

**WALDPORT CITY COUNCIL
JANUARY 12, 2017
MEETING NOTICE AND AGENDA**

The Waldport City Council will meet at 2:00 p.m. on Thursday, January 12, 2017 in the City Council Meeting Room, 125 Alsea Highway to take up the following agenda:

1. CALL TO ORDER
2. OATH OF OFFICE FOR COUNCIL MEMBERS
3. ROLL CALL
4. ELECTION OF COUNCIL PRESIDENT
5. MINUTES: *December 8, 2016*
6. PUBLIC COMMENTS/PRESENTATIONS
7. CORRESPONDENCE: *Letter From County Commissioners re Joint Meeting Date*
8. DISCUSSION/ACTION ITEMS
 - A) *Approval of Budget Schedule for FY17/18*
 - B) *Consideration of Signatory Resolution*
 - C) *Industrial Park Master Plan Update*
 - D) *Affordable Housing Program*
 - E) *Other Issues*
9. COUNCIL COMMENTS AND CONCERNS: *Memo From Councilor Holland Re Proposed Crosswalk Art Project*
10. REPORTS
 - City Manager*
 - City Librarian*
 - Public Works Director*
 - City Planner*
11. GOOD OF THE ORDER
12. ADJOURNMENT

The City Council Meeting Room is accessible to all individuals. If you will need special accommodations to attend this meeting, please call City Hall, (541)264-7417, during normal office hours.

* Denotes no material in packet

Notice given this 6th day of January, 2017 - Reda Q. Eckerman, City Recorder

**WALDPOR CITY COUNCIL
DECEMBER 8, 2016
MEETING MINUTES**

1. CALL TO ORDER AND ROLL CALL: Mayor Woodruff called the meeting to order at 2:00 p.m. Mayor Woodruff and Councilors O'Brien, Campbell, Cutter and Holland answered the roll. Councilor Christenson was excused. Councilor Gates was absent. A quorum was present.

2. MINUTES: The Council considered the minutes from the November 10, 2016 Meeting. Councilor Holland **moved** to approve the minutes as presented. Councilor Cutter **seconded**, and the motion **carried** unanimously on a voice vote.

3. CITIZEN COMMENTS/PRESENTATIONS: Shirley Hanes and Pat Warwick addressed the Council, expressing appreciation for the people who give of their time in these voluntary positions.

4. DISCUSSION/ACTION ITEMS:

A. Resolution Accepting Public Art: City Manager Kemp indicated that ODOT requested this resolution as part of the placement of the seal sculpture at the south end of town. Councilor Cutter **moved** to approve Resolution 2017. Councilor Holland **seconded**, and the motion **carried** unanimously on a voice vote.

B. Acceptance of Abstract of Votes for November 2016 Election: Councilor Campbell **moved** to accept the abstract of votes. Councilor O'Brien **seconded**, and the motion **carried** unanimously on a voice vote.

C. Consideration of Change to Financial Management Policy: Councilor Holland **moved** to approve the changes with the amendments as proposed at the previous Council meeting. Mayor Woodruff **seconded**, and the motion **carried** unanimously on a voice vote.

D. Consideration of Final Parks, Recreation and Trails Master Plan: Councilor Cutter **moved** to approve the final plan. Councilor Campbell **seconded**, and the motion **carried** unanimously on a voice vote.

E. Other Issues: None.

5. COUNCIL COMMENTS AND CONCERNS: Councilor Campbell thanked City workers for responding on short notice to assist with the Chamber's holiday tree. Mayor Woodruff reported that she had followed up on Councilor Christenson's concern about the turnover of doctors at Samaritan, noting that it was apparently due in part to a nationwide shortage of physicians. Councilor O'Brien gave a brief report on the CERTS program, and mentioned that they are looking at the Community College in South Beach as a meeting place.

Mayor Woodruff presented a certificate to Councilor Campbell for his many years of service, and indicated that she would ensure Councilor Gates receives hers as well.

6. REPORTS: The written reports from the City Manager, Public Works Director and City Planner were included in the packet materials. City Manager Kemp noted that a list of

upcoming trainings for councilors was also included in his written report, and anyone interested should let staff know so that arrangements can be made. He gave a brief review of the tsunami conference he had attended that week, and indicated he would bring additional information to the next Council meeting. With regard to the Bridgeview Trail, Mr. Kemp noted that ODOT had informed him of concerns with ADA compliance issues for the proposed design. Councilor Cutter mentioned that when the project had originally been proposed, the Council had raised those very concerns. The final item in Mr. Kemp's written report was the information that the new clinic facility, which had been the subject of a minor amendment to the boundaries of Urban Renewal #2, was considered to be a non-profit enterprise, which meant that no tax increment would be generated. Future Urban Renewal discussions may focus on additional amendments to the current plan, or possibly delineation of a whole new area. Councilor Campbell mentioned that Urban Renewal #1 monies still needed to be spent, and Mayor Woodruff noted one possibility would be cleaning up the Mercantile building. Mr. Kemp indicated this might be an option, though it might be better to look other options such as a facade improvement incentive.

With regard to the City Planner's report, Mr. Kemp confirmed that Dollar General had submitted for a building permit on November 8. He and City Planner Lewis have been in contact with the developer to ensure that the building is reflective of the Downtown Development zone design requirements. The developer has offered to make a presentation, but staff suggested that they wait until the revisions are done and then they can do a presentation with the new plans. This will probably be in January or February.

Under Public Works, Mr. Kemp gave a brief review of the department's recent activities, including storm damage and the major leak in November that had caused the City to lose over a million gallons of water. Pat Warwick and Shirley Hanes both expressed their appreciation for the alacrity of the department in restoring water during that incident. It was noted that a tour of City facilities will be arranged at some point for any interested Council members.

7. GOOD OF THE ORDER: Nothing further.

8. ADJOURNMENT: At 2:50 p.m., there being no further business to come before the Council, the meeting was adjourned. The Council then joined members of the Planning Commission, the Library Board, and City staff in a holiday celebration.

Respectfully submitted,

Reda Q. Eckerman, City Recorder

APPROVED by the Waldport City Council this ____ day of _____, 2017.

SIGNED by the Mayor this ____ day of _____, 2017.

Susan Woodruff, Mayor



Board of Commissioners

Courthouse, Room 110
225 W. Olive Street
Newport, Oregon 97365
(541) 265-4100
FAX (541) 265-4176

December 15, 2016

City of Waldport
Susan Woodruff, Mayor
PO Box 1120
Waldport, OR 97394

RE: Joint Session with Lincoln County Board of Commissioners - 2017

Dear Mayor Woodruff:

The Lincoln County Board of Commissioners would once again like to schedule a joint work session with your city councilors. The joint work session in your council chambers would begin at 6:00 p.m. and continue to no later than 7:00 p.m., with everyone from your council who could attend. We would then hold our regular weekly Board of Commissioners meeting immediately following the joint session and would include information and discussion items that might be of particular interest to citizens in your area.

We are flexible in scheduling these joint meetings based on your availability and we hope one of the following available meeting dates is convenient for your schedule:

June 14

~~June 21~~ reserved for budget mtg.

June 28

To confirm one of these dates, please contact me at the address and/or phone number listed above, or you may e-mail me at tagraham@co.lincoln.or.us. Our Board looks forward to continuing its ongoing communication and cooperation with you and your council members.

Sincerely,

Tanya Graham
Administrative Assistant
Lincoln County Board of Commissioners

e-c: Reda Eckerman, City Recorder reda.eckerman@waldport.org



**CITY OF WALDPOR
PROPOSED SCHEDULE
FOR 2017/2018 BUDGET**

- 12 Jan 2017** **Amend or approve budget schedule. Appoint budget committee members as needed.**
- 13 Jan 2017 Notify committee members of budget meeting dates.
(DOR budget workshop in Newport on March 3rd.)
Distribute preliminary budget worksheets to department heads.
- 27 Feb 2017 Submit department budgets to finance.
- 6 Mar 2017 Department heads meet with Budget Officer to review and revise.
- 27 Mar 2017 Submit complete proposed budget to finance for compilation, printing,
and binding.
- 3 Apr 2017 Distribute proposed budget to committee members. Publish notice of
budget committee hearing on city's website (10 to 30 days before the
meeting).
- 12 Apr 2017 Publish notice of budget committee hearing, as well as state revenue
sharing, in News Times (10 to 30 days before the meeting)).
- 25 Apr 2017** **Hold budget meeting, from 1:30pm to 5pm, give budget message, and
hold public hearings.**
- 24 May 2017 Publish financial summary, notice of budget hearing, and notice of state
revenue sharing in News Times (5 to 30 days before the hearing).
- 8 Jun 2017** **Hold budget hearing and deliberations. Adopt budget, make
appropriations, declare and categorize taxes, and elect to receive state
revenue sharing.**
- 30 Jun 2017 Submit tax certification to County Assessor. Send complete budget
documentation to County Clerk.

Budget Committee Members

Mark Campbell	Alan Canfield	Dennis Meredith
Lisa Miller	Scott Perkins	Herman Welch
	Vacancy	

RESOLUTION NO. _____

**A RESOLUTION AUTHORIZING SIGNATORIES TO THE CITY OF WALDPOR
CHECKING ACCOUNT AND REPLACING RESOLUTION 1192.**

WHEREAS, the City of Waldport maintains a checking account of public funds for operating purposes at the Umpqua Bank that require authorized signatures to draw against the funds;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Waldport:

Section 1. The following signatories are authorized on the City of Waldport checking account effective as of January 12, 2017:

Susan Woodruff, Mayor	Greg Dunn, Councilor
Jack Christenson, Councilor	Bob O'Brien, Councilor
Gregory Holland, Councilor	Dann Cutter, Councilor
Pat Warwick, Councilor	Kerry Kemp, City Manager

Section 2. Checks over \$5000 require two signatures.

Section 3. Resolution No. 1192 is hereby replaced, effective as of the date of adoption of this resolution.

PASSED by the City Council of Waldport this _____ day of January, 2017.

SIGNED by the Mayor this ____ day of January, 2017.

Susan Woodruff, Mayor

ATTEST:

Reda Q. Eckerman, City Recorder



CITY COUNCIL MEETING AGENDA COVER SHEET FOR DISCUSSION / ACTION

TITLE OF ISSUE: Industrial Park Feasibility Study/Master Plan

REQUESTED BY: City Manager/City Planner

FOR MEETING DATE: January 12, 2017

SUMMARY OF ISSUE:

The City of Waldport received a \$60,000 Technical Assistance Grant from the Department of Land Conservation and Development for Tier 2, the Industrial Park Feasibility Study, with the balance coming from City match of \$15,000 and potential contributions totaling \$25,000 from property owners in the Industrial Area. The property owner contributions have fallen well short of the target. Given this, the City applied for and received a \$15,000 Lincoln County Economic & Community Development Grant. The Tier 2 scope of work and budget has been revised.

STAFF RECOMMENDATION or ACTION REQUESTED:

Review and approve the revised Waldport Industrial Area Master Plan Scope of Work and Budget for Tier 2, and authorize City Manager or Mayor to sign the County Grant Award Letter.

BACKGROUND:

Tier 2 of the Master Plan is divided into base tasks and additional (optional) tasks. The base tasks will be done with the master plan. These include traffic, utilities, storm drain, and site planning. The added tasks may be done if needed and as funding becomes available in the future. These include wetlands, biological, and survey. Landfill has been isolated and removed.

The funding initially included \$60,000 from the DLCD grant, \$15,000 from the City (as a match to the previous Industrial Finance Authority grant), and \$25,000 from property owners. Voluntary contributions from the owners total \$5,961. Lincoln County Board of Commissioners approved allocating \$15,000 for helping to fund the plan. The total Tier 2 cost is now \$96,000, as shown on the attached revised Scope of Work and Budget. Also attached is the Award Letter for the Lincoln County Economic & Community Development Grant.

Please note that another roadway alternative is being added to the mix: going north from the industrial park through the property adjacent to the golf course, then west to Highway 101. This option puts the entire roadway within City limits.

Attachments: Revised Master Plan Scope of Work and Budget (Tier 2)
Award Letter – Lincoln County Economic & Community Development Grant



PROPOSED SCOPE OF SERVICES **Amendment # 1**

Date: January 6, 2017

Work Order Number: 3208-005

To: Mr. Kerry Kemp, City Manager, City of Waldport

From: Andrea Stancliff, PE, Area Manager, Civil West Engineering Services, Inc.

RE: **Industrial Park Master Plan – Tier 2 Access Roads – Scope of Services**
Civil West Project Number: 3208-005

In the interest of working with the City of Waldport's current funding allocations, we have prepared a scope of services to include the traffic portion of Tier 2 ADD services to the project scope of Tier 2 Base services, as described below. The previously contracted Tier 2 scope already includes site planning, utility analysis and storm drainage.

Part A: B Work Items (Included in this Scope of Services)

1. ADD Traffic –

- a. **Tier 2 – Access Road Analysis:** The Feasibility Study narrowed the Access Road options to 2 alternatives: the White Cap Drive route and a southern route combining Options 3 and 4. In this item, we will prepare an in-depth analysis of each of these routes, along with analysis of a 3rd proposed route that runs to the north of the site through portions of the Golf Course property. Our report will include recommendations for roadway improvements and preliminary cost estimates, as determined by the analysis. We will also look at the continued use of Crestline Drive/Wakonda Beach Road for an interim period. This scope does not include collecting or analyzing traffic data, including traffic counts and trip generation calculations.

Part B: Additional Items (Not part of this Scope of Services)

Waldport Master Plan ADDITIONAL Recommendations

1. ADD Wetlands

- a. **Tier 2 – Delineation:** In this item, we will complete a wetland delineation report including a summary of the data points, mapping, findings, narrative, and other key information that would be required by a regulatory agency should a submittal be required. The report will also include recommendations for mitigation or avoidance as it relates to the site development.

2. ADD Biological

- a. **Tier 2 – Report:** In this item, we will complete a report that documents the findings of the biological assessment, identifying the constraints that exist on the site for its use and development.

3. ADD Landfill

- a. **Tier 2 – Remediation Analysis:** Depending on the results of “Tier 1 – Landfill Determination”, it is possible that extensive geotechnical engineering may be required for the development of the landfill site. This engineering analysis could include soil tests, compaction tests, lab analyses, and extensive permitting. This would be an additional cost outside of this scope.

4. ADD Survey

- a. **Tier 2 – Data Collection:** In this item, our surveyor will complete the survey data for each data point in the wetland delineation, as well as complete a survey of all the property boundaries and topographical data on the site.

Part C: Item Fee Proposal

As explained previously, Tier 2 fees have been broken out into Base requirements and Additional services. The Additional services were separated out, as the level of effort for these items is contingent upon the Tier 1 and Tier 2 Base results and funding allocations. The scope and fees for Tier 2 ADD will be revisited pending the previous results.

Item No.	Item	Tier 2 Base	Tier 2 Add
1	Wetlands	**	\$ 17,500
2	Traffic	\$ 21,000	
3	Utilities	\$ 30,000	
4	Storm Drain	\$ 15,000	
5	Biological	**	\$ 15,000
6	Landfill	**	
7	Survey	**	\$ 25,000
8	Site Planning	\$ 30,000	
TOTAL		\$ 96,000	\$ 57,500
GRAND TOTAL			\$ 153,500

** Dependent on results of Tier 2 Planning

The fee proposed above is a firm, fixed price, not to exceed maximum and includes all direct reimbursables for the scope of work described in this Task Order, with a total fee of **\$96,000** for Tier 2 Base work. This total includes the previously contracted amount of \$75,000 (Task 3 Utility Planning; Task 4 Storm Drain Planning; and Task 8 Site Planning) plus this fee of **\$21,000** for Task 2 Traffic Planning. Invoices will be based on percentage of each task completed for the invoice period.

The final product of this assessment will be a technical memorandum, spiral or comb bound, including a written summary and development of all the tasks described above under Tier 2 Base. The plan will include tables, figures, narratives, summaries, and other information necessary to provide the City with the planning information they require.

Part D: Project Schedule

We will be flexible and adjust our focus and efforts to meet the demands and desires of the City regarding project schedule. We can adjust our schedule to meet budgetary and timing constraints that the City has.

As discussed previously, the results of this Scope of Services will be to prepare an Interim Master Plan, which will be followed up with the Tier 2 Additional work in order to complete the Final Master Plan by June 30, 2017.

We are grateful for the opportunity to provide these services to the City of Waldport and we are prepared to begin work on this important project as soon as we are authorized to do so. Please let me know if you have any questions or if you wish to see any alterations to our proposed approach. If this proposed approach is acceptable, please sign below and return a copy to our office for our records.

Sincerely,
Civil West Engineering Services, Inc.



Andrea Stancliff, PE
Area Manager

Authorized Representative Signature Accepting Scope of Services

Date

Award Letter

Lincoln County Economic & Community Development Grant

The **Lincoln County Board of Commissioners (Board)** is pleased to announce that **City of Waldport** has been awarded a grant of **\$15,000** for the purpose of helping to fund the Waldport Industrial Park Master Plan.

This grant is made from the **Lincoln County** Community and Economic Development Fund awarded by **Board Order No. 12-16-330** on December 21, 2016. The **Recipient** agrees to accept the grant award under the following conditions:

- Recipient** shall use the funds for the stated purposes in its application filed with Lincoln County. That application is incorporated herein as if fully set forth. No other use of the funds will be authorized without the **Board's** written concurrence. **Recipient** shall post in a prominent location a provided sign, and note in any related publications, that this project is funded in part by Lincoln County Economic Development Funds.
- Recipient** shall apply for release of the funds by returning the completed Award Letter to the Lincoln County Board of Commissioners Office, 225 W. Olive, Room 110, Newport, Oregon 97365, no later than **January 1, 2018**, or request a time extension, in writing, with an explanation of the reason for the request. Requests for time extensions will be reviewed and are not automatically granted. If neither a request for release of funds nor request for time extension is received by **January 1, 2018**, this award shall be voided with no further action required by the County.
- Recipient** agrees to be responsible for, and indemnify, hold harmless and defend Lincoln County against any legal liabilities, claims, losses, damages, costs or expenses arising in favor of any persons from personal or property damages or injuries or death directly or indirectly from, or incident to, the acts or omissions of its employees, agents and officers under this project. **Recipient** agrees to keep in effect for the length of the project comprehensive liability and property damage insurance covering its acts and omissions in minimum amounts as specified in ORS 30.270.
- Recipient** shall supply a detailed, written report to the Board upon final expenditure of the grant funds certifying how the funds were used and updating the Board on the status of the project. Include with report a photo of the posted sign or copy of any related publications as mentioned previously in paragraph 1.
- Recipient** will retain fiscal and programmatic records concerning these funds for at least three years from the date of this award and shall make these records available for audit by Lincoln County.
- The failure of the **Board** to enforce any provision of this contract shall not constitute a waiver by Lincoln County of that or any other provision. Failure to expend moneys in accordance with the grant will subject **Recipient** to all legal remedies available under applicable laws and disqualify **Recipient** from further participation in this grant program.
- In the event suit, action or other legal proceeding is instituted by either party against the other, the prevailing party shall be entitled to recover from the losing party the prevailing party's costs and reasonable attorney fees, including costs and fees in any appellate proceeding relating thereto and costs and fees in collection of an award under this provision, which amounts shall be determined by the court or tribunal which decides this proceeding.

I have read, understand and agree to the terms for acceptance of this grant:

RECIPIENT: City of Waldport

Signature _____

Name(print) _____

Title _____

Address: _____

Date: _____

FED. ID NO. _____

BEFORE THE BOARD OF COMMISSIONERS

FOR LINCOLN COUNTY, OREGON

In the Matter of:)
)
AWARDING LINCOLN COUNTY COMMUNITY)
AND ECONOMIC DEVELOPMENT FUND GRANTS)
)

ORDER # 12-16-330

WHEREAS the Board of Commissioners (Board) has designated funds for Community and Economic Development grants under the program currently denominated the Lincoln County Community Economic Development Fund; and

WHEREAS applications received by the County prior to the November 3, 2016, deadline for funds were reviewed by the Economic Development Alliance of Lincoln County (EDALC); and

WHEREAS at its December 14, 2016 meeting, the Board reviewed the applications and EDALC recommendations regarding grants, and desires to adopt the recommendations as amended; and

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Grants from the Lincoln County Community Economic Development Fund are authorized as follows:

	<i>Company</i>	<i>Project</i>	<i>Money Awarded</i>
1	City of Waldport	Waldport Industrial Park Master Plan	\$15,000
2	Friends of the Yachats Commons Foundation	LED Lighting for the Yachats Commons	\$10,000
3	Habitat for Humanity of Lincoln County	Duplex Build #18	\$15,000
4	Lincoln City Cultural Center	Handicapped Elevator Replacement	\$15,000
5	Northwest Coastal Housing	Repair and Upgrade to the Community Room for Public Programs	\$10,000
6	Oregon Coast Community College Small Business Development Center	Digital Media Business Learning Lab	\$15,000
7	Port of Alsea	Dredging Project	\$15,000
8	Toledo Community Foundation dba Toledo Downtown Association	Toledo Welcome Signs Restoration	\$10,000
		TOTAL:	\$105,000

2. That the Board of Commissioners office will forward to the grant recipients a grant award agreement and a letter to those grant applicants who did not receive funding.

