made the same observations. Id. If the Court wishes additional briefing and supporting materials related  
 25 to harm, NWF will provide it.

26 <sup>25</sup> Additional details regarding the scope of the injunction are included in the Proposed Order filed with  
 27 this motion.

1 92. Moreover, “[t]he fact that FEMA may be unable to limit the availability of flood insurance with  
2 an otherwise eligible community is unrelated to the Court’s ability to prevent Plaintiffs from  
3 suffering irreparable harm until such time as” the agencies comply with the ESA. Id. at 1291; Key  
4 Deer, 522 F.3d at 1147 (“Where a federal agency fails to comply with the ESA, it is settled that a  
5 court may enjoin the agency from further noncompliant action pending satisfaction with the ESA’s  
6 requirements.”); see also Alaska Ctr. for the Environment, 20 F.3d 981, 986 (9th Cir. 1994) (“The  
7 district court has broad latitude in fashioning equitable relief when necessary to remedy an  
8 established wrong.”).

9 III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST SUPPORT AN  
10 INJUNCTION.

11 As noted above, under the ESA there is simply no “balancing” of harm to listed species  
12 against other interests. Supra at 9; Tenn. Valley Auth., 437 U.S. at 194 (“Congress has spoken in  
13 the plainest of words, making it abundantly clear that the balance has been struck in favor of  
14 affording endangered species the highest of priorities....”). As the Ninth Circuit has emphasized,  
15 “[i]n Congress’ view, projects that jeopardized the continued existence of endangered species  
16 threatened incalculable harm; accordingly, it decided that the balance of hardships and the public  
17 interest tip heavily in favor of endangered species.” Marsh, 826 F.3d at 1383; Washington Toxics,  
18 413 F.3d at 1035 (“The district court was not required to balance interests in protecting endangered  
19 species against the costs of the injunction when crafting its scope. Congress has decided that under  
20 the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened  
21 species.”); Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996). Accordingly, the fact  
22 of a violation of the ESA, combined with likely harm to listed species, is a more than sufficient  
23 basis on which to issue an injunction.

24 Even if it were appropriate to consider countervailing impacts and the public interest, the  
25 facts weigh in favor of an injunction. See Key Deer, 386 F. Supp. 2d at 1287 (even if public interest  
26 could be considered, “the Court concludes that the public interest is best served by granting an

1 injunction” prohibiting new flood insurance). FEMA has continually emphasized that changing  
2 floodplain practices to protect salmon habitat is also beneficial for communities, taxpayers, and  
3 public safety. See, e.g., Carey Letter at 1, 9 (ESA compliance will “reduce the devastating effects  
4 of flooding on life and property”); 2009 Annual Report at 7. Many of the actions contained in the  
5 RPA—such as more protective development criteria—are similar to actions FEMA has said for  
6 years it would like to encourage in the name of better floodplain management, albeit without  
7 success. BiOp, at 88; NWF v. FEMA, 345 F. Supp. 2d at 1158 (discussing FEMA’s voluntary  
8 “model ordinance”). By reducing the exposure of homes and people to flooding, NWF’s injunction  
9 is in the public interest.

10 CONCLUSION

11 For the foregoing reasons, plaintiff respectfully requests that the Court issue a preliminary  
12 injunction as described in this memorandum and accompanying proposed order.

13 Respectfully submitted this 21st day of December, 2011.

14  
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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

I HEREBY CERTIFY that on December 21, 2011, I filed the following documents electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

1. Plaintiff’s Motion for a Preliminary Injunction;
2. Declaration of Jan Hasselman in Support of Plaintiff’s Motion for a Preliminary Injunction and Exhibits 1-232;
3. Declaration of Alan Wald in Support of Plaintiff’s Motion for a Preliminary Injunction; and
4. [Proposed] Order Granting Plaintiff’s Motion for a Preliminary Injunction.

Ethan C. Eddy, Trial Attorney  
 U.S. Department of Justice  
 Environment and Natural Resources Division  
 Wildlife and Marine Resources Section  
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- via facsimile
- via overnight courier
- via first-class U.S. mail
- via hand delivery
- via e-mail
- via electronic service by Clerk

AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Registered Participants in the manner indicated:

None.

1 I, Cheryl McEvoy, declare under penalty of perjury that the foregoing is true and correct.

2 Executed this 21<sup>st</sup> day of December, 2011, at Seattle, Washington.

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5 Cheryl McEvoy

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