3. That copies of this order be provided to Caroline Bauman, Executive Director, Economic Development Alliance of Lincoln County; Janice Riessbeck, County Finance Director; and to Wayne Belmont, County Counsel.

Dated this 21st day of December 2016.

LINCOLN COUNTY BOARD OF COMMISSIONERS



BILL HALL, Chair



TERRY N. THOMPSON, Commissioner



DOUG HUNT, Commissioner



CITY COUNCIL MEETING AGENDA COVER SHEET FOR DISCUSSION / ACTION

TITLE OF ISSUE: Affordable Housing Program

REQUESTED BY: City Manager/City Planner

FOR MEETING DATE: January 12, 2017

SUMMARY OF ISSUE:

On August 11, 2016, the City Council held a housing workshop with respect to potential ideas for trying to generate more affordable housing being created in the City of Waldport. Staff listened in on a webinar regarding implementing an affordable housing pilot program with respect to HB 4079, housing outside urban growth boundaries. Before an entity may apply to the program, an applicant must show other efforts and results in the housing arena within its UGB. At this time staff is seeking direction from Council, recommending that it authorizes staff developing programmatic elements for review by the Planning Commission, with any recommendations to Council for consideration and approval. This effort is needed, regardless of whether or not the City decides to ever apply for a future pilot program with respect to HB 4079.

STAFF RECOMMENDATION or ACTION REQUESTED:

Review materials and direct staff as warranted.

BACKGROUND:

Evaluating opportunities for housing development or assistance is a goal of the City Council.

The attached memorandum dated August 3, 2016, was distributed during the housing workshop in August. The memo summarizes prior meetings, identifies assets and obstacles related to housing development, and summarizes data for Waldport and the County, as well as potential tools for use by the City. Larry Lewis and I recently sat in on a webinar presented by the State Department of Lands Conservation and Development regarding implementation of HB 4079, which authorizes a pilot program for increasing affordable housing construction outside a city's urban growth boundary. Information from the webinar is attached. Criteria for selecting a project include that a city has adopted measures to encourage affordable and needed housing within its UGB. Since the City hasn't done so, staff recommends that the City Council approve staff researching and developing elements for an affordable housing program, and the Planning Commission deliberate and recommend alternatives for consideration by Council.

Enclosure: Memo to City Manager from Economic Development Planner, August 3, 2016
Information from Webinar on4079

TO: Kerry Kemp, City Manager, City of Waldport

FROM: Rachel Cotton, Economic Development Planner, City of Waldport

DATE: August 3, 2016

RE: Workforce Housing Data and Development Tools for Waldport, August 2016

I. Workforce Housing Development Discussion Milestones for City of Waldport, 2016:

1. **January 25, 2016** - Panel discussion convened jointly by the City of Waldport and the Economic Development Alliance of Lincoln County to discuss assets and obstacles related to workforce housing development in south county (Table 1). Panelists included representatives from finance, government, non-profits, and the Lincoln Community Land Trust. Two similar sessions were held for central and north Lincoln County between April and August of 2016.
2. **July 12, 2016** - Joint work session convened by the City of Newport for Lincoln County staff. This included reports on affordable housing initiatives currently enacted by represented governmental units, review of potential housing initiatives, and discussion of next steps in exploring areas for potential collaboration among local government units.
3. **August 11, 2016** City of Waldport Council work session to discuss data and options related to incentivizing workforce housing development in Waldport.

Table 1: Assets and Obstacles Related to Workforce Housing Development in South Lincoln County

<u>ASSETS</u>	<u>OBSTACLES</u>
<ul style="list-style-type: none">● Ease of permitting compared to bigger metros● Functional governments● Political will for increasing workforce and affordable housing● Large employers expanding (OSU, Samaritan, Rogue)	<ul style="list-style-type: none">● Land<ul style="list-style-type: none">○ High land costs on the coast, particularly ocean view lots○ Restrictive topography in many areas○ Lack of development ready residential land (adding costs to develop infrastructure)○ Stagnation/paralysis around highest and best use of land, particularly publically owned● Tax Credits<ul style="list-style-type: none">○ Difficult to finance small projects with tax credits○ Lots of statewide competition for tax credits● Finance/Lending<ul style="list-style-type: none">○ Difficult to attract tax credit buyers to rural areas○ Difficult to attract lenders to rural projects○ Need development experience for credibility with lenders, which is sometimes lacking in rural areas● Development<ul style="list-style-type: none">○ 3rd party developers and lenders may impose additional requirements (e.g. parking, location)● Regulatory<ul style="list-style-type: none">○ Difficult and expensive to insure in floodplain and tsunami zone (and may be impossible to get federal funding for these projects)

II. Data Summary (figures and tables referenced can be found in the Appendix)

This data is provided as an update to the Workforce Housing Toolkit for Lincoln County, Oregon (2009).

- Waldport is more affordable for both renters and owners than most other areas in Lincoln County (Figures 1 & 2).
- However, the increase of seasonal units in Waldport between 2000 and 2010-2014, when an estimated 85 seasonal units were either added or converted from other uses, is a concern. During that same period, only 72 total housing units were added in Waldport, and Waldport added seasonal units at a higher rate than the country did (Table 6).
- Land—particularly oceanfront and lakefront lots, as well as view lots—has continued to increase in value much more rapidly than incomes have increased in Lincoln County since 2000 (Table 3).
- Lower than average incomes and higher than average home values in Lincoln County both contribute to higher than average home value to income ratios in the county as compared to the state (Table 4).
- In Waldport low income growth is a bigger problem than high housing values and costs when considering overall housing costs, housing cost burdens, and income trends throughout Lincoln County (Table 4).
- Lincoln County has a slightly higher level of owner-occupied housing (65 percent) than the state of Oregon overall. Waldport has the same share of owner-occupied housing as Lincoln County (Table 2). Lincoln City (54 percent renters), Toledo (49 percent renters), and Newport (47 percent renters) have the highest shares of renters in the county.
- As an increasing number of housing units are either built as or converted to seasonal units in Lincoln County, and the majority of new growth favors construction of single family units, many households in Lincoln County, particularly those who rent, may experience increasing housing cost burdens and fewer affordable options when looking to rent or buy in the area (Table 6).
- Waldport's major economic development asset, related to workforce attraction and retention, is its relative affordability compared to surrounding areas in Lincoln County. As economic conditions improve throughout the County, Waldport would do well to preserve and continue to expand its existing stock of affordable and workforce housing with tools discussed in the next section.

III. Potential Workforce Housing Development Tools for Waldport

Tool	Details
1. Multi-unit tax exemption	Developers of multi-unit housing in a designated “core area” are granted a tax exemption on structural improvements to a property for up to ten years following construction. This is a state enabled program enacted by individual jurisdictions where each is able to set eligibility criteria and approve projects through a competitive process.
2. CDBG funding for revolving loans and grants	Community Development Block Grants (CDBG) provide communities with resources to address a range of community development needs, including infrastructure improvements and housing and commercial rehab. loans and grants. Lincoln County competes for CDBG funding through Business Oregon’s Infrastructure Finance Authority with other rural counties and non-metropolitan regions. Waldport is eligible for CDBG rehab funds through a partnership with Community Services Consortium, though this program is in temporary hiatus.
3. Construction excise tax	The passage of SB 1533 authorizes local governments to impose a Construction Excise Tax on improvements to real property in order to fund affordable housing initiatives.
4. Scaled or waived SDCs	Municipalities can provide assistance in the form of reduced SDCs to lower development costs and incentivize workforce housing development. One option is to purposefully waive SDCs for development that offers rents affordable to workforce households. Additionally, scaled SDCs could be offered for residential development under a certain square footage and/or ADUs to incentivize workforce housing development by the private market. SDC financing is an option allowing developers to stretch their SDC payment over time, thereby reducing upfront costs.
5. Urban Renewal	Urban renewal funds can be used to develop infrastructure to support workforce housing. Urban renewal funds can also be used for workforce housing development within urban renewal districts.
6. Housing Trust Fund	A local housing trust allows municipalities to collect funds for affordable housing, segregate them out of the general municipal budget into a trust fund, and use the funds for local initiatives to create and preserve affordable housing.
7. Revolving Loan Fund	Municipalities can loan money to developers of workforce housing through a revolving loan fund. Funding can offset construction, land acquisition, and SDC costs. Loans are repaid upon sale.
8. Vertical housing tax exemption	Oregon’s Vertical Housing program encourages mixed-use commercial / residential developments through a partial property tax exemption. The exemption varies in accordance with the number of residential floors on a project with a maximum property tax exemption of 80 percent over 10 years. An additional property tax exemption on the land may be given if some or all of the residential housing is for low-income persons (80 percent of area median income or below). The proposed zone must meet AT LEAST ONE of the following criteria: completely within the core area of an urban center; entirely within one-quarter mile of fixed-route transit service (including a bus line), or; contains property for which land-use comprehensive plan and implementing ordinances effectively allow “mixed-use” with residential.

9. Development code changes	Development code changes to incentivize workforce housing development could include reduction in minimum lot sizes in single family zones, limitation of zones within which detached single family residential units are permitted, increase in land zoned for multi-family residential development, and an increase in allowable housing density in appropriate areas.
10. Inclusionary zoning	Inclusionary zoning would require developers to designate a certain percentage of new multifamily construction (of at least 20 units) as affordable to those making 80 percent of area median income or less, in exchange for density bonuses or property tax exemptions.
11. Density bonus	Density bonuses are a zoning tool that permits developers to build more housing units, taller buildings, or larger FAR than normally allowed, in exchange for a specified number or percentage of affordable units included in the development.
12. Mixed use zoning requirements along commercial corridors	Mixed use zoning can offer additional workforce housing by encouraging the use of second and third stories of existing and new structures for residential use.
13. Accessory dwelling units (ADUs) & tiny homes	Allowing ADUs in R-1 and other zones can: create new housing units while respecting the look and scale of single-dwelling development; allow more efficient use of existing housing stock and infrastructure; provide a mix of housing that responds to changing family needs and smaller households; provide a means for residents, particularly seniors, single parents, and families with grown children, to remain in their homes and neighborhoods, and obtain extra income, security, companionship and services, and; provide a broader range of accessible and more affordable housing.
14. Cottage Clusters	With a planned development or multifamily model, cottage clusters are all on the same lot. Homes are grouped around shared community elements, including outdoor play areas, gardens, or a common house. With a subdivision model, each home is on a separate lot and the common property may be a common green. Some jurisdictions have adopted cottage cluster zoning that allows a property to be subdivided into more lots than would typically be allowed so long as homes are smaller than usual.
15. Fast track permitting for workforce housing development	Jurisdictions could implement an expedited permitting process for housing development applications designed to provide workforce and affordable units.

IV. Appendix: Updated Housing Data for Lincoln County, 2016

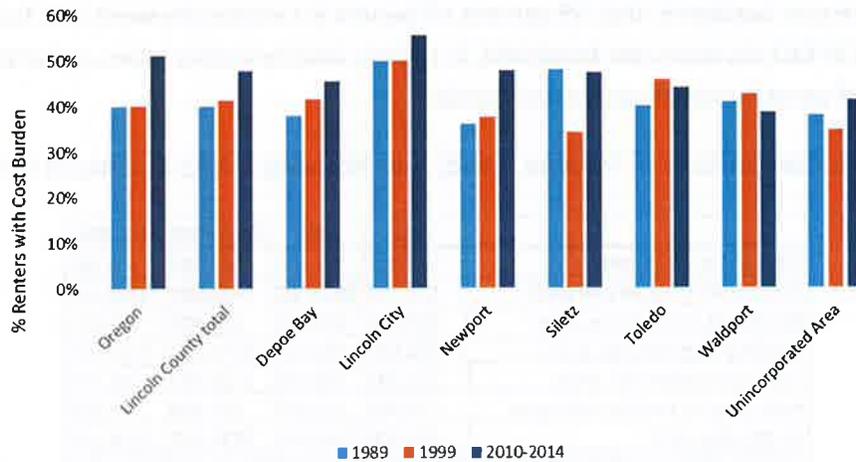
Table 2: Occupied Housing Units by Tenure, 2010-2014

	Oregon	% All Households	Lincoln County	% All Households	Depoe Bay	% All Households	Lincoln City	% All Households	Newport	% All Households
Total households (occupied units)	1,522,988		20,672		826		3,566		4,570	
Owner occupied	936,806	62%	13,440	65%	538	65%	1,648	46%	2,401	53%
Renter occupied	586,182	38%	7,232	35%	288	35%	1,918	54%	2,169	47%
	Siletz	% All Households	Toledo	% All Households	Waldport	% All Households	Yachats	% All Households	Unincorporated Area	% All Households
Total households (occupied units)	591		1,242		904		375		8,598	
Owner occupied	420	71%	629	51%	585	65%	265	71%	6,954	81%
Renter occupied	171	29%	613	49%	319	35%	110	29%	1,644	19%

Source: 2010-2014 American Community Survey, B25003

Notes: Roughly 62 percent of occupied housing units in Oregon are owner-occupied, while 38 percent are occupied by renters. Lincoln County has a slightly higher level of owner-occupied housing (65 percent) than the state of Oregon overall. Waldport has the same share of owner-occupied housing as Lincoln County. Lincoln City (54 percent renters), Toledo (49 percent renters), and Newport (47 percent renters) have the highest shares of renters in the county. There have not been significant changes in the ratio of owners to renters in either the state or the county since 2000.

Figure 1: Renters with 30% or More Cost Burden, 1989 to 2010-2014

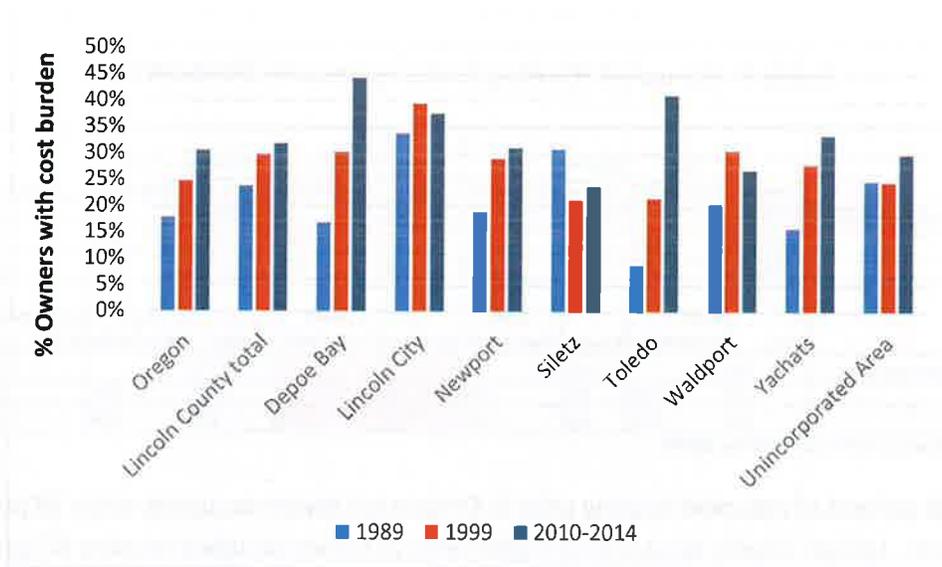


Source: 1990 and 2000 Census SF3, H069; 2010-2014 American Community Survey, B25095, B25106

Notes: Over the past decade and a half, renters in Oregon have become increasingly cost burdened, with just over half of all renters in the state spending at least 30 percent of their incomes on gross rent¹ as of the 2010-2014 period. During that same period, 48 percent of renters in Lincoln County were cost burdened, spending at least 30 percent of their incomes on gross rent. Waldport had the lowest rate of cost burdened renters (39 percent) in the county over the 2010-2014 period.

¹ Gross rent is calculated as the amount of the contract rent plus the estimated average monthly cost of utilities (electricity, gas, and water and sewer) and fuels (oil, coal, kerosene, wood, etc.) if these are paid for by the renter (or paid for the renter by someone else).

Figure 2: Owners with 30% or More Cost Burden², 1989 to 2010-2014



Source: 1990 and 2000 Census SF3, H069; 2010-2014 American Community Survey, B25095, B25106

Notes: Although Lincoln County has a slightly higher percentage of cost-burdened owners (32 percent) as is seen overall in the state of Oregon (31 percent), there is a large variation between local cities. In the 2010-2014 period, Waldport had among the lowest rates (27 percent) of cost burdened owners in the county. Over that same period, it is estimated that 44 percent of owners in Depoe Bay were cost burdened, that 41 percent of owners in Toledo were cost burdened, that 38 percent of owners in Lincoln City were cost burdened, and that 34 percent of owners in Yachats were cost burdened. In Lincoln County’s other cities and unincorporated areas, less than 32 percent of owners experienced a cost burden.

Table 3: Comparison of Income, Land, and Housing Prices in Lincoln County

	1990	2000	2005-2009	2010-2014
Median Family Income	\$27,224	\$39,403	\$52,584	\$52,041
Oceanfront median sale price	\$77,750	\$150,000	\$493,000	\$269,050
Riverfront median sale price	\$25,000	\$43,500	\$85,400	\$68,665
Lakefront median sale price	\$50,000	\$92,000	\$174,650	\$222,200
View lot median sale price	\$25,000	\$50,000	\$126,500	\$81,250
Non-view lot median sale price	\$14,500	\$35,000	\$65,880	\$46,000
All housing units	\$59,500	\$130,000	\$233,800	\$194,100
Ratio of Price to Median Family Income				
Oceanfront	2.9	3.8	9.4	5.2
Riverfront	0.9	1.1	1.6	1.3
Lakefront	1.8	2.3	3.3	4.3
View	0.9	1.3	2.4	1.6
Non-view	0.5	0.9	1.3	0.9
All housing units	2.2	3.3	4.4	3.7

Sources: 2005-2009 and 2010-2014 American Community Survey, B19126; 2000 Census SF 3, P53, P77, H76; 1990 Census SF 3, P080A, P107A, H061A.

Income data is estimated for the 2005-2009 and 2010-2014 periods. Land and housing price data is an average of each of those 5 year periods from the Lincoln County Assessor’s data.

² Owner costs are calculated as the sum of payments for mortgages, deeds of trust, contracts to purchase, or similar debts on the property (including payments for the first mortgage, second mortgages, home equity loans, and other junior mortgages); real estate taxes; fire, hazard, and flood insurance on the property.

Notes: Though the 2006-2009 housing bubble is apparent when looking at land and housing prices in Lincoln County over the past two and a half decades, some trends have persisted over time. Land—particularly oceanfront and lakefront lots, as well as view lots—has continued to increase in value much more rapidly than family incomes have increased over the same period of analysis.

Table 4: Comparison of Incomes and Housing Values in Oregon and Lincoln County, 2000 and 2010-2014

	Oregon	Lincoln County	Depoe Bay	Lincoln City	Newport	Siletz	Toledo	Waldport	Yachats
Median household income in 1999	\$40,916	\$32,769	\$35,417	\$24,959	\$31,996	\$38,542	\$34,503	\$33,301	\$32,308
Median family income in 1999	\$48,680	\$39,403	\$43,967	\$31,783	\$36,682	\$42,250	\$39,597	\$38,571	\$41,250
Median owner occupied housing value 2000	\$145,800	\$136,900	\$182,900	\$127,300	\$132,100	\$89,600	\$99,500	\$129,300	\$200,800
Housing Value to household income	3.6	4.2	5.2	5.1	4.1	2.3	2.9	3.9	6.2
Housing Value to family income	3.0	3.5	4.2	4.0	3.6	2.1	2.5	3.4	4.9
Median household income estimate 2010-2014	\$50,521	\$42,429	\$45,047	\$35,524	\$40,448	\$39,063	\$44,034	\$38,264	\$44,150
Median family income estimate 2010-2014	\$61,890	\$52,041	\$57,240	\$46,120	\$53,036	\$41,420	\$48,438	\$47,788	\$51,786
Median owner occupied housing value 2010-2014	\$234,100	\$221,800	\$277,900	\$212,700	\$221,000	\$152,400	\$162,100	\$190,600	\$351,100
Housing Value to household income	4.6	5.2	6.2	6.0	5.5	3.9	3.7	5.0	8.0
Housing Value to family income	3.8	4.3	4.9	4.6	4.2	3.7	3.3	4.0	6.8
Change in median household income 1999 to 2010-2014	23%	29%	27%	42%	26%	1%	28%	15%	37%
Change in median family income 1999 to 2010-2014	27%	32%	30%	45%	45%	-2%	22%	24%	26%
Change in median housing value 1999 to 2010-2014	61%	62%	52%	67%	67%	70%	63%	47%	75%

Sources: 2005-2009 and 2010-2014 American Community Survey, B19113, S1903, B25077; 2000 Census SF 3, P053, P077, H76

Notes: With the exceptions of Siletz and Toledo, all cities in Lincoln County and the county itself have had a higher ratio of housing values to household and family incomes than the state of Oregon as a whole over the past decade and a half. In short, it takes a higher percentage of household and family income³ to purchase homes in the majority of Lincoln County than it does in the state of Oregon overall. In the 2010-2014 period, Waldport had a housing value to household income ratio of 5.0, which was higher than the state average of 4.6. In Waldport’s case, low income growth has contributed more to decreasingly housing affordability than has high housing value growth since 1999.

During 2010-2014 period, Yachats, Depoe Bay, and Lincoln City had the highest ratios of housing values to incomes in the county. The ratio of housing values to incomes is substantially higher in these areas, as well as in Newport and Waldport, than in the state of Oregon overall. Lower than average incomes and higher than average home values in Lincoln County both contribute to this phenomenon. Though Siletz had the lowest median home value and Yachats had the highest median home value in the 2010-2014 period, both cities had the two highest rates of housing value increase in Lincoln County between 2000 and 2010-2014. Median home values increased 70 percent in Siletz and 75 percent in Yachats during this period, though Siletz also had the lowest rate of income growth over the same period.

³ A household is defined as one or more people living in a residence. A family consists of a householder and one or more other people living in the same household who are related to the householder by birth, marriage or adoption.

Table 5: Maximum Monthly Expense and House Price Affordable by Income Levels in Lincoln County, 2010-2014

	Income	Maximum Monthly Housing Expense	Maximum House Value¹
120% MFI	\$62,449	\$1,735	\$273,000
100% MFI	\$52,041	\$1,446	\$218,000
80% MFI	\$41,633	\$1,156	\$164,000
60% MFI	\$31,225	\$867	\$110,000
Source: http://www.realtor.com/mortgage/tools/affordability-calculator/ ¹ Assumes: 30 year fixed rate mortgage at 3.48% interest with 10% downpayment. Maximum purchase price rounded to the nearest \$1000; monthly household debt of \$300 assumed, including payments for credit card balances, auto or student loans, child support, etc.; no more than 38% of income will go towards debts and no more than 33% will be allocated for all housing expenses.			

Notes: Monthly and annual affordable housing expenses for various income levels in Lincoln County are detailed above. Housing expenses include principle, interest, property taxes, homeowner's insurance, and private mortgage insurance. These figures represent the maximum housing cost thresholds for area families at these various income levels. Numerous assumptions were made to derive these figures, including that at least a 10 percent downpayment is made, that a conventional 30 year fixed rate mortgage can be secured at an interest rate of 3.48 percent, that no more than 38 percent of income will go toward debt, and that no more than 33 percent of income will be allocated for housing expenses.

As of 2015, the median sales price of all homes in Lincoln County was \$215,000 (Lincoln County Assessor, 2016), a figure that would be unaffordable for all households earning less than 100 percent of the county's median family income in the 2010-2014 period. By these metrics, the average home in Lincoln County is unaffordable to more than half of all households in the county. In addition, the large downpayment and relatively conservative mortgage terms and conditions proposed by these assumptions, in conjunction with the current market, may put ownership out of reach for higher earning households as well.

Table 6: Housing Units by Type, 2000, 2005-2009, and 2010-2014

	Oregon					Lincoln County, Oregon					Depeoe Bay, Oregon					Lincoln City, Oregon					Newport, Oregon				
	2000	2005-2009	2010-2014	Change 2000-2014		2000	2005-2009	2010-2014	Change 2000-2014		2000	2005-2009	2010-2014	Change 2000-2014		2000	2005-2009	2010-2014	Change 2000-2014		2000	2005-2009	2010-2014	Change 2000-2014	
	1,452,709	1,607,411	1,685,814	233,105		26,898	29,024	30,656	3,767	928	1,088	1,384	466	5,017	5,433	3,419	564	5,019	5,528	5,693	674	2,535	3,020	2,940	405
Total units:	911,595	1,020,966	1,073,900	162,305		17,144	19,001	20,503	3,359	559	670	983	424	2,904	3,182	3,419	515	2,535	3,020	2,940	405	2,535	3,020	2,940	405
1, detached	47,671	64,687	74,591	26,920		511	530	627	116	11	41	37	26	113	100	83	-30	188	214	124		188	214	124	
2	44,298	49,198	48,441	4,143		858	666	733	-125	41	11	11	-30	199	225	255	56	352	230	293	-59	352	230	293	-59
3 or 4	60,394	68,773	74,354	13,960		1,141	982	1,098	-43	71	113	166	85	304	182	223	-81	443	382	462	19	443	382	462	19
5 to 9	62,234	73,696	74,377	12,143		983	1,113	1,256	273	51	40	32	-19	292	358	307	15	484	377	498	14	484	377	498	14
10 to 19	85,203	63,922	61,664	6,461		489	585	505	16	40	47	44	4	238	118	219	-19	146	200	93	-53	146	200	93	-53
20 to 49	46,596	48,663	52,160	5,564		596	962	579	-17	18	62	34	16	308	567	199	-108	143	270	298	155	143	270	298	155
50 or more	66,172	68,923	82,251	16,079		362	420	514	152	0	18	17	17	295	258	324	29	37	52	146	109	37	52	146	109
Mobile home	149,732	143,697	139,459	-10,273		4,834	4,518	4,591	-243	122	86	65	-57	320	328	552	232	601	663	584	-17	601	663	584	-17
Boat, RV, van, etc.	8,814	4,876	4,617	-4,197		421	287	250	-171	15	0	15	0	44	115	0	-44	90	120	67	-23	90	120	67	-23
	Summary Data					Summary Data					Summary Data					Summary Data									
Multifamily (2 or more units in structure)	334,897	373,195	393,247	58,350		4,429	4,708	4,695	256	221	291	294	73	1,636	1,708	1,527	-109	1,605	1,511	1,790	185	1,605	1,511	1,790	185
Vacant - For seasonal, recreational, occasional use	36,850	48,056	59,466	22,616		5,279	7,672	7,779	2,500	220	404	408	188	1,270	1,412	1,607	337	427	885	698	271	427	885	698	271
Percentage vacant for seasonal, recreational or occasional use	2.5%	3.0%	3.5%	1.0%		19.6%	26.4%	25.4%	5.7%	23.7%	37.1%	29.3%	5.6%	25.3%	26.0%	28.8%	3.5%	8.5%	16.0%	12.3%	3.8%	8.5%	16.0%	12.3%	3.8%
	Summary Data					Summary Data					Summary Data					Summary Data									
	Siletz, Oregon					Toledo, Oregon					Waldport, Oregon					Yachats, Oregon									
	2000	2005-2009	2010-2014	Change 2000-2014		2000	2005-2009	2010-2014	Change 2000-2014		2000	2005-2009	2010-2014	Change 2000-2014		2000	2005-2009	2010-2014	Change 2000-2014		2000	2005-2009	2010-2014	Change 2000-2014	
Total units:	480	409	645	165		1,445	1,221	1,552	331	1,080	1,242	1,152	72	629	714	823	194	12,291	13,389	13,816	1,525	12,291	13,389	13,816	1,525
1, detached	236	192	301	65		1,018	906	1,082	176	750	841	813	63	544	649	714	170	8,598	9,541	10,251	1,653	8,598	9,541	10,251	1,653
1, attached	0	10	10	10		23	19	32	13	4	0	13	9	12	0	13	1	160	146	127	-33	160	146	127	-33
2	9	5	7	-2		72	15	46	31	23	19	24	1	23	15	31	8	139	146	66	-73	139	146	66	-73
3 or 4	32	20	33	1		81	86	79	-7	48	53	43	-5	13	14	6	-7	149	112	96	-53	149	112	96	-53
5 to 9	4	11	3	-1		62	24	109	85	50	39	49	-1	0	5	0	0	50	259	258	208	50	259	258	208
10 to 19	0	0	12	12		25	20	96	76	12	19	7	-5	2	7	23	21	84	29	18	-66	84	29	18	-66
20 to 49	0	0	0	0		29	8	0	-8	12	19	7	-5	2	7	23	21	84	29	18	-66	84	29	18	-66
50 or more	0	0	0	0		6	0	0	0	11	16	15	4	0	0	0	5	13	76	7	-6	13	76	7	-6
Mobile home	0	171	269	269		132	135	101	-34	162	212	168	6	33	24	23	-10	3,464	2,899	2,829	-635	3,464	2,899	2,829	-635
Boat, RV, van, etc.	0	0	10	10		7	8	7	-1	0	0	10	10	2	0	0	-2	263	24	141	-122	263	24	141	-122
	Summary Data					Summary Data					Summary Data					Summary Data									
Multifamily (2 or more units in structure)	45	36	55	10		265	163	330	177	164	189	148	-16	38	41	73	35	455	779	468	13	455	779	468	13
Vacant - For seasonal, recreational, occasional use	7	17	0	-7		0	0	0	0	93	203	178	85	247	410	401	154	3,015	4,341	4,487	1,472	3,015	4,341	4,487	1,472
Percentage vacant for seasonal, recreational or occasional use	1.5%	4.2%	0.0%	-1%		0.0%	0.0%	0.0%	0%	8.6%	16.3%	15.5%	7%	39.3%	57.4%	48.7%	9%	24.5%	32.4%	32.5%	8%	24.5%	32.4%	32.5%	8%

Sources: 2000 Census SF 3, H30; 2005-2009 and 2010-2014 American Community Survey, B25024.

Notes: Single family units have dominated the construction market over the past decade and a half in Oregon, accounting for approximately 80 percent of new units in the state between 2000 and 2014. Over the same period, an estimated 92 percent of new units in Lincoln County were single family attached or detached units. An estimated 25 percent of housing units in Lincoln County are classified as vacant for seasonal, recreational or occasional use, which is over seven times the state average of 3.5 percent. Though use of units as seasonal and vacation homes is not exclusive to the other categories (data overlaps between unit type and seasonal use), Lincoln County had over five times the rate of growth in seasonal units as Oregon did overall between 2000 and 2014. Waldport, Yachats, and the county's unincorporated areas saw higher rates of growth of seasonal units than Lincoln County did as a whole over the same period.

Process Overview

(summarized for brevity; see rule for precise details)

1. City Submits Pre-Application (Required)

- Site map
- Total acreage
- Current land use designations, zoning of site, surrounding land
- No high value farmland on proposed site
- Proposed affordable housing units, number and type
- Proposed market rate units, number and type, if any
- Identity of development partners
- Public facilities and services, brief statement

2. Department Reviews, Talks to Each Applicant

3. City Submits Final Application

All of the above, plus:

- Development phasing
- Income limits for affordable housing
- Affordable housing unit prices
- List comprehensive plan and land use regulation amendments
- Public facilities and services, more information
- Buffering from farm and forest zones
- Natural resources on site
- Natural hazards location, protection, mitigation
- How mixed income supports affordable housing
- Resolution of city to implement concept plan, annex site
- Resolution of support, county
- Resolution of support, any special district serving site
- Property owner consent statements
- Housing measures adopted to encourage housing inside UGB
- Data on how project serves those in need of affordable housing
- Why project development won't happen elsewhere
- Identity and experience of development partners
- Plan for ensuring affordable housing is such for 50 years

Concept plan components

4. Department Determines if Application Qualifies

- Adjacent to UGB
- No high value farmland
- Total site ≤ 50 acres
- Gross density at least 7 dwelling units/acre for affordable housing units
- Gross density at least 7 dwelling units/acre for market rate units
- Can be provided with public facilities/services
- Avoids/minimizes impacts to natural resources, farm/forest use
- Enough housing measures adopted to encourage affordable, needed housing within UGB
- Sufficient affordable housing units and phasing on site
- Project will serve population needing affordable housing
- Project unlikely to happen elsewhere

Department may solicit additional information

5. Commission Selects Sites by Written Order

6. Pilot Projects Move Forward

- Amend the UGB
 - Annex site into city
 - Adopt plan/zone designations
 - Adopt measures ensuring affordable housing stays such for 50 years
 - Prior to construction, city documents projected costs
 - Issue permits for development
 - After construction, city documents actual costs
- City reports to commission annually for ten years
- Pilot projects do not impact future city findings on housing
- If project cannot be implemented, city/county shall withdraw site and rezone it

Pilot Project Selection Overview

(Summarized for brevity; see rule for precise details)

Issue	Minimum Requirements	Additional Considerations
<p>Basic requirements for project proposal sites (Section 0020 and 0030)</p>	<ol style="list-style-type: none"> 1. Adjacent to UGB 2. No high value farmland 3. Site ≤ 50 acres 4. 7+ dwelling units/acre for affordable housing units 5. 7+ dwelling units/acre for market rate units 6. Project not likely to be developed inside UGB 7. Findings of compliance with Goals 5 and 7 8. Findings of compliance with Goal 11 in regard to impact of pilot project 	
<p>Requirements for housing on pilot project site (Section 0070)</p>	<ol style="list-style-type: none"> 1. At least 30% of units must be affordable 2. For smaller cities, at least 10 affordable units; For larger cities, at least 20 affordable units 3. Phasing plan ensures affordable built along with market rate 4. All common amenities equally accessible to all 5. Ensure all units stay affordable for 50 years 6. Ensure not used for vacation/short term rentals 7. Development partners can complete project 	<ul style="list-style-type: none"> • Total number and percentage of affordable units • Units for those with lower than 80% AMI • Units for those between 80% and 120% AMI
<p>Affordable and needed housing measures inside existing UGB (Section 0060)</p>	<ol style="list-style-type: none"> 1. Three points of affordable housing measures in list 2. Twelve points combined from lists for affordable and needed housing (up to six points for alternate) 	<ul style="list-style-type: none"> • Measures adopted beyond the minimums required
<p>Public facilities and services on project site (Section 0040)</p>	<ol style="list-style-type: none"> 1. Public facilities and services can be reasonably provided 2. Cities >25,000: Affordable housing have fixed route transit within ¾ mile, or service commitment 3. Cities ≤25,000: Fixed route or demand response transit, or service commitment 	<ul style="list-style-type: none"> • Proximity and expense of public facilities/services • Quality of facilities/services for biking, walking, transit
<p>Natural resources and farm and forestland (Section 0050)</p>	<ol style="list-style-type: none"> 1. Project buffered from land in farm, forest zones or alternative method providing greater protection 2. Apply Goal 5 requirements 	<ul style="list-style-type: none"> • Quality of buffers and impacts on farm and forest uses

Measures to Encourage Affordable and Needed Housing (within existing UGB)

Affordable Housing Measures (23 total points) Section 0060(3)(a)

Density Bonus (max 3 points)

- 3 points – Density bonus of at least 20%, no additional design review
- 1 point – Density bonus with additional design review

Systems Development Charges (max 3 points)

- 3 points – At least 75% reduction on SDCs
- 1 point – Defer SDCs to date of occupancy

Property Tax Exemptions

- 3 points – Property tax exemption for low income housing
- 3 points – Property tax exemption for non-profit corp. low income housing
- 3 points – Property tax exemption for multi-unit housing

Other Property Tax Exemptions/Freeze

- 1 point – Property tax exemption for housing in distressed areas
- 1 point – Property tax freezes for rehabilitated housing

Inclusionary Zoning

- 3 points – Imposes inclusionary zoning

Construction Excise Tax

- 3 points – Adopted construction excise tax

Cities must have adopted measures totaling at least 3 points of affordable housing measures and they may apply for up to 6 points of credit for alternative measures

Needed Housing Measures (30 total points) Section 0060(3)(b)

Accessory Dwelling Units (max 3 points)

- 3 points – ADUs allowed in any zone without many constraints
- 1 point – ADUs with more constraints

Minimum Density Standard (max 3 points)

- 3 points – Minimum density standard at least 70% of maximum
- 1 point – Minimum density standard at least 50% of maximum

Limitations on Low Density Housing Types

- 3 points – No more than 25% of residences in medium density to be detached
- 1 point – No detached residences in high density zones
- 1 point – Maximum lots for detached homes medium/high zones $\leq 5,000$ sq ft

Multifamily Off-street Parking Requirements (max 3 points)

- 3 points – ≤ 1 space/unit for multi-unit dwelling and ≤ 0.75 spaces/unit for units within one-quarter mile of transit
- 1 point – ≤ 1 required parking space/unit in multi-unit dwellings

Under Four Unit Off-street Parking Requirements

- 1 point – ≤ 1 space/unit required for detached, attached, duplex, triplexes

Amount of High Density Zoning Districts (max 3 points)

- 3 points – At least 15% of all residential land is zoned for high density

- 1 point – At least 8% of all residential land is zoned for high density

Duplexes in Low Density Zones (max 3 points)

- 3 points – Duplexes are allowed in low density zones
- 1 point – Duplexes are allowed on corner lots in low density zones

Attached Units Allowed in Low Density Zones

- 1 point – Attached residential units allowed in low density zones

Residential Street Standards

- 3 points – Allowed minimum local residential street width 28 feet or less

Mixed-Use Housing

- 3 points – At least 50% of commercial zoned land allows residential

Low Density Residential Flexible Lot Sizes

- 1 point – Minimum lot size in low density zones is 25%+ less than the minimum lot size corresponding to maximum density

Cottage housing

- 1 point – Allows cottage housing

Vertical housing

- 1 point – Allows vertical housing

1 **DRAFT – HB 4079 RULES**

2 **November 9, 2016 – Staff Draft**

3 **660-039-0000**

4 **Purpose**

5 The affordable housing pilot program is intended to:

- 6 (1) Encourage local governments to provide an adequate supply of land within urban growth
7 boundaries that is dedicated to affordable housing;
- 8 (2) Encourage the development of affordable housing on land dedicated to affordable housing;
- 9 (3) Protect land dedicated to affordable housing from conversion to other uses before or after the
10 development of affordable housing;
- 11 (4) Enhance public understanding of the relationship of land supply to the development of affordable
12 and needed housing; and
- 13 (5) Enhance public understanding of how cities can increase the amount of affordable and needed
14 housing.

15
16 **660-039-0010**

17 **Definitions**

18 The definitions in ORS 197.015, the statewide planning goals, and the following definitions apply to this
19 division:

- 20 (1) “Affordable housing” means:
- 21 (a) Housing units available for rent, with or without government assistance, by households who
22 meet applicable maximum income limits, not to exceed 80 percent of the area median income,
23 adjusted for family size, as determined based on data from the United States Department of
24 Housing and Urban Development or its successor agency, and in a manner so that no more than
25 30 percent of the household’s gross income will be spent on rent and utilities;
- 26 (b) Housing units available for purchase, with or without government assistance, by households
27 who meet applicable maximum income limits, not to exceed 80 percent of the area median
28 income, adjusted for family size, as determined based on data from the United States
29 Department of Housing and Urban Development or its successor agency, and in a manner so
30 that no more than 30 percent of the household’s gross income will be spent on home loan or
31 mortgage payments, amortized interest, property taxes, insurance, and condominium or
32 association fees, if any; or
- 33 (c) Spaces in manufactured dwelling parks available for rent, with or without government
34 assistance, by households who meet applicable maximum income limits, not to exceed 80

1 percent of the area median income, adjusted for family size, as determined based on data from
2 the United States Department of Housing and Urban Development or its successor agency.

3 (2) "Affordable housing unit" means a single housing unit, or a single space in a manufactured dwelling
4 park, that meets the definition of affordable housing.

5 (3) "High-value farmland" has the meaning provided in ORS 195.300.

6 (4) "Housing unit" means a single unit providing complete, independent living facilities for one or more
7 persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation.

8 (5) "Market rate housing unit" means a single housing unit, or a single space in a manufactured dwelling
9 park, that does not qualify as affordable housing.

10 (6) "Public facilities and services" means sanitary sewers, water, fire protection, parks, recreation,
11 streets and roads, and mass transit.

12 (7) "Qualifying city" means any incorporated city except for:

13 (a) Any incorporated city within Clackamas, Marion, Multnomah, Polk and Washington Counties;
14 and

15 (b) Culver, Madras, Metolius, or any other incorporated city within the portion of Jefferson County
16 that is also within the boundary of the North Unit Irrigation District.

17 (8) "Site" means one or more contiguous lots or parcels.

18

19 **660-039-0020**

20 **Preliminary Application and Final Application Requirements**

21 (1) The director shall set deadlines for qualifying cities to submit:

22 (a) A preliminary application for a pilot project site; and

23 (b) A final application for a pilot project site.

24 (2) The director may revise either deadline under section (1) as the director determines is appropriate
25 to accomplish the purpose of the pilot program.

26 (3) To participate in the pilot program, a qualifying city must submit a preliminary application for a pilot
27 project site to the department. A preliminary application must include:

28 (a) A map of the pilot project site;

29 (b) The total acreage of the pilot project site;

30 (c) The existing land use designation and zoning of the pilot project site, and surrounding land
31 within a minimum one-half mile radius;

32 (d) Demonstration that the pilot project site does not include high-value farmland;

- 1 (e) The number and type of affordable housing units, and, if the pilot project is a mixed income
2 project, the number and type of market rate housing units, to be developed on the pilot project
3 site;
- 4 (f) The identity of entities that may partner with the qualifying city in development of the pilot
5 project site; and
- 6 (g) A brief statement of how the pilot project site will be provided with public facilities and services.
- 7 (4) The department will review a preliminary application submitted under section (3) to determine
8 whether the preliminary application is complete. If the preliminary application is not complete, the
9 department shall notify the applicant in writing of what information is missing within 30 days of
10 receipt of the application and allow the applicant to submit the missing information. The
11 department will contact each pre-applicant to discuss the proposed pilot project.
- 12 (5) An applicant may revise information included in a preliminary application as part of a final
13 application submitted pursuant to section (6).
- 14 (6) In order to be selected as a pilot project, a qualifying city that submitted a complete preliminary
15 application must submit a final application to the department that includes:
- 16 (a) A map of the pilot project site;
- 17 (b) The total acreage of the pilot project site;
- 18 (c) The existing land use designation and zoning of the pilot project site, and surrounding land
19 within a minimum one-half mile radius, including demonstration that the pilot project site does
20 not include high-value farmland;
- 21 (d) A concept plan narrative and map showing generalized land uses and public facilities that
22 includes:
- 23 (A) The number and type of affordable housing units;
- 24 (B) If the project is a mixed income project, the number and type of market rate
25 housing units;
- 26 (C) The development phasing of affordable housing and any market rate housing
27 included on the pilot project site, including a phasing timeline for the entire
28 project;
- 29 (D) The applicable maximum income limits of households eligible to rent or
30 purchase affordable housing on within the pilot project site, expressed as a
31 percentage of the area median income, adjusted for family size;
- 32 (E) The prices at which affordable housing units within the pilot project site will
33 be rented or sold to eligible tenants or homebuyers;
- 34 (F) A list of the amendments to the qualifying city's comprehensive plan and land
35 use regulations that would be required to implement the final application;

- 1 (G) Information about how the pilot project site will be provided with public
2 facilities and services, including:
- 3 (i) the proposed network of streets and other transportation facilities
4 designed to connect with existing street facilities and serve all modes of
5 personal transportation, including mass transit; and
- 6 (ii) the location of parks and recreational facilities;
- 7 (H) Proposed buffering from adjacent and nearby farm and forest uses on farm
8 and forest lands;
- 9 (I) Location of any natural resources on the pilot project site requiring analysis
10 and protection under Statewide Planning Goal 5, or mitigation of hazards
11 under Statewide Planning Goal 7; and
- 12 (J) If the pilot project is a mixed income project, a description of how the mixed
13 income portion supports the development of affordable housing
- 14 (e) A resolution adopted by the governing body of the qualifying city stating if the pilot project is
15 selected, the qualifying city will:
- 16 (A) Implement the concept plan; and
- 17 (B) Annex the pilot project site within two years of an acknowledged urban
18 growth boundary amendment to include the site;
- 19 (f) A resolution of support for the pilot project adopted by the governing body of the county in
20 which the pilot project site is located;
- 21 (g) A resolution of support for the pilot project adopted by the governing body of any special
22 district providing urban services to the pilot project site for sanitary sewer, water, fire
23 protection, parks, recreation, streets and roads, or mass transit;
- 24 (h) A signed and notarized statement from all owners of the pilot project site consenting to all
25 aspects of the final application and agreeing to designation of the site as a pilot project;
- 26 (i) Citations for any code or ordinance provisions the qualifying city has adopted that implement
27 housing measures described in OAR 660-039-0060, or any additional housing measures the
28 qualifying city has adopted that accommodate and encourage the development of affordable or
29 needed housing within its existing urban growth boundary;
- 30 (j) Data on how the pilot project will serve identified populations in need of affordable housing,
31 including:
- 32 (A) Household cost burden in the region, as determined using information from
33 the United States Department of Housing and Urban Development;
- 34 (B) Conversion of manufactured home parks in the region;
- 35 (C) Availability of government assisted housing in the region; and

- 1 (D) Other data the qualifying city determines to be relevant.
- 2 (k) An explanation of why the development of a project similar to the proposed pilot project is
 3 unlikely to be developed within the existing urban growth boundary. The explanation may
 4 include, but is not limited to: land costs, redevelopment or remediation costs, site availability, or
 5 physical constraints;
- 6 (l) The identity and prior experience with the development of affordable or market-rate housing, of
 7 any other entity, public or private, that will be developing the pilot project site.
- 8 (m) An explanation of how the qualifying city will ensure affordable housing developed on the pilot
 9 project site will continue to be used as provided in the concept plan for a minimum of 50 years
 10 after selection of the pilot project site through one or more of the following:
- 11 (A) Zoning restrictions;
- 12 (B) Guaranteed rental rates or sales prices;
- 13 (C) Incentives, contract commitments, density bonuses or other voluntary
 14 regulations, provisions or conditions designed to increase the supply of
 15 moderate or lower cost housing units;
- 16 (D) Restrictive agreements entered into with sources of affordable housing
 17 funding; or
- 18 (E) Other regulations, provisions or conditions determined by the local
 19 government to be effective in maintaining the affordability of housing on the
 20 pilot project site.
- 21 (7) The department will review a final application submitted under section (6) to determine whether
 22 the final application is complete. If the final application is not complete, the department shall notify
 23 the applicant in writing of what information is missing within 30 days of receipt of the application
 24 and allow the applicant to submit the missing information.
- 25 (8) A final complete application must demonstrate the following to be considered for selection as a
 26 pilot project by the commission:
- 27 (a) The pilot project site is adjacent to the existing urban growth boundary of the applicant
 28 qualifying city;
- 29 (b) No tract within the pilot project site is high-value farmland;
- 30 (c) The total acreage of the pilot project site does not exceed 50 acres;
- 31 (d) The proposed gross residential density on the pilot project site is:
- 32 (A) At least seven housing units per acre for areas of the pilot project site proposed for
 33 affordable housing; and
- 34 (B) At least seven housing units per acre for areas of the pilot project site proposed for market
 35 rate housing;

- 1 (e) The pilot project site can be provided with public facilities and services as provided in OAR 660-
2 039-0040(1) to (3);
- 3 (f) The pilot project avoids or minimizes adverse effects on natural resources and nearby farm and
4 forest uses as provided in OAR 660-039-0050(1), (2), and (4);
- 5 (g) The qualifying city has adopted the required number of housing measures into its development
6 code as provided in OAR 660-039-0060;
- 7 (h) The pilot project satisfies the housing requirements as provided in OAR 660-039-0070(1) to (6);
- 8 (i) The project will serve identified populations in need of affordable housing; and
- 9 (j) The qualifying city has explained why the development of a project similar to the proposed pilot
10 project is unlikely to be developed within the existing urban growth boundary;
- 11 (k) The qualifying city has demonstrated that the entity developing the pilot project will be able to
12 complete the development.

13

14 **660-039-0030**

15 **Compliance with Goals, Statutes, Administrative Rules**

- 16 (1) Regarding the pilot project site, a qualifying city submitting a pilot project nomination is exempt
17 from compliance, and the commission is not required to select a pilot project that complies, with:
 - 18 (a) ORS 197A.320;
 - 19 (b) The Land Need or Boundary Location provisions of Goal 14;
 - 20 (c) Goals 3, 4, 6, 8, 9, 10, 12, 13, and 19;
 - 21 (d) Goal 11, except that portion applicable to the impact of development of the pilot project site
22 upon existing and planned public facilities within the qualifying city's urban growth boundary;
 - 23 (e) Goal 15, unless the land is within the Willamette River Greenway Boundary; or
 - 24 (f) Goals 16, 17, and 18, unless the land is within a coastal shorelands boundary.
- 25 (2) A qualifying city submitting a pilot project nomination is required to make findings showing
26 compliance, and the commission is required to select a pilot project that complies with:
 - 27 (a) Goal 5, regarding resources located on the project site; and
 - 28 (b) Goal 7.
- 29 (3) Notwithstanding section (1), a qualifying city may not bring high-value farmland within its urban
30 growth boundary to implement a pilot project.

31

1 **660-039-0040**

2 **Provision of Public Facilities and Services**

3 (1) A qualifying city submitting a pilot project nomination shall demonstrate that, for sanitary sewers,
4 water, fire protection, parks or recreation, and streets and roads the pilot project site can be
5 reasonably provided with public facilities and services and the provider(s) of the public facilities and
6 services have the capacity and financial resources to serve development on the site as proposed in
7 the concept plan.

8 (2) (a) A qualifying city with a population of 25,000 or less shall demonstrate that, either:

9 (A) For mass transit corridors, the affordable housing units within the pilot project site are
10 accessible or can be made accessible to a transit stop served by a fixed transit corridor with at least
11 four weekday trips in each direction, or four weekday trips at the terminus of a fixed transit corridor,
12 that is within a three-quarters mile distance via sidewalk or pedestrian walkway; or

13 (B) If transit service described in paragraph (A) is unavailable, the pilot project site is served by
14 public demand response transit service that does not exclude any segment of the general
15 population.

16 (b) If transit service is not currently available, the qualifying city shall provide an official resolution
17 or other action of the governing body providing mass transit service stating that, if the project is
18 selected, mass transit service that satisfies the standards under subsection (a) will be provided
19 concurrently with development of the affordable housing units.

20 (3) A qualifying city with a population greater than 25,000 shall demonstrate that, for mass transit
21 corridors, the affordable housing units within the pilot project site are accessible or can be made
22 accessible to a transit stop served by a fixed transit corridor with at least eight weekday trips in each
23 direction, or eight weekday trips at the terminus of a fixed transit corridor, that is within a three-
24 quarters mile distance via sidewalk or pedestrian walkway. If transit service is not currently
25 available, the qualifying city shall provide an official resolution or other action of the governing body
26 providing mass transit service stating that, if the project is selected, mass transit service with such
27 minimum frequency and distance from affordable housing units will be provided concurrently with
28 development of the affordable housing units.

29 (4) The commission may consider the following aspects of the nomination when determining the
30 strength of the public facilities and services committed to serving the pilot project site pursuant to
31 660-039-0080(2)(b)(B):

32 (a) The proximity of the pilot project site to adequate existing public facilities and services;

33 (b) The projected expense of providing necessary public facilities and services to the pilot project
34 site; and

35 (c) The availability and quality of the proposed transportation facilities and services provided for
36 bicyclists, pedestrians, and mass transit users within the pilot project site and connecting to the
37 pilot project site from other areas within the qualifying city.

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660-039-0050

Impacts on Natural Resources and Nearby Farm and Forest Uses

- (1) The pilot project site shall be buffered from adjacent lands in an exclusive farm use zone, forest zone, or mixed farm and forest zone, by a minimum 100 foot wide buffer on the pilot project site. The buffer shall include features, such as terrain differential, natural or introduced vegetation, and constructed berms, designed to provide additional buffering quality within the buffer area.
- (2) In lieu of the buffer required under section (1), a qualifying city may propose an alternative method to avoid or minimize adverse effects on natural resources and nearby farm and forest uses that would provide greater protection to land zoned farm, forest or mixed farm and forest than would otherwise be provided through the buffer.
- (3) The commission shall consider the following when determining the strength of buffers pursuant to OAR 660-039-0080(2)(b)(C):
 - (a) The amount and percentage of the pilot project site perimeter that is not adjacent to lands in an exclusive farm use zone, forest zone, or mixed farm and forest zone;
 - (b) A proposed buffer that is wider than 100 feet, or that uses more thorough techniques within the buffer area to reduce impacts to farm and forest lands;
 - (c) The type and characteristics of farm and forest practices on the pilot project site over the past 20 years;
 - (d) The type and characteristics of farm and forest practices on lands adjacent to the pilot project site;
 - (e) The impact of the pilot project development on adjacent farm and forest practices including movement of farm and forest vehicles and equipment; and
 - (f) The impact of the pilot project development on fire protection, if adjacent to forest practices.
- (4) If a qualifying city submits factual information demonstrating a Goal 5 resource site, or the impact areas of such a site, is included in the pilot project site to be added to the urban growth boundary, the qualifying city shall apply the requirements of OAR chapter 660, division 23. For purposes of this section, "impact area" is a geographic area within which conflicting uses could adversely affect a significant Goal 5 resource, as described in OAR 660-023-0040(3).

660-039-0060

Measures to Accommodate and Encourage Needed and Affordable Housing within Existing Urban Growth Boundary

- 1 (1) A qualifying city submitting a pilot project nomination must demonstrate that its acknowledged
2 comprehensive plan, acknowledged development code, or other relevant adopted city codes or
3 other governing documents include:
- 4 (a) Affordable housing measures from the list in subsection (3)(a) equaling at least three points; and
5 (b) Affordable housing measures from the list in subsection (3)(a) or needed housing measures
6 from the list in subsection (3)(b) equaling at least twelve points combined.
- 7 (2) For up to six of the twelve points required under subsection (1)(b), the qualifying city may
8 demonstrate that its acknowledged comprehensive plan, acknowledged development code, or other
9 relevant adopted city codes or other governing documents include an alternative housing measure
10 not on the list of measures in section (3) that the qualifying city demonstrates, with appropriate
11 findings, have a positive effect upon needed or affordable housing equal to or greater than an
12 equivalent measure in section (3).
- 13 (3) A qualifying city may satisfy subsection (1)(a) and section (2) through adoption of the following
14 measures, or alternative measures pursuant to subsection (1)(b), to accommodate and encourage
15 the development of needed housing and affordable housing within its existing urban growth
16 boundary:
- 17 (a) Affordable housing measures
- 18 (A) Density bonus for affordable housing (three points maximum):
- 19 (i) Three points if code has a density bonus provision for affordable housing of at least 20
20 percent with no additional development review standards than required for
21 development applications that do not include a density bonus, with reservation of
22 affordable housing units for at least 50 years; or
- 23 (ii) One point if code has a density bonus provision for affordable housing of at least 20
24 percent, with additional development review standards than required for development
25 applications that do not include a density bonus.
- 26 (B) Systems development charges (three points maximum):
- 27 (i) Three points for provisions that eliminate systems development charges for affordable
28 housing units described in subsection (3)(a)(A)(i), or reduce systems development
29 charges for such units by at least 75 percent when compared to similar units that are
30 not reserved for affordable housing; or
- 31 (ii) One point for provisions deferring systems development charges for affordable housing
32 units described in subsection (3)(a)(A)(i), to the date of occupancy of the housing unit.
- 33 (C) Property tax exemptions (Nine points maximum):
- 34 (i) Three points for code provision authorizing property tax exemptions under ORS 307.515
35 to 307.537 for low income housing development, under criteria in both ORS 307.517
36 and 307.518, with no additional development review standards;

- 1 (ii) Three points for code provisions authorizing property tax exemptions under ORS
 2 307.540 to 307.548 for non-profit corporation low-income housing development, with
 3 no additional development review standards; and
- 4 (iii) Three points for code provision authorizing property tax exemptions under ORS 307.600
 5 to 307.637 for multiple unit housing, with no additional restrictions on location of such
 6 housing in addition to those contained within ORS 307.600 to 307.637, and with
 7 required benefits pursuant to ORS 307.618 that are clear and objective and do not have
 8 the effect of discouraging the use of the property tax exemption through imposition of
 9 unreasonable cost or delay.
- 10 (D) Other property tax exemptions or assessment freezes (two points maximum):
- 11 (i) One point for code provision authorizing property tax exemptions for ORS 307.651 to
 12 307.687 – single-unit housing in distressed areas – with clear and objective design
 13 standards that do not have the effect of discouraging use of the property tax exemption
 14 through unreasonable cost or delay; and
- 15 (ii) One point for code provision authorizing property tax freezes under ORS 308.450 to
 16 308.481 – rehabilitated residential property – if the boundaries of the distressed area
 17 consist of at least 10 percent of the qualifying city’s total land area, and clear and
 18 objective standards that do not have the effect of discouraging use of the program
 19 through unreasonable cost and delay.
- 20 (E) Inclusionary Zoning: Three points for code provision imposing inclusionary zoning
 21 requirements consistent with the provisions of ORS 197.309.
- 22
- 23 (F) Construction Excise Tax: Three points for code provision imposing construction taxes
 24 consistent with the provisions of Oregon Laws 2016, Chapter 59, Sections 8 and 9.
- 25
- 26 (b) Needed Housing Measures
- 27 (A) Accessory dwelling units (three points maximum):
- 28 (i) Three points for allowing accessory dwelling units in any zoning district that allows
 29 detached single family housing units, with no off-street parking requirement, any
 30 structure type allowed, allowing owner to live in either the primary or accessory
 31 dwelling unit, with no systems development charges for water, sewer, or transportation,
 32 and with clear and objective review standards; or
- 33 (ii) One point for allowing accessory dwelling units, but one or more of the attributes in
 34 subsection (3)(b)(A)(i) missing.
- 35 (B) Minimum density standard (three points maximum):
- 36 (i) Three points if all residential zoning districts have a minimum density standard of at
 37 least 70 percent of the maximum density allowed, with optional exemptions for lands

- 1 that do not qualify as buildable lands under OAR 660-008-0005(2) and lands that are
2 being partitioned as defined by ORS 92.010(7); or
- 3 (ii) One point if all residential zoning districts have a minimum density standard of at least
4 50 percent of maximum density allowed, with optional exemptions for lands that do not
5 qualify as buildable lands under OAR 660-008-0005(2) and lands that are being
6 partitioned as defined by ORS 92.010(7).
- 7 (C) Limitations on low density housing types (five points maximum):
- 8 (i) Three points for code provision that allows no more than 25 percent of residences in
9 medium density residential zoning districts to be detached single family housing units,
10 unless the detached single family housing unit is on a lot less than or equal to 3,000
11 square feet, with exemptions for lands that are being partitioned as defined by ORS
12 92.010(7);
- 13 (ii) One point for code provision that prohibits detached single family housing units in high
14 density residential zoning districts; and
- 15 (iii) One point for code provision establishing maximum lot size for detached single family
16 housing units in medium and high density residential zoning districts as less than or
17 equal to 5,000 square feet.
- 18 (D) Off-street parking requirements for multiple family housing with four or more units (three
19 points maximum):
- 20 (i) Three points if off-street parking requirement is no more than one space per housing
21 unit in multiple family housing developments of four or more units, and no more than
22 0.75 spaces per housing unit in multiple family housing developments of four or more
23 units within one-quarter mile of transit service with weekday peak hour service
24 headway of 20 minutes or less; or
- 25 (ii) One point if parking requirements require no more than one space per housing unit in
26 multiple family housing developments of four or more units, without additional
27 reductions in subsection (3)(b)(D)(i);
- 28 (E) Off-street parking requirements for single family housing, duplexes, and triplexes (one point
29 maximum): One point if off-street parking requirement for detached single family housing
30 units, attached single family housing units, duplexes, and triplexes is no more than one
31 space per housing unit.
- 32 (F) Amount of high density residential zoning districts (three points maximum):
- 33 (i) Three points if at least 15 percent of all residentially-zoned land in the qualifying city is
34 zoned for high density residential development; or
- 35 (ii) One point if at least eight percent of all residentially-zoned land in the qualifying city is
36 zoned for high density residential development.

- 1 (G) Duplexes in low density residential zoning districts (three points maximum):
- 2 (i) Three points if duplexes are allowed in low density residential zoning districts on any lot
- 3 with no additional development review standards than required for detached single
- 4 family dwellings; or
- 5 (ii) One point if duplexes are allowed on corner lots in low density residential zoning
- 6 districts with no additional development review standards than required for detached
- 7 single family housing units;
- 8 (H) Attached single-family residential housing units in low density residential zoning districts
- 9 (one point maximum): One point if attached single-family residential housing units are
- 10 allowed in low density residential zoning districts, with attached single-family residential lots
- 11 having a minimum lot size no greater than 5,000 square feet.
- 12 (I) Residential street standards (three points maximum): Three points for allowance of local
- 13 residential street pavement minimum widths of 28 feet or less with parking on both sides,
- 14 24 feet or less with parking on one side, or 20 feet or less with no parking.
- 15 (J) Mixed-use housing (three points maximum): Three points if at least 50 percent of land
- 16 within commercial zoning districts in the qualifying city permits residential development
- 17 with off-street parking requirement no greater than one space per housing unit and
- 18 provisions for additional parking reductions for shared commercial and residential uses and
- 19 in areas with approved parking management districts.
- 20 (K) Low density residential flexible lot sizes (one point maximum): One point if minimum lot size
- 21 in low density residential zoning districts is at least 25 percent less than the minimum lot
- 22 size that would correspond to the maximum density allowed in that zoning district.
- 23 (L) Cottage housing provisions (one point maximum): One point if development code has
- 24 cottage housing code provision authorizing development at a maximum of at least 12
- 25 housing units per acre.
- 26 (M) Vertical housing provisions (one point maximum): One point if the Housing and Community
- 27 Services Department has approved a vertical housing development zone under ORS 307.841
- 28 to 307.867 for the qualifying city;
- 29 (4) For the purposes of this rule:
- 30 (a) "High density residential zoning district" means a zoning district that allows a maximum
- 31 residential density of 16 housing units per acre or more;
- 32 (b) "Low density residential zoning district" means a zoning district that allows a maximum
- 33 residential density of eight housing units per acre or less; and
- 34 (c) "Medium density residential zoning district" means a zoning district that allows a maximum
- 35 residential density greater than eight housing units per acre and less than 16 housing units per
- 36 acre.

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660-039-0070

Housing Requirements

- (1) The following types of affordable housing are allowed on pilot project sites:
 - (a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
 - (b) Government assisted housing;
 - (c) Manufactured dwelling parks as provided in ORS 197.475 to 197.490; and
 - (d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions.
- (2) At least 30 percent of the total housing units proposed and developed on a pilot project site must be affordable housing units. In addition:
 - (a) At least 10 affordable housing units must be proposed and developed on a pilot project site from a qualifying city with a population of 25,000 or less; and
 - (b) At least 20 affordable housing units must be proposed and developed on a pilot project site from a qualifying city with a population greater than 25,000.
- (3) Pilot project development phasing shall:
 - (a) Ensure all affordable housing units have been issued permanent certificates of occupancy prior to issuance of permanent certificates of occupancy to the last 50 percent of any market rate housing units included as part of the pilot project; or
 - (b) Phase development so that affordable housing units and market-rate housing units are issued permanent certificates of occupancy over time in a ratio similar to the ratio of affordable and market-rate housing units within the pilot project as a whole.
- (4) All common areas and amenities accessible to residents of market rate housing units within the pilot project site shall be equally accessible to residents of affordable housing units;
- (5) The qualifying city must ensure all affordable housing units within the pilot project site are rented or sold exclusively to households described in OAR 660-039-0010(1) or, if the pilot project includes dedicated affordable housing units proposed under subsection 6(b), to those households described, at the time of sale or rental during a period of at least 50 years after the selection of the pilot project site;
- (6) The qualifying city must ensure that all housing units within the pilot project site are not used as vacation or short term rentals for any significant period during any calendar year.
- (7) The commission shall consider the following when reviewing a final application pursuant to OAR 660-039-0080(2)(b)(A):

- 1 (a) Percentages or numbers of affordable housing units greater than the minimum percentages and
2 numbers required in section (2);
- 3 (b) Dedication of affordable housing units for households with lower maximum incomes than
4 described in the definition of affordable housing in OAR 660-039-0010(1); and
- 5 (c) In the case of a mixed income project, the total number and overall percentage of market rate
6 housing units dedicated for households making 80 to 120% of the AMI.

7
8 **660-039-0080**

9 **Commission Selection**

- 10 (1) After the deadline for final applications established in OAR 660-039-0020(1)(b) or (2), the
11 commission shall select two pilot projects for implementation:
 - 12 (a) One from a qualifying city with a population of 25,000 or less, and
 - 13 (b) One from a qualifying city with a population greater than 25,000.
- 14 (2) In selecting pilot projects, the commission may:
 - 15 (a) Only consider applications that:
 - 16 (A) The department determines are complete pursuant to OAR 660-039-0020(7); and
 - 17 (B) The commission determines have met all of the requirements provided in OAR 660-039-
18 0020(8);
 - 19 (b) Consider recommendations of the director and determine which two pilot project proposal as
20 provided in section (1) best satisfy the following factors:
 - 21 (A) The housing considerations, as provided in OAR 660-039-0070(7);
 - 22 (B) The proximity and quality of public facilities and services, including transportation facilities
23 and transit service, for the pilot project site as provided in OAR 660-039-0040(4).
 - 24 (C) The quality of measures to avoid or minimize adverse effects on natural resources and
25 nearby farm and forest uses as provided in OAR 660-039-0050(3).
 - 26 (D) The number and strength of measures the qualifying city has adopted to accommodate and
27 encourage the development of needed and affordable housing within its existing urban
28 growth boundary as provided in OAR 660-039-0060.
 - 29 (c) Consider each factor in subsection (b) and select the application that best achieves the purposes
30 as provided in OAR 660-039-0000.
- 31 (3) The commission shall make a preliminary selection of one pilot project site from a qualifying city in
32 both subsection (1)(a) and (b). Within 60 days of the preliminary selection, each qualifying city shall
33 submit to the commission specific information regarding:

- 1 (a) The form and content of the legal documents that ensure that the pilot project site will remain
2 affordable for at least 50 years after the selection of the pilot project site; and
3
4 (b) The proposed comprehensive plan and zoning designations for the pilot project site.
- 5 (4) The commission shall review each qualifying city's information submittal pursuant to section (3).
6 Once the form and content are satisfactory to the commission, the commission shall issue a final
7 order selecting the pilot project site for the development proposed in the concept plan.

8
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10 **660-039-0090**

11 **Subsequent Events**

- 12 (1) Upon selection by the commission as provided in OAR 660-039-0080(4), the qualifying city shall:
- 13 (a) In concert with the county in which the urban growth boundary is located, amend the urban
14 growth boundary to include the pilot project site, and identify the provisions of law and rules
15 pursuant to OAR 660-039-0030 relating to urban growth boundary amendments that are not
16 applied to allow the pilot project site to be included within the urban growth boundary;
- 17 (b) Annex the pilot project site to the qualifying city within two years of the acknowledged urban
18 growth boundary amendment;
- 19 (c) Adopt plan and zone designations for the pilot project site that authorize development of the
20 concept plan included in the application;
- 21 (d) Adopt measures ensuring that affordable housing developed on the pilot project site remains
22 affordable for a period of at least 50 years after the selection of the pilot project site; and
- 23 (e) Issue permits for development on the pilot project site only after annexation of the site to the
24 qualifying city and adoption of measures ensuring that housing developed on the pilot project
25 site will continue to be used to provide affordable housing for a period of at least 50 years after
26 the selection of the pilot project site.
- 27 (2) For a post-acknowledgement plan amendment or land use regulation change under OAR chapter
28 660, division 18, that proposes amendments with any effect upon existing comprehensive plan
29 designations or provisions that impact residential development, or land use regulations that impact
30 residential development, the qualifying city may not, for a period of 50 years after approval of the
31 pilot project by the commission, consider the existence of housing units existing or approved on the
32 pilot project site when making findings regarding the proposed amendment.
- 33 (3) The qualifying city for the pilot project site selected by the commission may not plan or zone the site
34 to allow a use or mix of uses not authorized by the commission unless the qualifying city, in concert
35 with the county, withdraws the pilot project site from the urban growth boundary and rezones the
36 site pursuant to law, statewide land use planning goals and land use regulations implementing the
37 goals that regulate allowable uses of land outside urban growth boundaries.

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660-039-0100

Reporting Requirements

- (1) The qualifying city for a pilot project selected by the commission pursuant to OAR 660-039-0080 shall provide the following information in reports to the commission:
- (a) Prior to construction of the project, documentation of the land cost for affordable and market portions of project, expected infrastructure costs, permitting costs, systems development charges, affordable housing incentives or subsidies, and expected construction costs;
 - (b) After construction of the project is complete, documentation showing the actual costs of all items indicated in subsection (a).
 - (c) If the project cannot be completed as approved, the contributing factors that prevented completion of the project as approved.
 - (d) On an annual basis once construction of the pilot project has begun, for a period of ten years:
 - (A) The number of affordable housing units on the pilot project site;
 - (B) The number of market rate housing units on the pilot project site;
 - (C) The vacancy rate of the affordable housing units;
 - (D) The vacancy rate of the market rate housing units;
 - (E) The current monthly rent for the affordable housing units, or sales price of the affordable housing units;
 - (F) The current monthly rent for the market rate housing units, or sales price of the market rate housing units;
 - (G) Any affordable housing incentives or subsidies applied to the pilot project site in addition to the incentives provided by the provisions of chapter 52, Oregon Laws 2016;
 - (H) Any housing measures from OAR 660-039-0060(3) that have been adopted or amended by the qualifying city; and
 - (I) A qualitative assessment of the pilot project and lessons learned from implementation of the pilot project, including the burden of reporting requirements and impacts on the city's overall housing market.

<http://intranet.dlcd.state.or.us/projects/AHPP/Documents/HB4079-RAC Draft-20161024.docx>

The Crosswalk Project For Waldport.

I, Greg Holland am unable to attend the council meeting due to healthcare treatment in LA. I am also serving as the organizing chair of Waldport Arts Group.

The Waldport Arts Group (WAG) proposes to take on the entire project of painting and maintaining a public art project, which will consist of a large, solid bar of color. The colored bar will be separated by an equal-sized bar of untreated, natural asphalt. Then a differing color bar, followed by untreated bar. This will continue until the entire crosswalk is finished.

Greg Holland polled the 71 members of the Waldport Arts Group for their vote to move forward or oppose the project. The voting members unanimously favored making the Crosswalk Project its initial undertaking in the City of Waldport. Many more will follow if we see city support.

Greg would ask that the Waldport City Council find that there is a consensus of the council to move forward with the project and ask the City Manager to work with ODOT to obtain the permits necessary for the project.

Some have inferred problems with the rainbow colors, due to the rainbow flag use by the LGTBQ community. The original flag designer had no idea that this would be usurped by the gay community.

The colors have strong meanings: pink is for sex, red is for life, orange is for health, yellow is for sun, green is for nature, turquoise blue is for art, indigo is for harmony and violet is for spirit.

The rainbow stands for hope. It stands for the diversity of the universe and yet, how we all can come together. I

I would ask that the Council not fall into the "gay flag" opposition. We don't have problems with uses of red, white and blue due to the US Flag. Different shades of the colors can be used if it really becomes an issue. The crosswalks of Waldport will not only be safer for those entering the crosswalk, it will beautify the street(s) selected for the project.

WAG is counting on your support for the project. Please don't upset a bunch of art lovers.

Please help find a consensus to ask the City Manager to move forward on this project. Thank you.

CITY COUNCIL MEETING – January 12, 2017

CITY MANAGER REPORT

1. Councilor Training

"Elected Essentials" is a training for new and experienced elected officials. This League of Oregon Cities training is open exclusively to elected city officials and is free as part of membership in the League.

Dates/Locations somewhat near us:

- January 12 - Cannon Beach
Cannon Beach Chamber of Commerce Community Hall
207 North Spruce Street, Cannon Beach, OR 97110
- January 25 - Lebanon
Best Western Premier Boulder Falls Inn & Conference Center
505 Mullins Drive, Lebanon, OR 97355
- January 26 - Coquille
Community Center
115 North Birch St., Coquille, OR 97423

Links for information and to register: <http://www.orcities.org/Training/ElectedEssentials2017>

<http://www.orcities.org/Training/ElectedEssentials2017/ElectedEssentials2017Registration/tabid/6771/language/en-US/Default.aspx>

Link to City Handbook: <http://www.orcities.org/Portals/17/CityResources/LOCCityHandbook.pdf>

2. Marijuana Update

Attached is an overview of the tax program, prepared by the Oregon Department of Revenue.

DOR expects to begin administration of local tax agreements on January 1, 2017. DOR estimates that the local three percent tax for the first quarter will be distributed in June. The state's tax is estimated to be in the range of \$30-\$35 million, with roughly \$4 million going to cities. OLCC borrowed startup funds for administration of the recreational program, which has a two-year timeframe through the end of the fiscal year, so the first allocation of state tax revenues is anticipated to be August, 2017.

According to the Oregon Liquor Control Commission, of the three locations within the City, OLCC has licensed Serene Highness and Waldport Cannabis as recreational outlets.

3. Oregon Tsunami Conference

I presented at the Oregon Tsunami Conference in Florence on December 8th with Derrick Tokos, Newport Community Development Director, on Community Tsunami Mitigation. My focus was on the former high school site/open space project and its potential reuse. The conference was well attended, with probably close to 200 attendees over the two-day period. Much of the focus was on the Cascadia earthquake and resulting tsunami, with additional focus on preparedness before and after. There wasn't much discussion on recovery of public infrastructure over time, as well as dealing with the aftermath.

One of the interesting tidbits of knowledge gained is the snappy “2-2-2-2” planning preparation. Prepare yourselves for the first two minutes, then two hours, then two days, then two weeks. On a citywide response and recovery level, I would also add two months and two years, making it “2-2-2-2-2-2.”

Slide shows from the various presenters may be found at:

<https://drive.google.com/drive/folders/OB93BpYE6ggDbV19KcOV6UIFzZGs>

4. ***“Fish, Flood Insurance and FEMA”***

FEMA consulted with National Marine Fisheries Service (“NMFS”) as part of a law suit settlement under the Endangered Species Act, resulting in an opinion that recommends significant changes to the management and regulation of the National Flood Insurance Program (“NFIP”), potentially exceeding FEMA’s authority to administer the NFIP. Attached are several documents for your reading pleasure, in chronological order:

1. FEMA letter dated June 13, 2016 (sans attachments)
2. State of Oregon Response dated June 17, 2016
3. State of Oregon DLCDC Paper
4. LOC Article from Local Focus (October 2016)
5. Email string and Letters re: Coalition Challenge

The LOC is actively engaged in this matter, and staff will be working with LOC and other cities or the County, and notifying the City Council as the need arises, either for information or action.

Marijuana Tax Program – Quick Facts



We've put together some general information about Oregon's recreational marijuana taxes to help guide your discussions with retailers in your municipality. If you need additional information, feel free to contact us at (503) 947-2597.

An overview of Oregon's recreational marijuana taxes

- The state tax rate is 17 percent.
- Municipalities can enact an additional tax of up to 3 percent with the approval of voters.
- Only retailers licensed by the Oregon Liquor Control Commission (OLCC) can sell recreational marijuana.
- Our rules require monthly payments. Payments are due on the last day of each month for retail sales from the previous month. For example, the tax for January's sales is due by February 28.
- Payments are accepted by check, money order, cashier's check, bank account transfer, credit or debit card, or cash. Cash payments are by appointment only at the Revenue building in Salem only.
- Taxpayers can keep 2 percent of the state tax to cover their administrative costs.
- Returns are due on the last day of the month following the quarter's end (January 31, April 30, July 31, October 31).
- Returns are only accepted electronically through Revenue Online at www.oregon.gov/dor.

Information on municipality taxes and payments

Confidential taxpayer information

The tax information we provide to you is confidential and should be treated as such if disclosed to the public (ORS 475B.755 and ORS 314.815). Municipalities with a small number of taxpayers should take precautions to ensure that tax information is not inadvertently disclosed. This can happen in situations such as reporting marijuana tax receipts in combination with other sources of revenue. With a small taxpayer group, details from marijuana tax receipts can provide enough information to allow identification of specific taxpayers.

Filing and paying for taxpayers

For taxpayers located in areas where we're administering the local tax, state and local taxes will be fully integrated. They will make a single payment each month and file a single return each quarter. Based on the information on the return, we will determine the appropriate split between the Oregon Marijuana Account (state taxes) and your municipality. The goal, first and foremost, is to make the process easy for the taxpayer to navigate.

Payments to municipalities

We'll make payments to municipalities once per quarter. We won't include funds in payments unless there's a return associated with those funds for us to validate the details of their payment. Once a return is delinquent (past its due date), we'll prepare an estimated return as described in ORS 314.400. The estimated return will then allow us to release your portion of the funds.

Local ordinances

Local marijuana tax ordinances often require modification so we can handle local marijuana taxes the way we handles other taxes. This usually requires that the ordinance cite ORS 475B.700 to ORS 475B.760. The League of Oregon Cities has prepared model ordinance language, which is available [on their website](#). In the absence of this or similar language, we can administer the agreement, but won't be able to charge delinquent filers with penalty and interest on the local tax portion.

Quick reference chart

Questions about...	Refer them to...	Contact information
<p>Filing returns Tax payment options Revenue reporting and distributions State tax deductions Payroll taxes and employee withholding</p>	<p>Department of Revenue, Marijuana Tax Program</p>	<p>General information: (503) 947-2597 Payment appointments: (503) 945-8050 www.oregon.gov/dor/marijuana_marijuanatax.dor@oregon.gov</p>
<p>Medical Marijuana Cardholder Registry (patients, caregivers, and growers) Medical Marijuana Registration (growers, processors, and dispensaries) Inventory reporting Registered location enforcement Product testing Concentration limits Labeling Youth Prevention</p>	<p>Oregon Health Authority</p>	<p>(971) 673-1234 www.healthoregon.org/ommp</p>
<p>Industry licensing Cannabis Tracking System Marijuana worker permits Enforcement of licensed locations Packaging What's legal? Minor in possession decoy operations</p>	<p>Oregon Liquor Control Commission, Recreational Marijuana Licensing</p>	<p>(503) 872-5000 marijuana@oregon.gov www.marijuana.oregon.gov</p>
<p>Pesticides Weights and measures Food safety</p>	<p>Oregon Department of Agriculture</p>	<p>(503) 986-4550 bit.do/CannabisODA</p>

Agricultural water quality Industrial hemp		
Nuisance complaints DUII/field sobriety tests Enforcement of unlicensed locations	Local law enforcement and Oregon State Police	



FEMA

June 13, 2016

Honorable Mayor Susan Woodruff
PO Box 1120
Waldport, OR 97394

Dear Honorable Mayor Woodruff,

In 2009, the U.S. Department of Homeland Security's Federal Emergency Management Agency (FEMA) was sued by the Audubon Society of Portland, the National Wildlife Federation, the Northwest Environmental Defense Center, and the Association of Northwest Steelheaders for failure to consult under Section 7 of the Endangered Species Act (ESA) with respect to the effects of the implementation of the National Flood Insurance Program (NFIP) on certain ESA-listed species in the state of Oregon. On July 12, 2010, the United States District Court, District of Oregon at Salem, required FEMA to consult with the National Marine Fisheries Service (NMFS) on impacts the NFIP was having on ESA listed species. FEMA complied by submitting a Biological Assessment in July of 2011 to NMFS, which concluded the NFIP may affect, but does not adversely affect, the ESA-listed species considered in the assessment.

On April 14, 2016, NMFS provided a Biological Opinion in which they concluded that the implementation of the NFIP in Oregon jeopardizes the continued existence of 18 ESA listed species and adversely modifies their critical habitat. Federal agencies are prohibited by the ESA from causing jeopardy to ESA-listed species or adversely modifying the designated critical habitat of such species. Although the NMFS Biological Opinion's determination is written for FEMA, the Endangered Species Act (ESA) applies to everyone, whether a federal agency, state agency, local jurisdiction, or individual. We all have a legal responsibility to ensure our actions do not cause a take (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct) to threatened or endangered species. Under Section 9 of the ESA, actions or decisions enacted by you and your officials are subject to this take prohibition regardless of federal involvement. Additionally, any person can be subject to criminal or civil penalties for causing a take of threatened or endangered species. NMFS considers the issuance of floodplain development permits that do not avoid or compensate for detrimental impacts on ESA-listed species or their critical habitat as noncompliant with the Endangered Species Act. NMFS identifies certain private floodplain development activities as harmful to listed species, including the addition of fill, structures, levees and dikes, the addition of impervious surfaces, removal of vegetation, and bank armoring. NMFS has determined that these activities impair natural floodplain functions and thereby negatively impact the survival and recovery of ESA-listed species.

With a jeopardy determination, NMFS is obligated to provide a Reasonable and Prudent Alternative (RPA), which are program changes to the NFIP that will allow the program to be implemented in a manner that avoids jeopardy to ESA-listed species and adverse modification

of their critical habitat. For details on these program changes, please see the RPA attached to this letter or the complete NMFS Biological Opinion at <http://www.westcoast.fisheries.noaa.gov/habitat/conservation/index.html>.

As envisioned by NMFS, the RPA is intended to be implemented in stages, with two different sets of program changes that will need to be implemented by FEMA and the NFIP participating communities. The first set of program changes are interim measures found in Element 2 of the RPA, which must be implemented within 2 years of the issuance of the Biological Opinion (April 14, 2018). These measures will remain in place until FEMA and the participating communities implement the second set of program changes (Elements 3-6 of the RPA), which are the permanent program changes to the NFIP required by the RPA. NMFS requires the interim measures in Element 2 to be superseded by the permanent floodplain management criteria in RPA Element 4 that do not require regulatory revisions (such as revising the Code of Federal Regulations) by January 1, 2019. All elements of the RPA that do not necessitate regulatory revisions are to be implemented by September 15, 2019 and complete implementation, including regulatory revisions, is required to occur by January 1, 2021.

The NMFS Biological Opinion authorizes a certain amount of jeopardy or adverse modification to ESA-listed species or their habitat during the time necessary for FEMA and participating NFIP communities to implement the complete RPA. During this interim time and until all permanent RPA elements are in place, your community may either choose to voluntarily impose a temporary moratorium on all floodplain development that adversely impacts ESA listed species or their habitat, or voluntarily implement the interim measures found in RPA Element 2. Oregon DLCDD and FEMA will develop guidance to help your community implement these interim requirements.

FEMA and Oregon DLCDD will be inviting you and other interested stakeholders to participate in workgroups to identify options and methods that communities can implement, with respect to the RPA. These implementation options may include guidance, training, and technical assistance. One example is the development of a model ordinance that would meet FEMA's minimum criteria while also incorporating the requirements of the RPA. Once this model ordinance is finalized, it will be shared with all interested communities.

The RPA comprises six elements or sections, and a full copy of the RPA is provided as an attachment to this letter. Element 1 involves notice, education, and outreach regarding the outcome of FEMA's consultation with NMFS on the implementation of the NFIP in Oregon. This letter is part of that requirement for FEMA to provide Notice of the Biological Opinion and RPA. RPA Element 1 encourages communities to send data or information on locally identified flood-related hazards due to erosion or inundation, including anticipated flooding patterns influenced by build-out, climate change or sea level rise, which are not currently reflected on effective Flood Insurance Rates maps (FIRMs) to the FEMA Region X office by August 12, 2016. In addition, the RPA recommends that substantially improved and new structures (as defined in the RPA) placed in the Special Flood Hazard Area should be elevated by methods other than fill, and that proponents of projects that involve adding fill exceeding 50 cubic yards should pursue CLOMR-Fs prior to LOMR-Fs to ensure ESA compliance is obtained prior to undertaking floodplain development. This element also requires FEMA to

provide guidance to communities regarding elevating structures in a manner that minimizes the adverse effects to natural floodplain functions. For information on elevating structures, please see the attached Frequently Asked Question document - Elevating Structures Without Fill.

In Element 2 of the RPA, NMFS has laid out a set of Interim Measures expected to be implemented within 2 years and requires that all development in the SFHA be mitigated to achieve no net loss of natural floodplain functions. Element 2 includes requirements for mitigation ratios, impervious surfaces, stormwater, floodplain management standards, riparian buffers, LOMCs and CLOMCs, and floodplain development permit reporting. FEMA will be working to provide you with guidance regarding how to achieve the requirements listed in RPA Element 2.

Additionally, to help minimize the time and effort imposed upon your staff resulting from the floodplain development permit reporting requirement, FEMA intends to use a Microsoft Excel based reporting tool that will be sent to each community to track all new development occurring in floodplains. Once the interim RPA requirements are in place, if communities issue floodplain development permits without reporting said development or without mitigating for adverse effects on ESA listed species or their habitat, FEMA will be required, in coordination with NMFS acting under their own authority, to initiate appropriate enforcement action.

Element 3 requires use of revised mapping protocols and methodologies for the stated purpose of improving the identification of special hazard areas. The RPA also requires several additions to the Flood Insurance Rate Maps, including the future conditions floodplain, erosion zones, and channel migration zones.

Element 4 requires revisions to the floodplain management criteria to, among other things:

- Include a generally applicable ESA performance standard;
- Prohibit almost all development in an area known as the High Hazard Area (floodway, V-Zone, LiMWA, erosion zone);
- Prohibit re-drawing of the floodway to accommodate floodplain development;
- Require a 60 year erosion setback area with very limited uses (agricultural, open space, temporary structures); and
- Significantly restrict subdivisions of lots.

Element 4 also requires extensive compensatory mitigation requirements in the areas where floodplain development is not otherwise prohibited. FEMA will be working to provide you with guidance regarding how to achieve the requirements listed in RPA Element 4.

Element 5 requires data collection and describes reporting requirements needed to accurately track floodplain development impacts and RPA implementation. Element 6 speaks to compliance and enforcement requirements of the RPA and the associated timelines for compliance.

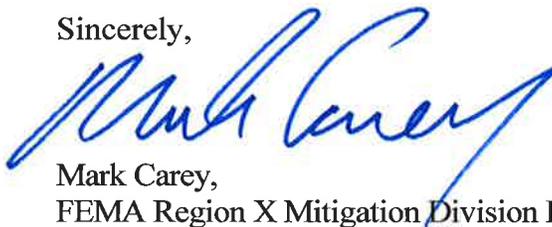
FEMA recognizes that many of you have already been implementing measures that compensate/mitigate floodplain development actions affecting ESA-listed species and their habitat. However, for others, these requirements may pose an additional workload on your

June 13, 2016

Page 4

community. We will work diligently with you, State resource agencies, and NMFS to offer guidance and resources that will help facilitate this transition. We will keep you advised and look forward to working with interested stakeholders to develop our strategy for implementation. If you have any questions, please email FEMA-R10-ESACOMMENTS@fema.dhs.gov or contact Scott Van Hoff, Senior NFIP-ESA Specialist at 425-487- 4677.

Sincerely,



Mark Carey,
FEMA Region X Mitigation Division Director

cc: FPA
State NFIP Coordinator
Kim Kratz, NMFS

Attachments: Oregon NFIP Reasonable and Prudent Alternative (RPA)
FAQ- Elevating Without Fill

SVH: jg



KATE BROWN
Governor

June 17, 2016

W. Craig Fugate
Administrator
U.S. Department of Homeland Security/FEMA
500 C Street, SW
Washington D.C. 20472

Subject: Response to Federal Emergency Management Agency (FEMA) June 13, 2016, notice to local governments regarding FEMA's implementation of the Reasonable and Prudent Alternative arising from National Marine Fisheries Service (NMFS) Biological Opinion

Dear Mr. Fugate:

On June 15, 2016, FEMA forwarded to the Department of Land Conservation and Development (DLCD) a copy of FEMA's June 13, 2016, letter to National Flood Insurance Program (NFIP) communities in Oregon. The letter is required by the NMFS Biological Opinion and Reasonable and Prudent Alternative (RPA) to provide notice of the outcome of the Endangered Species Act (ESA) consultation between FEMA and NMFS.

The State was taken aback by the letter's poor attempt to communicate with local governments on what is required of them at this time, and what is not required. I request that FEMA avoid undue burdens and premature punitive actions on local governments and Oregon communities by providing clear information to local governments and greater procedural input into the guidelines and standards to be developed by FEMA over the course of the coming years.

I was also disappointed in the tone of the letter and its inconsistent, confusing and erroneous messages. For example, I am deeply concerned that the letter implies local governments are required to take actions in direct response to the RPA. The RPA does not apply directly to NFIP communities. The RPA states that "... the locus of accountability for these ESA duties rests upon FEMA." The letter also inappropriately threatens enforcement actions before FEMA has even developed an implementation plan.

The letter indicates an alarming abdication of FEMA's responsibilities as the implementing agency for the NFIP. FEMA determines how to interpret and implement the RPA. Oregon expects the federal government to be a partner with the State, local and tribal governments in implementing federal programs. I call on FEMA to work closely with local communities, tribal



W. Craig Fugate
June 17, 2016
Page Two

governments, state agencies and stakeholders in FEMA's development of standards and guidelines that protect endangered salmon and steelhead, and the economic vitality of our communities.

The Department of Land Conservation and Development has scheduled several meetings around the State at FEMA's request. FEMA Region X previously indicated the intent of these meetings is to gather local community input to inform FEMA's development of an RPA implementation plan. It is critical that FEMA engage local communities, tribal governments and the State to inform FEMA's implementation of the RPA.

Oregon will continue to advocate strongly for local communities, and for actions that benefit healthy salmon and steelhead habitat consistent with Oregon's land use program. Oregon looks forward to working with FEMA on a collaborative process to ensure that revised floodplain management standards meet multiple social, economic and environmental needs.

Sincerely,



Governor Kate Brown

KB:ja

cc:

Roy Wright, Associate Administrator
Michael Grimm, Assistant Administrator Mitigation
Kenneth Murphy, Region X Administrator
Will Stelle, NOAA West Coast Regional Administrator
Mark Carey, FEMA Region X Mitigation Division Director
Kim Kratz, National Marine Fisheries Service
Oregon Congressional Delegation
Senate President Peter Courtney
House Speaker Tina Kotek
Senate Republican Leader Ted Ferrioli
House Republican Leader Mike McLane
Richard Whitman, Natural Resource Policy Director
Jim Rue, Department of Land Conservation and Development
Mike McArthur, Association of Oregon Counties
Mike McCauley, League of Oregon Cities



Oregon

Kate Brown, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

Fax: (503) 378-5518

www.oregon.gov/LCD



Oregon Seeks Common-Sense Approach to New Floodplain Development Expectations

**New Guidelines Should Support Healthy Salmon and Steelhead Populations,
Promote Resilient Communities, and Advance the Goals of
Oregon's Land Use Program.**

Managing development in flood prone areas protects people, property, and communities, and protects fish and wildlife habitat. This will become even more important as Oregon faces extreme weather events and other challenges that a changing climate brings.

On April 14th, 2016 the National Marine Fisheries Service (NMFS) delivered a Biological Opinion (BiOp) to the Federal Emergency Management Agency (FEMA). Based on the BiOp, FEMA will be setting new minimum requirements for local floodplain development ordinances based on federal requirements to protect endangered species. These changes will be incorporated into the National Flood Insurance Program (NFIP).

The federal NFIP provides flood insurance for homeowners and property owners generally. In Oregon, 260 cities and counties and three Indian tribes¹ participate in the NFIP.

The NFIP is administered by FEMA, which sets standards for local governments that participate in the NFIP, including requirements for local floodplain development regulations. DLCD assists local governments with implementation of those regulations.

How will the state assist local communities?

The state has a strong interest in how FEMA implements the NFIP. Oregon is working with FEMA to identify a common-sense approach to new floodplain development expectations, ones that support healthy salmon and steelhead populations, promote resilient communities, and advance the goals of Oregon's land use program.

Our activities will include:

- Workshops and presentations
- Guidance
- Model local ordinances
- Grants
- Technical assistance

For more information from the Department of Land Conservation and Development, please contact [Amanda Punton](#), Natural Resource Specialist, at (971) 673-0961 or [Chris Shirley](#), NFIP Coordinator, at (503) 934-0027.

For more information from the Federal Emergency Management Agency, please contact [John Graves](#), at (425) 487-4737.

¹ http://www.fema.gov/media-library-data/20130726-1915-25045-9744/or_nfip_pba_final_version_march_2013.txt

Fish, Flood Insurance and FEMA: The Future of Development in the Floodplain

By Erin Doyle, LOC Intergovernmental Relations Associate

Most communities in Oregon participate in the National Flood Insurance Program (NFIP) in order to allow residents, businesses and developers to find affordable flood insurance for structures that are at risk of flood. The NFIP is run through the Federal Emergency Management Agency (FEMA) and its jurisdiction is limited by federal law. In 2008, FEMA agreed to a consultation with the National Marine Fisheries Service NMFS under the Endangered Species Act (ESA) as part of a lawsuit settlement. The result of that consultation was a biological opinion (BiOp), which was released in April of this year.

The NMFS found that the NFIP has an impact that could either harm or harass a number of endangered salmon and other species, known as a "take" under the ESA. When the NMFS determines that a federal program could lead to a take, it must examine the federal agency's plan to prevent the take. If it believes the agency's plan is insufficient, it must provide a "reasonable prudent alternative" (RPA) that will prevent the impact to the species. In Oregon, the NMFS found that the NFIP does not prevent a take under the ESA and issued its RPA in April of this year. This BiOp recommends significant changes to the management and regulations of the NFIP in Oregon, and potentially exceeds the authority of the FEMA to implement the NFIP. The RPAs, however, must be measured

against the limited jurisdiction of FEMA in regulating floodplains and the activities within those areas where the agency has oversight. In reading the RPAs drafted by the NMFS, it appears that there are recommendations that will overstep FEMA's authority in running the NFIP. Moving forward, it will be necessary to insure that any efforts to implement the RPAs cannot exceed the current jurisdiction of the NFIP.

What the RPAs Say

The NMFS separated the RPA into six elements, and not all elements can be enacted at the same time. The six elements are:

1. Notice, Education and Outreach;
2. Interim Measures;
3. Mapping Flood and Flood-Related Hazard Areas;
4. Floodplain Management Criteria;
5. Data Collection and Reporting; and
6. Compliance and Enforcement.

NMFS anticipated that some of the elements of the RPAs will take longer to implement than others, and therefore FEMA has stated that it plans to implement each element on a separate timeline.

(continued on page 28)

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Element 1: Notice, Education and Outreach

Currently, FEMA has begun the process for outreach and education required under Element 1. This included the letter sent to impacted communities and meetings around the state to begin the discussion with local government leaders about FEMA's next steps and long-term response to the RPAs.

Moving forward, FEMA has stated an intention to work with interested persons in local government to determine how to implement the remaining elements. Moving forward, participation by city officials and staff is paramount to insuring that FEMA remains within its scope of authority and limiting the impact on cities.

Element 2: Interim Measures

The RPAs assume that FEMA will undertake significant rule-making to accomplish the final recommendations of NMFS, and therefore Element 2 recommends interim measures to guide development within the floodplain. The interim measures are strict requirements aimed at maintaining habitat features and functions within the floodplain through mitigation, restriction and replacement. The RPAs provide standards for replacement of lost trees within areas designated as floodways, channel migrations zones or a riparian buffer zone. These zones are new designations that FEMA is required to identify and map for local communities.

Other restrictions in Element 2 require limitations on fill permits to inhibit the use of fill as a mitigation technique for new development. The RPAs direct FEMA to determine if fill will impact the natural floodplain function before allowing a developer to use fill to lift a site out of the floodplain. This could have significant impact to some development proposals, and if not implemented correctly could require local governments to bare the majority of the burden in enforcing these changes.

Element 3: Mapping Special Hazard Areas to Fully Identify Floodplain Resources

The next element requires FEMA to create new maps for all participating communities that are impacted by the BiOp. Currently, FEMA is undergoing a technical review of its mapping protocols, as the RPAs increase the details required in Oregon for floodplain maps. The NMFS is recommending the incorporation of several new protocols, zones and details on the maps provided by FEMA, including identification of future condition flood hazards. These new map elements should account for environmental changes—both built and natural—that will impact the likelihood of future flooding in new areas. These new protocols will also significantly increase the time and cost related to creating these maps. However, the NMFS also requires FEMA to schedule the completion of all maps in the impacted area, with a minimum of 10 maps finished per year. Given the challenges of getting updated maps from FEMA under current protocols, it is unclear the impact that more rigorous standards will have on the ability of local governments to participate in the process of map adoption.

Element 4: Floodplain Management Criteria for Special Hazard Areas that Avoid, Minimize and Mitigate Program Level Impacts

Element 4 is the largest substantive change to the NFIP recommended by NMFS, and therefore will take the most time to accomplish. Any new standards for regulating development within the floodplain in order to maintain eligibility in the NFIP would have to be adopted through a federal rulemaking process. The RPAs are highly technical, specific, and restrictive of development within areas of the floodplain. There is a high likelihood of significant impacts on city development plans related to these detailed changes to development within the floodplain, floodways and erosion zones.

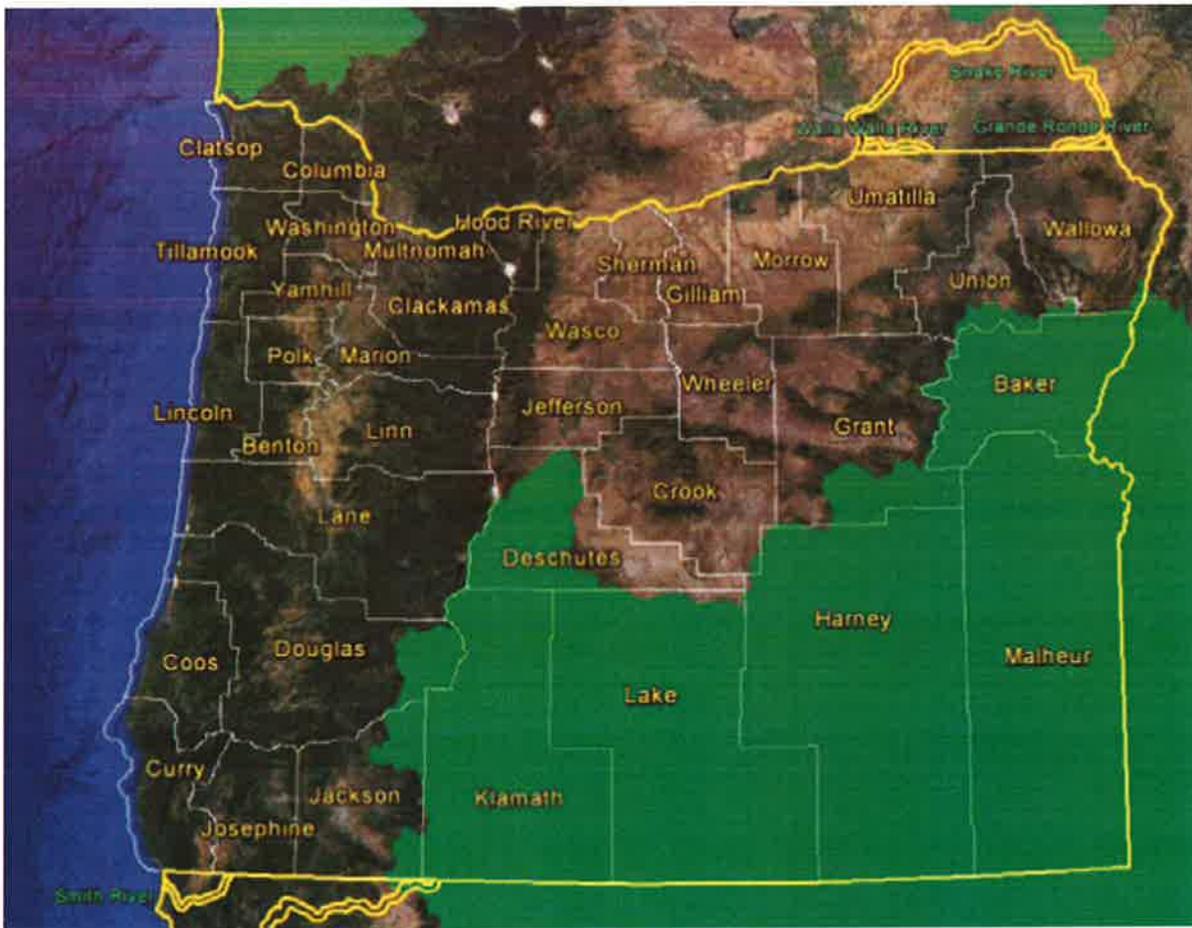
Element 5: Data Collection and Reporting

In order to track the amount of floodplain development that occurs, the RPAs include a reporting requirement. Element 5 clearly states that there is an expectation that FEMA will develop a permit reporting system in which local governments report each permit issued for development in the special hazard areas. The RPAs state that the reporting system should not require more than 10 minutes per permit to submit. FEMA will then provide an annual report on local government's adoption of ordinances (to be reviewed by NMFS), as well as extensive reports related to the development projects completed in participating communities. Given the detailed

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The State of Oregon portion of the action area. The yellow outline indicates the action area, including major main-stem rivers located downstream. The green field indicates areas without ESA-listed species under NMFS jurisdiction.

information that FEMA is expected to report, it is clear that local governments will be providing a significant amount of information to FEMA as part of this process.

Element 6: Compliance and Enforcement

Currently, when a community that participates in the NFIP fails to comply with the program requirement, FEMA's recourse is to first warn of the failure to comply and then work with the community to bring them into compliance. If the community fails to comply with the NFIP requirements, the community is removed from the program and property owners cannot obtain flood insurance through the NFIP. NMFS recommends that FEMA implement the same enforcement mechanism for failing to meet the new requirements established by FEMA in response to the RPAs.

Next Steps

The League is working to respond to all of these RPAs at the regulatory and legislative levels. The RPAs assume that FEMA has the ability to enact each of the elements. However, FEMA has provided an opportunity for local governments and other interested parties to participate in the crafting of the final changes to the NFIP in Oregon. As that process moves forward, there is a need to keep the state's federal delegation aware of the significant impacts that this BiOp will have on the local land use process, community decision-making, and economic development of cities statewide. FEMA cannot enact rules that exceed the authority granted to them www.orcities.org

by Congress, and the League will work to ensure that this is closely watched so that the NFIP does not expand beyond its current purview.

Moreover, if some of these changes significantly impact the ability to develop lands that cities have designated in their comprehensive plans for development, changes must be made in the state land use system to allow cities to address these mandatory changes to their development expectations. Oregon's land use system is the proper mechanism for cities to create long-term development plans that balance the function of the floodplain to prevent flood damage with the need for areas to develop.

Proper limitations on floodplain development can mitigate against the loss of life and property if flooding occurs, and many of Oregon's cities take advantage of the natural resource that waterways provide for recreation, green space and other non-development purposes. However it is the cities making these decisions with knowledge of the local needs and impacts. Communities that participate in the NFIP work hard to make flood insurance available to land owners to ensure the land within city limits and urban growth boundaries can be developed. The League will work to prevent this biological opinion from putting cities in the position of having to opt out of the NFIP as the only means of allowing development to move forward. In addition, LOC will work to keep cities informed of significant changes moving forward. ■

Kerry Kemp

From: Erin Doyle <edoyle@orcities.org>
Sent: Thursday, December 22, 2016 4:20 PM
To: Kerry Kemp
Cc: Tracy Rutten; Sean O'Day
Subject: RE: Coalition's Challenge to the Biological Opinion regarding Implementation of the NFIP in Oregon

Follow Up Flag: Follow up
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Kerry:

I am the staff person who is the primary contact on the FEMA biological opinion policy for the League. Sean forwarded this email to me so that I could respond. We are definitely watching this issue and have been trying to keep cities informed. There has been a lot of starting and stopping to keep track of as there is a disconnect between the federal agencies that are involved. In addition, much of FEMA's work and outreach is being done through DLCD which is also working out how this will impact the state land use policies that already strictly govern development patterns across the state. The League is engaging with the coalition that sent the letter you received, but the coalition wanted to reach out directly to cities while the League is evaluating all of the means to address our concerns. This may include legislative work at the federal level as well as the challenge the coalition is looking at. We are also working with the county association as their governments participate in the NFIP as well. Below I have specifically addressed your questions if more information is available.

1) Is LOC evaluating this matter, and will there be a communication to cities of its potential ramifications, or options for proceeding?

We are evaluating all of the options for the League's work on this issue, including working with the Oregon federal delegation to address this issue through potential legislation or clarification of the limits to FEMA's authority. As we do this and as we have learned more from the agencies involved, we have put stories in the weekly electronic Bulletin. We also provided a summary of the reasonable prudent alternatives in our monthly magazine, Local Focus, in October (<http://www.orcities.org/Portals/17/Publications/localfocus/OctLF2016web.pdf> starting on page 27). As we continue to evaluate information, we will continue to communicate information through our Bulletin and Local Focus pages. DLCD is also maintaining a page that has information from the federal agencies involved: http://www.oregon.gov/LCD/pages/nfip_biop.aspx.

2) Should there be, or will there be, an advocacy effort that will allow Oregon cities to have a unified voice on this matter? I'd like to be able to inform the City Council of impacts, and any options moving forward. I think speaking in unison with other effected cities – according to the email below, 200 agencies in NFIP – would make a stronger impact on the federal agencies than being lone voices barking from the wilderness, so to speak.

The League has always supported a unified voice as the most powerful tool that cities can have in effecting legislative work. We also know that our role is to advocate both in Congress and in court as that unified voice. Because 2017 will include the reauthorization of the flood insurance program at the federal level, we are working strategically with the Oregon delegation to determine the best course of action moving forward. In addition we are communicating with DLCD to express our ongoing concerns about the impact that any recommendations will have on city's ability to properly plan and develop lands within the UGB or the need to find new land outside the UGB if any restrictions are put in place through the NFIP requirements for participation. FEMA is currently evaluating its authority, the opinion, and how they will be responsible for any development that may impact any endangered species. They have not provided much

guidance or clue as to how they will address the recommendations of the NMFS but I have expressed our ongoing concerns about potential burden shifting in my conversations with them. As this work moves forward, will provide as much advise and information to our cities as we can to ensure that all cities are able to join together to move the discussion to better meet city needs.

I am happy to discuss this issue further with you if you would like. I will be back in the office next Tuesday and am happy to chat on the phone any time. Or, feel free to send me an email anytime.

Thanks,
Erin



Erin Doyle, Intergovernmental Relations Associate

edoyle@orcities.org

(503) 588-6550 | (503) 540-6574 direct | (503) 941-8934 cell

From: Kerry Kemp [<mailto:kerry.kemp@waldport.org>]

Sent: Thursday, December 22, 2016 10:25 AM

To: Sean O'Day <soday@orcities.org>

Subject: FW: Coalition's Challenge to the Biological Opinion regarding Implementation of the NFIP in Oregon

Greetings Sean,

The message below was forwarded to me by Mayor Susan Woodruff. Waldport, as well as other coastal cities in Lincoln County, received the letter dated June 13, 2016, from FEMA. At this point we have taken no action as a City, but staff has been monitoring the situation, and we've briefly discussed it several months ago with local colleagues.

The two letters that come up when clicking on the links below were sent by this coalition to FEMA, US Dept. of Commerce, and NOAA Fisheries. Mike McCarthy was copied on each letter, so they may have ended up with you (if someone else please refer me to that person – thank you). My questions are these: 1) Is LOC evaluating this matter, and will there be a communication to cities of its potential ramifications, or options for proceeding? 2) Should there be, or will there be, an advocacy effort that will allow Oregon cities to have a unified voice on this matter? I'd like to be able to inform the City Council of impacts, and any options moving forward. I think speaking in unison with other effected cities – according the the email below, 200 agencies in NFIP – would make a stronger impact on the federal agencies than being lone voices barking from the wilderness, so to speak.

I appreciate your thoughts on this matter, maybe some direction. Please feel free to email or call. Thank you.

Regards,

Kerry Kemp
City Manager
City of Waldport
PO Box 1120

Waldport, OR 97394
541.264.7417, x111
541.264.7418 (fax)
www.waldport.org

Begin forwarded message:

From: "Molly Lawrence" <mol@vnf.com>
Subject: Coalition's Challenge to the Biological Opinion regarding Implementation of the NFIP in Oregon
Date: December 15, 2016 at 1:55:42 PM PST
To: "" <suewoodruff@peak.org>
Reply-To: mol@vnf.com



December 15, 2016

Dear Mayor Woodruff,

I am writing on behalf of the Oregon Home Builders Association, the Oregon Association of Realtors, BOMA Oregon, the Association of Oregon Industries, the Oregon Farm Bureau, and the Oregon Concrete and Aggregate Producers Association (collectively, the "Coalition"). The Coalition is concerned by the efforts of the Federal Emergency Management Agency ("FEMA") and the National Marine Fisheries Service ("NMFS") to force local jurisdictions participating in the National Flood Insurance Program ("NFIP") to apply more restrictive regulations to areas mapped as floodplains. The Coalition wants to ensure that you are aware of its plans to halt these efforts before they unnecessarily restrict development and up-end years of land use planning in Oregon.

Background

On April 14, 2016, NMFS issued FEMA a Biological Opinion concluding that FEMA's implementation of the NFIP in Oregon violated the Endangered Species Act ("ESA") by allowing and encouraging floodplain development that jeopardizes the continued existence of 16 ESA-listed anadromous fish species and Southern Resident killer whales, and results in the destruction or adverse modification of critical habitat for the fish species ("Oregon BiOp"). Based on that conclusion, NMFS directed FEMA to change its floodplain mapping protocols and minimum floodplain regulatory criteria and to enforce these new standards against local governments in Oregon. In particular, NMFS directed

FEMA to expand its mapped floodplains, including mapping entirely new areas that have never previously been considered part of the floodplain, and to prohibit nearly all development in these areas (except open space, low intensity recreational activities, habitat restoration projects, and very limited water dependent uses). In all other floodplain areas, NMFS directed FEMA to prohibit all development unless it will have no adverse effect or a net beneficial effect on floodplain habitat for ESA-listed anadromous fish species.

In response to the BiOp, FEMA sent a letter on June 13, 2016, to more than 200 NFIP-participating jurisdictions in Oregon explaining the Oregon BiOp and NMFS's recommended program changes. Unfortunately, FEMA's letter confuses FEMA's Section 7 obligation under the ESA with local jurisdictions' Section 9 obligations under the ESA, purporting to shift FEMA's ESA burden to Oregon communities and ultimately Oregon land owners. Although FEMA has not expressly stated that it will require each jurisdiction to comply with the Oregon BiOp's recommendations to maintain eligibility to participate in the NFIP, FEMA's letter signals that intention moving forward.

NMFS set a preliminary "deadline" of March 15, 2018, for local jurisdictions to adopt the first round of regulatory changes, known in the Oregon BiOp as "Interim Measures." For the past several months, Oregon's Department of Land Conservation and Development ("DLCD") has been working with FEMA and NMFS to develop model provisions and guidance to implement the Interim Measures. The Interim Measures amount to "one size fits all" restrictions aimed at halting all development within the floodplain without reference to the actual effects of the development on listed species or their habitat, existing conditions, or existing regulations and programs that already protect endangered species and their habitat in Oregon.

Coalition Response

The Coalition formed for the purpose of invalidating the Oregon BiOp and halting FEMA's efforts to force local jurisdictions to implement the BiOp's recommendation. Last month, the Coalition sent the letters to FEMA and NMFS (see links below) outlining its plans to challenge the Oregon BiOp and any effort by FEMA to implement its recommendations. We plan to proceed with litigation early next year unless FEMA and NMFS withdraw the Oregon BiOp and return to the drawing board regarding this consultation. In particular, the Coalition requested that FEMA and NMFS step back and provide the following:

- 1) A thorough evaluation of the scope of FEMA's authority under the NFIP to limit development in floodplains for reasons other than public safety;
- 2) A complete and accurate analysis of the effects of floodplain development caused by the NFIP on ESA-listed species in light of existing floodplain conditions and existing Oregon laws and regulations;

- 3) A thorough evaluation of how the Oregon BiOp's recommended changes relate to and impact existing Oregon laws and regulations, particularly local comprehensive planning; and
- 4) An open and complete public review process in which communities and the public are provided notice and an opportunity to weigh in before FEMA decides whether to adopt any of the recommendations from the Oregon BiOp or impose them on Oregon communities.

The Coalition understands that your jurisdiction has received FEMA's June 13, 2016, letter notifying you of the Oregon BiOp and FEMA's intent to begin implementation of its recommendations. The Coalition encourages you not to adopt changes to your local ordinances at least until FEMA and NMFS address the four issues outlined above. Furthermore, if you share the Coalition's concern about the potential effects of the needless and over-reaching changes imposed by the Interim Measures on your community, we invite you to join the Coalition in its challenge to the Oregon BiOp and FEMA's implementation efforts. It was never Congress' intent that the NFIP—an insurance program—become a conduit for the federalization of local land use. The Oregon BiOp fails to demonstrate why such regulation is necessary or appropriate. The Coalition is concerned that NMFS's singular focus on stopping all floodplain development comes at the expense of years of comprehensive land use planning in Oregon, and ignores both existing conditions and existing laws.

If you would like further information regarding the Coalition's challenge, please contact me at mol@vnf.com or 206-623-9372 or Jon Chandler at the Oregon Home Builders Association at jchandler@oregonhba.com or 503-602-8945.

Very truly yours,

Van Ness Feldman LLP



Molly Lawrence

cc: Jon Chandler, Oregon Home Builders Association
Jenny Pakula, Oregon Association of Realtors
Susan Steward, BOMA Oregon
Richard Angstrom, Oregon Concrete and Aggregate Producers
Association
David Dillon, Oregon Farm Bureau
Mike Freese, Association of Oregon Industries

[Click here for the Notice of Intent to NMFS.](#)

[Click here for the Notice of Intent to FEMA.](#)

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November 23, 2016

Kenneth Murphy
Regional Administrator
FEMA Region 10
130 228th Street SW
Bothell, WA 98021-8627

Re: Notice of Intent to Challenge FEMA's Implementation of the National Marine Fisheries Service's Biological Opinion for the Implementation of the National Flood Insurance Program in the State of Oregon

Dear Administrator Murphy:

We are a coalition of industry associations concerned about the unnecessary over-regulation of floodplain areas within the state of Oregon. The coalition currently includes the Oregon Home Builders Association, the Oregon Association of Realtors, BOMA Oregon, the Association of Oregon Industries, the Oregon Farm Bureau, and the Oregon Concrete and Aggregate Producers Associations (collectively, the "Coalition"). We have reviewed the *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) 'Not Likely to Adversely Affect' Determination for the Implementation of the National Flood Insurance Program in the State of Oregon* ("Oregon NFIP BiOp" or "BiOp") issued by the National Marine Fisheries Service ("NMFS"), together with the Federal Emergency Management Association's ("FEMA") 60-day notice letter to National Flood Insurance Program ("NFIP") participating communities regarding FEMA's plans to implement the Reasonable and Prudent Alternative ("RPA") set forth in the BiOp. We are writing to inform you of the Coalition's intention to commence a lawsuit challenging both the Oregon NFIP BiOp, as well as any efforts by FEMA to implement the BiOp's RPA. As explained further below, NMFS's analysis and conclusions as set forth in the BiOp are arbitrary and capricious and should be withdrawn. Further, FEMA lacks the authority at this time to enforce any element of the RPA against any local communities in Oregon.

Despite these errors and deficiencies, FEMA has indicated that it intends to implement at least the Interim Measures (RPA Element 2) from the BiOp. Before FEMA may make any changes to its implementation of the NFIP—whether those proposed by NMFS in the BiOp or alternatives proposed by FEMA in response to the BiOp—FEMA *must complete a public review process* wherein the affected jurisdictions and landowners are provided notice and the opportunity to participate in developing any changes to the NFIP. Quite simply, *hundreds* of local jurisdictions and *thousands* of property owners in Oregon will be affected and have the

right to participate and be heard on these fundamental issues. FEMA may not continue to subvert the public processes in considering such dramatic changes to the NFIP.

1. The Oregon NFIP BiOp is Arbitrary and Capricious and, Therefore, Must Be Withdrawn and Consultation Reinitiated.

The Coalition has prepared a letter to NMFS outlining our concerns with the analysis, conclusions and the RPA in the BiOp. *See attached.* As detailed therein, the BiOp is fatally flawed. It begins within an incomplete environmental baseline; fails to analyze the effects of the NFIP against an accurate, current environmental baseline; attributes the effects of all floodplain development over the past century to the NFIP; grossly overestimates the impacts of the NFIP on certain threatened and endangered species and their designated critical habitat in Oregon; and proposes an RPA that does not comply with the regulatory definition and goes far beyond what is necessary or appropriate to address any impacts of the NFIP. As a result, the BiOp and its RPA must be withdrawn and consultation reinitiated.

2. FEMA Lacks the Authority to Implement the Oregon NFIP BiOp's RPA.

Despite the various flaws in the Oregon NFIP BiOp, FEMA Region X's notice letter to NFIP participating jurisdictions states FEMA's intent to implement the RPA set forth in the BiOp, beginning with the Interim Measures set forth in RPA Element 2.¹ FEMA does not have legal authority under the National Flood Insurance Act ("NFIA") to implement each of the elements of the RPA. Even if FEMA did have the authority under the NFIA, FEMA has not yet gone through the requisite processes to enable it to implement or enforce any components of the BiOp's Interim Measures, much less the permanent NFIP changes proposed in RPA Elements 3 and 4.

A. FEMA's Authority Under the NFIA is Limited to Protecting People and Property from Flood Hazards.

FEMA itself has asserted repeatedly throughout this consultation that it lacks the legal authority to implement certain elements of the RPA.² That is because FEMA's authority under the NFIA is limited to protecting people and property from flood hazards and does not include protecting listed species or their habitat.³ Most recently during a hearing before the Committee on Transportation and Infrastructure in the U.S. House of Representatives, Michael Grimm, Assistant Administrator for Mitigation for FEMA, was asked whether FEMA has "the authority

¹ Letter from Mark Carey, Mitigation Division, Fed. Emergency Mgmt. Agency, Region X, to Oregon NFIP Participating Communities (June 13, 2016).

² *E.g.*, Letter from Roy E. Wright, Deputy Assoc. Adm'r for Mitigation, Fed. Ins. and Admin. Ass'n, to William Stelle, Regional Adm'r, Nat'l Marine Fisheries Serv. (May 29, 2014); Letter from Mark Carey, Mitigation Division, Fed. Emergency Mgmt. Agency, Region X, to Kim Kratz, Assistant Reg'l Adm'r, West Coast Region, Nat'l Marine Fisheries Serv. (Jan. 14, 2013); Letter from Mark Carey, Mitigation Division, Nat'l Marine Fisheries Serv., Region X, to Kim Kratz, Assistant Reg'l Adm'r, West Coast Region, Nat'l Marine Fisheries Serv. (June 3, 2015); Letter from Michael Grimm, Assistant Adm'r for Mitigation, Fed. Emergency Mgmt. Agency, to Kim Kratz, Assistant Reg'l Adm'r, West Coast Region, Nat'l Marine Fisheries Serv. (May 4, 2016).

³ 42 U.S.C. §§ 4001-4002; § 4102.

to regulate privately funded development on private land under the NFIP?” Mr. Grimm responded simply, “No.” FEMA has no ability or obligation to implement those provisions of the RPA for which it lacks legal authority.

B. FEMA Cannot Implement the RPA Without First Completing Administrative Procedures Act Rulemaking and National Environmental Policy Act Review.

Despite its lack of authority, FEMA Region X has stated that it intends to implement at least the Interim Measures (RPA Element 2) from the BiOp.⁴ As explained in its “Proposed Action,” FEMA intends to rely on a provision in its existing “Floodplain management criteria for flood-prone areas”, 44 C.F.R. § 60.3(a)(2), as the regulatory hook for enforcing these changes to the NFIP against local communities.⁵ The provision does not, however, provide FEMA the necessary authority to implement the Interim Measures. Instead, the provision requires only that local communities “[r]eview proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law, including section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1334.”⁶ As NMFS has explained to FEMA, there is no “necessary” ESA permit. Specifically, NMFS wrote in the BiOp:

A significant flaw in this aspect of FEMA’s proposed action is the reliance on local entities “complying with the ESA” prior to issuing a floodplain development permit.

While FEMA indicates that ESA section 10(a)(1)(B) permits are that vehicle, they misunderstand how that section of the ESA operates – ESA section 10 permits are not a required permit. The services’ regulations at 50 CFR 222.301 state “any person who desires to obtain permit privileges” for take incidental to an otherwise lawful activity must apply for that permit in accordance with applicable regulatory provisions. *In other words, section 10 permits are elective, not required, and therefore do not appear to fall within the purview of 44 CFR 60.3(a)(2).*⁷

⁴ See Letter from Mark Carey, Mitigation Division Director, Fed. Emergency Mgmt. Agency, Region X to Oregon NFIP Participating Communities (June 13, 2016).

⁵ Fed. Emergency Mgmt. Agency, Program Level Biological Assessment for National Floodplain Insurance Program, Oregon State, at 2-40-41 (Feb. 2013).. It is unclear how FEMA reconciles its two inconsistent positions: one, that the NFIA grants FEMA only authority to protect people and property from flood hazards; and two, that FEMA’s existing NFIP implementing regulations can be used as a vehicle to require local governments to demonstrate ESA compliance. If FEMA lacks the authority to change its implementation of the NFIP to protect listed species beyond the bounds of its obligation to protect people and property from flooding, FEMA’s implementing regulations cannot create that authority.

⁶ 44 C.F.R. § 60.3(a)(2) (Emphasis added.)

⁷ Nat’l Oceanic and Atmospheric Admin., Nat’l Marine Fisheries Serv., Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) “Not Likely to Adversely Affect” Determination for the Implementation of the National Flood Insurance Program in the State of Oregon, at 40 (Apr. 14, 2016) [hereinafter “BiOp”].

Moreover, FEMA's reliance on 44 C.F.R. § 60.3(a)(2) to support imposing ESA-based requirements on local jurisdictions amounts to a re-writing of that regulation without first going through the required notice and comment process. FEMA established the existing "Floodplain management criteria for flood-prone areas", 44 C.F.R. § 60.3, in 1976.⁸ In the 30 years prior to NMFS's issuing a biological opinion in Washington regarding the effects of the NFIP on threatened and endangered species and critical habitat in the Puget Sound ("Puget Sound NFIP BiOp")⁹, FEMA never asserted that 44 C.F.R. § 60.3(a)(2) required local communities to demand that project applicants produce an "ESA permit" before issuing a floodplain development permit. The re-interpretation of the NFIP regulations proposed by FEMA to implement the Interim Measures is a legislative rule in interpretive clothing that FEMA may not implement before going through the Administrative Procedure Act's ("APA") notice-and-comment rulemaking.¹⁰ Because FEMA has not yet done so, it may not rely on its reinterpretation of 44 C.F.R. § 60.3(a)(2) as authority to implement the Interim Measures.¹¹

Furthermore, FEMA must also complete review under the National Environmental Policy Act ("NEPA") before it may either reinterpret 44 C.F.R. § 60.3(a)(2) or implement any change to the NFIP in response to the Oregon NFIP BiOp.¹² The programmatic changes triggered by FEMA's de facto revision to 44 C.F.R. § 60.3(a)(2) or any implementation of the Interim Measures *will* significantly change FEMA's implementation of the NFIP in Oregon and *will* significantly affect the human environment.¹³ As a result, NEPA review is required. To date, however, FEMA has made no indication that it intends to complete any NEPA review prior to enforcing the Interim Measures against local jurisdictions.¹⁴ FEMA must identify what changes,

⁸ 41 Fed. Reg. 46975 (Oct. 26, 1976).

⁹ Nat'l Oceanic and Atmospheric Admin., Nat'l Marine Fisheries Serv., Endangered Species Act Section 7 Consultation Final Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the Implementation of the National Flood Insurance Program in the State of Washington, Phase One Document – Puget Sound Region (Sept. 22, 2008) [hereinafter "WA BiOp"].

¹⁰ *Appalachian Power Company v. U.S. Envtl. Prot. Agency*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (holding that the EPA violated the APA by attempting to avoid notice and comment rulemaking by "labeling a major substantive legal addition to a rule a mere interpretation"); *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166-68 (2012) (where agency announces a new interpretation of an existing regulation after years of silence and/or alternative interpretation, the new interpretation is not entitled to deference); *Alabama Educ. Ass'n v. Chao*, 539 F. Supp. 2d 378, 381 (D.C. Cir. 2008), *clarified on denial of reconsideration*, 595 F. Supp. 2d 93 (D.C. Cir. 2009) (agencies have discretion to interpret their own regulations; however, if an agency changes its interpretation, such an interpretation is not entitled to deference unless the change is accompanied by reasoned analysis).

¹¹ 5 U.S.C. § 553. FEMA would be required as part of any notice and comment rulemaking to identify the source of its statutory authority for any new regulation.

¹² 42 U.S.C. § 4332(2)(C); *San Luis & Delta-Mendoza Water Authority v. Jewell*, 747 F.3d 581, 640-41 (9th Cir. 2014). Notably, FEMA did complete NEPA review when it originally created the NFIP minimum floodplain development criteria. U.S. Dep't of Housing and Urban Dev., Fed. Ins. Admin., Office of Flood Ins., Final Environmental Impact Statement, Revised Floodplain Management Regulations of the National Flood Insurance Program (Sept. 1976). FEMA also has begun a Programmatic EIS regarding the NFIP, but there has been no apparent activity since May 2014. Docket ID: FEMA-2010-0065.

¹³ *Jewell*, 747 F.3d at 653.

¹⁴ FEMA, NMFS and the Oregon State Department of Conservation and Land Development ("DCLD") held a series of public open houses to explain the Oregon NFIP BiOp and Interim Measures, but provided no formal process for public participation—either through rulemaking or NEPA review—to weigh in regarding the proposed changes to the implementation of the NFIP. DCLD is currently hosting work groups to evaluate the Interim Measures, but those meetings are not FEMA meetings, they are not open to the public at large and they do not qualify as public comment opportunities.

if any, it is proposing to make to the NFIP in response to the BiOp and go through the required processes to adopt those changes before it may attempt to enforce any such change against any Oregon jurisdiction. Until FEMA has completed these steps—both formal notice and comment rulemaking and NEPA review—it does not have the authority to threaten, much less suspend, any local governments' participation in the NFIP for failure to implement any changes to the NFIP.

In sum, the Oregon NFIP BiOp is fatally flawed and we believe will be invalidated upon challenge. Even were the BiOp valid, we agree with FEMA that FEMA lacks the authority under the NFIA to implement the RPA. Finally, even if FEMA had the authority under the NFIA to implement the RPA, FEMA has not yet taken the necessary procedural steps to authorize enforcement of *any* changes to the implementation of the NFIP in Oregon. FEMA should decline to take any further action to implement the RPA and should instead reinitiate consultation and engage those affected – including local governments and property owners – in the consultation process.

3. To the Extent FEMA Continues to Explore Changes to the NFIP in Response to the BiOp, FEMA Must Work with Local Communities and Property Owners to Develop Appropriate Standards that Recognize Differences in Existing Floodplain Conditions and State and Local Regulations.

To the extent FEMA ignores the forewarnings set forth above regarding the BiOp and FEMA's authority to implement the RPA, the Coalition requests that FEMA revise its approach to responding to the RPA, particularly the Interim Measures, as explained below.

A. FEMA is Not Obligated to Accept NMFS's Proposed RPA.

FEMA should depart from the proposed Interim Measures in the BiOp and instead adopt a different reasonable alternative. As you know from FEMA's experience in the Puget Sound, the mere fact that NMFS suggests an RPA in a biological opinion is not a mandate that FEMA conform to that RPA. Put simply, FEMA is not obligated to implement the RPA as presented by NMFS. A Secretary can depart from the suggestions of a biological opinion, and so long as he or she takes "alternative, reasonably adequate steps to ensure the continued existing of any endangered or threatened species," no ESA violation occurs.¹⁵ In this case, there are compelling reasons to depart from the proposed Interim Measures. The BiOp entirely ignores all existing state and local regulations and programs aimed at protecting and restoring endangered species and critical habitat, significantly exaggerates the effects of the NFIP on listed species and critical habitat, and depends on FEMA exercising legal authority that FEMA has plainly stated it does not have.

¹⁵ *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988). So long as FEMA's alternatives steps are not demonstrated to be arbitrary and capricious, they will be upheld in a subsequent challenge. *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, No. C11-2004-RSM, 2014 WL 5449859, at *27, *38 (W.D.Wa. Oct. 24, 2014) (holding that the petitioner must demonstrate that FEMA's implementation was an abuse of discretion, arbitrary or capricious, or not in accordance with the law).

B. NMFS Has Repeatedly Acknowledged Varying Floodplain Conditions Yet RPA Element 2 Imposes One-Size Fits All Protections.

FEMA should not attempt to impose uniform standards on Oregon floodplains in response to the Interim Measures or any other portion of the RPA. The Interim Measures contain one-sized fits all development restrictions that entirely fail to account for existing conditions. The same 170-foot Riparian Buffer Zone, use restrictions, and mitigation requirements apply irrespective of the actual physical conditions in the floodplain.¹⁶ As a result, as was the case in the Puget Sound NFIP BiOp, the Oregon NFIP BiOp and RPA overestimate the impacts of floodplain development and the necessary degree of mitigation. As FEMA well knows, it is unwarranted to treat already developed floodplain areas in Portland, Eugene or Springfield the same as undeveloped natural floodplain areas like those along the headwaters of Wallowa or John Day River.

In contrast to the Interim Measures, prior comments from NMFS evidence NMFS's understanding and agreement that not all floodplains provide equivalent habitat value. For example, as part of implementing the Puget Sound BiOp in Washington, NMFS conceded that many floodplains in the Puget Sound area were already degraded, and that the intent of the Puget Sound RPAs was only to avoid further degradation of that existing baseline. In one letter, NMFS wrote:

The RPA was written as a programmatic consultation that applies to the entire geographic region, and the applicability of each element of the RPA may vary from place to place since differing jurisdictions have differing floodplain conditions and requirements. . . . [S]ome components of the RPA may not apply to every jurisdiction, because in some jurisdictions the floodplain no longer contains essential habitat features.¹⁷

In a subsequent letter, NMFS wrote:

NMFS understands that many Puget Sound floodplain areas are already developed to the point of providing *de minimis* habitat values. In those situations jurisdictions must maintain the residual habitat functions. Although NMFS encourages restoration of floodplain functions to promote the recovery of listed salmonids, restoration of previously developed areas is generally beyond the scope of the RPA unless part of a programmatic approach to mitigating unavoidable adverse effects.¹⁸

¹⁶ BiOp, *supra* note 7, at 278-80.

¹⁷ Letter from William Stelle, Jr., Reg'l Adm'r, Nat'l Marine Fisheries Serv., to Kenneth Murphy, Reg'l Adm'r, Fed. Emergency Mgmt. Agency (Sept.26, 2011).

¹⁸ Letter from William Stelle, Jr., Reg'l Adm'r, Nat'l Marine Fisheries Serv., to Kenneth Murphy, Reg'l Adm'r, Fed. Emergency Mgmt. Agency (Feb. 3, 2012). While NMFS may express its dissatisfaction with FEMA's implementation of the RPAs from the Puget Sound NFIP BiOp, to our knowledge NMFS has not withdrawn these letter interpretations.

In fact, in contrast to the uniform development restrictions enumerated in RPA Element 2, the BiOp also acknowledges that the intent of the Interim Measures is “to ensure that *existing natural floodplain functions* are *maintained* pending full RPA implementation.”¹⁹ In light of this, it would be arbitrary and capricious for FEMA to attempt to impose one-size-fits-all standards on Oregon floodplains in response to the Interim Measures or any other portion of the RPA. To the extent any change to the NFIP is appropriate (which the BiOp fails to establish and that FEMA has questioned throughout), those changes must be limited to protecting existing functions, not assuming and then protecting non-existent habitat.

C. FEMA Must Listen to and Work with Local Jurisdictions and Property Owners to Develop Measures (if any) that Recognize Existing Floodplain Conditions and Respect Oregon Law.

FEMA’s strategy to date for implementing the Interim Measures has relied entirely on state and local conformance. Numerous jurisdictions have already expressed their resistance to the Interim Measures based on their unanswered concerns regarding the effects on their communities. We urge FEMA to work with the Oregon Department of Land Conservation and Development, the affected local cities and counties, *and the affected land owners* to develop workable strategies to address concerns regarding the impacts of development within the floodplain on listed species and their designated critical habitat. As FEMA knows, the State of Oregon and each of the cities and counties within the state, as well as individual property owners, are currently subject to liability under Section 9 of the ESA if they “take” an endangered species.²⁰ As a result, the State and many cities and counties have already taken and continue to take significant steps to address impacts to listed species and their habitat through their own laws, regulations and programs. While NMFS has arbitrarily opted to ignore those laws, regulations and programs in its review of the NFIP’s effects on listed species and designated critical habitat, FEMA should not continue that mistake. Rather than adopting NMFS’s one-size-fits-all approach, FEMA must work with each local jurisdiction and their constituents to determine what regulatory changes are appropriate, if any, based on local knowledge of the environment and potential effects. Again, in Washington, NMFS acknowledged this as the appropriate approach: “NMFS believes it is contingent upon local governments to determine which functions are in their floodplains, and how they will maintain and restore floodplain functions.”²¹

Ultimately, FEMA could both meet its legal obligations under the APA and NEPA, and consider local conditions, by initiating rulemaking and NEPA review regarding any proposals to implement the Interim Measures or any alternatives. These formal processes would enable all potentially affected people and jurisdictions to participate in developing any changes to the local floodplain development regulations.

¹⁹ BiOp, *supra* note 7 (emphasis added). See also Letter from City of Portland to William Stelle, Jr., Reg’l Adm’r, Nat’l Marine Fisheries Serv. (Apr. 9, 2015) (raising need for the RPA to treat build out/developed floodplains differently than intact/less developed floodplains).

²⁰ 16 U.S.C. § 1538. Notably, the Coalition entirely rejects FEMA’s assertion in the Proposed Action that any ESA based review or approval is triggered by the “potential for take.” See BiOp, *supra* note 7 at 2-40.

²¹ Letter from William Stelle, Jr., Reg’l Adm’r, Nat’l Marine Fisheries Serv., to Kenneth Murphy, Reg’l Adm’r, Fed. Emergency Mgmt. Agency (Sept. 26, 2011); see also Letter from Katherine D. Sullivan, Under Secretary of Commerce for Oceans and Atmosphere, to Ron Wyden, United States Senate (Oct. 17, 2014).

This process would also allow FEMA to evaluate how any changes to the NFIP would affect existing Oregon state and local statutes and regulations. At this point, FEMA and NMFS have both failed to address the conflicts inherent between certain Oregon laws and the directives of the RPA. For example, under Oregon Measure 49, a local government is obligated to compensate a property owner where it imposes development restrictions that limit certain uses of property. Implementation of the Interim Measures as proposed by NMFS places local governments in the untenable position of either continuing to participate in the NFIP and potentially paying out millions in Measure 49 claims, or withdrawing from the NFIP.²² As FEMA well knows, because of the NFIP's mandatory flood insurance purchase requirement, NFIP participation is not purely voluntary. FEMA has a responsibility to identify a path forward that will enable local governments to stay on the "right" side of both the NFIP and existing state and local laws and regulations.

The Coalition acknowledges the difficult position in which FEMA finds itself. It is unacceptable, however, for FEMA to attempt to pass the responsibility for addressing the BiOp's findings on to local jurisdictions and property owners without engaging us in a meaningful and substantive opportunity to shape the outcome. Because FEMA has failed to take those required steps before beginning efforts to implement the Interim Measures, FEMA's actions are arbitrary and capricious and beyond its authority. Unless FEMA redirects its efforts to challenging many of the underlying errors in the BiOp's analysis and discontinues threats against local governments for failure to comply with the bogus Interim Measures, the Coalition will bring an action to stop FEMA's efforts to implement the RPA beginning with the Interim Measures. We would welcome the chance to meet with FEMA and identify thoughtful and lawful plans for addressing NMFS's BiOp.

Very truly yours,

Oregon Homebuilders



Jon Chandler, CEO

Oregon Association of Realtors



Jenny Pakula, General Counsel & VP Business Development

²² See Letter from John A. Kitzhaber, Oregon Governor to William Stelle, Jr., Reg'l Adm'r, Nat'l Marine Fisheries Serv. (Aug. 26, 2014).

BOMA Oregon



Susan Steward, Executive Director

Oregon Concrete and Aggregate Producers Association



Richard Angstrom, President

Oregon Farm Bureau



David Dillion, Executive Vice President

Association of Oregon Industries



Mike Freese, Vice President

- cc: Congressman Peter DeFazio
Congressman Jeffrey Merkley
Congressman Roy Wyden
Congressman Kurt Schrader
Congresswoman Suzanne Bonamici
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Penny Pritzker, Secretary of Commerce
Eileen Sobeck, Assistant Administrator for Fisheries, NOAA Fisheries
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Sandra McDonough, President & CEO, Portland Business Alliance
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November 23, 2016

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Re: Sixty-Day Notice of Intent to Sue Relating to the Biological Opinion Issued for the Oregon National Flood Insurance Program (April 14, 2016)

Dear Secretary Pritzker, Assistant Administrator Sobeck, and Regional Administrator Thom:

The Oregon Home Builders, the Oregon Association of Realtors, BOMA Oregon, the Association of Oregon Industries, the Oregon Farm Bureau, and the Oregon Concrete and Aggregate Producers Association (collectively, the “Coalition”) submit this letter to notify you of the Coalition’s intent to sue the National Marine Fisheries Service (“NMFS”) regarding the *Endangered Species Act (“ESA”) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) “Not Likely to Adversely Affect” Determination for the Implementation of the National Flood Insurance Program in the State of Oregon (“BiOp”)*. The Coalition provides this 60-day notice letter pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g), insofar as it may apply.

Background

On April 14, 2016, NMFS issued the BiOp, which concludes that the Federal Emergency Management Agency’s (“FEMA”) operation of the National Flood Insurance Program (“NFIP”) in Oregon violates the ESA by allowing and encouraging floodplain development that

jeopardizes the continued existence of certain ESA-listed anadromous fish species and Southern Resident killer whales, and results in the destruction or adverse modification of critical habitat for the fish species. The BiOp includes a “Reasonable and Prudent Alternative” (“RPA”) that directs FEMA to make unprecedented changes to implementation of the NFIP, including its floodplain mapping program and minimum floodplain regulatory criteria, which, if adopted, will affect all 22,000 NFIP participating jurisdictions and millions of property owners across the United States. In particular, the RPA directs FEMA to amend the NFIP implementing regulations to expand the areas mapped as floodplain, including mapping entirely new areas that have never previously been considered part of the floodplain, and to prohibit nearly all development in many mapped areas (except open space, low-intensity recreational activities, habitat restoration projects, and very limited water dependent uses). In all other floodplain areas, the RPA directs FEMA to prohibit all development unless it will have no adverse effect or a net beneficial effect on floodplain habitat. Further, while FEMA is pursuing implementation of these amendments to the NFIP regulations, the RPA directs FEMA to implement a series of “Interim Measures.” These Interim Measures would impose “one-size-fits-all” development restrictions on floodplains in Oregon irrespective of existing conditions and without the public engagement that is requisite before implementing such dramatic regulatory changes.

The BiOp and RPA are arbitrary and capricious, and contrary to law and applicable regulatory requirements. As a result of the numerous defects detailed below, the Coalition intends to sue to invalidate the BiOp unless NMFS immediately withdraws the BiOp and reinitiates consultation in a manner that addresses the concerns raised herein.

ESA Violations

1. The BiOp Fails to Include Several Required Components in the Baseline.

The BiOp is arbitrary and capricious and inconsistent with the ESA because the description of the baseline is incomplete. Without the correct environmental baseline, the entire BiOp analysis is flawed.¹ The baseline must reflect actual current conditions and is intended to be a snapshot in time of the status of the “present environment in which the species or critical habitat exists.”² NMFS must incorporate certain factors into the environmental baseline, including “the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.”³ Although the description of the baseline in the BiOp acknowledges these factors, it provides little or no analysis of how each of these factors has contributed to baseline conditions. Without any attempt to quantitatively or qualitatively describe the contributions to the baseline from these factors, the baseline is incomplete and erroneous.

¹ *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008)(“Any proposed agency action must be evaluated in the context [sic] of this baseline in order to properly determine whether the proposed actions will jeopardize the listed fishes.”)

² Interagency Cooperation; Endangered Species Act of 1973, 48 Fed. Reg. 29,990, 29,994 (1983)); *see also San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 1008 (9th Cir. 2014); *Nat. Res. Def. Council v. Rodgers*, 381 F. Supp. 2d 1212, 1229 (E.D. Cal. 2005).

³ 50 C.F.R. § 402.02.

One example of this error is the BiOp's failure to include any discussion of the impacts of existing state and local laws and regulations as part of the baseline. It is well established that the baseline must account for existing regulations and statutes.⁴ Although the BiOp acknowledges the existence of myriad state and local regulations,⁵ and a later section of the BiOp notes that aspects of the environmental baseline have improved due to these existing environmental regulations and land management practices,⁶ such regulations are neither mentioned nor evaluated in the description of the baseline. The Coalition acknowledges NMFS's decision not to include existing state and local laws and regulations as part of FEMA's proposed action,⁷ but that does not alleviate the requirement that NMFS include state and local laws and regulations in the environmental baseline. Because NMFS failed to do so, the environmental baseline is incomplete and inaccurate.

Another example of this error is the BiOp's treatment of other federal actions that have previously undergone Section 7 consultation. The description of the baseline lists a number of other consultations that have occurred in Oregon, but fails to explain how those other consultations have contributed to baseline conditions.⁸ For example, the baseline description states that NMFS considered the U.S. Environmental Protection Agency's ("EPA") consultations on the reregistration of certain pesticides,⁹ but does not attempt to quantify the impact of such consultations, including any changes to pesticide use that may be occurring as a result. Simply listing past consultations and federal actions is insufficient. Because the baseline lacks any details on the impacts of each of these other federal actions, and particularly how they have affected activities in the floodplain, NMFS fails to isolate the impacts that result from the NFIP and falsely attributes what should be baseline conditions to the NFIP.

2. The Effects Analysis Includes Numerous Errors and Consequently Significantly Overstates the Effects of the NFIP on Listed Species and Designated Critical Habitat.

A. The BiOp Erroneously Attributes Baseline Conditions to the Effects of the NFIP.

Although the baseline section of the BiOp acknowledges the varied and often degraded existing conditions of the Oregon's floodplains¹⁰, NMFS impermissibly fails to properly account for these existing conditions within the effects analysis. Rather than beginning from existing conditions, NMFS conducted the effects analysis by assuming a pre-development, pristine

⁴ See *Friends of East Fork, Inc. v. Thom*, 688 F. Supp. 2d 1245 (W.D. Wa. 2010); *Swan View Coal. v. Barbouletos*, No. CV 06-73-M-DWM, 2008 WL 5682094 (D. Mont. June 13, 2008), *enforcement granted*, 639 F. Supp. 2d 1187 (D. Mont. 2009), and *aff'd in part*, 348 F. App'x 295 (9th Cir. 2009).

⁵ Nat'l Oceanic and Atmospheric Admin., Nat'l Marine Fisheries Serv., Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) "Not Likely to Adversely Affect" Determination for the Implementation of the National Flood Insurance Program in the State of Oregon, 27-29 (Apr. 14, 2016) [hereinafter ("BiOp")].

⁶ BiOp *supra* note 5, at 268.

⁷ BiOp *supra* note 5, at 29

⁸ BiOp *supra* note 5, at 132-35.

⁹ BiOp *supra* note 5, at 133-134.

¹⁰ BiOp *supra* note 5, at 121-138.

floodplain habitat, then identifying all impacts that could potentially occur from development of that pristine environment, and attributing all of those potential impacts to the NFIP. The effects analysis, however, may not be conducted without reference to the actual baseline conditions of the habitat and the species.¹¹ The effects of the NFIP must be analyzed in their actual current context.¹²

NMFS's flawed approach leads to several errors in the effects analysis. First, by assuming in the effects analysis that all floodplain areas are undeveloped, the BiOp fails to differentiate between the effects of redevelopment on an already developed floodplain and the effects associated with development of an unaltered floodplain. In fact – as the baseline section of the BiOp explains – many floodplains in Oregon are already altered, many significantly. The impacts of redevelopment of an already developed floodplain are not the same as the impacts that occur when development begins on unaltered floodplains.¹³ Because NMFS failed to incorporate the current variations in conditions of Oregon floodplains into its effects analysis, and instead focused exclusively on impacts to pristine floodplains, the analysis overstates the effects of the NFIP.

Second, by evaluating the impacts of the NFIP under the false premise that all floodplains were unaltered prior to the proposed action, NMFS also improperly attributed the existing degraded habitat conditions to the NFIP. Properly evaluating the effects of the action in the context of the baseline is meant to allow NMFS to isolate the impacts of the proposed action from already existing conditions.¹⁴ The effects of the project or program are limited to “future direct and indirect impacts of the operation over the new license or contract period.”¹⁵ By failing to begin the effects analysis from the current baseline conditions, the BiOp improperly attributes effects of past activities, including seemingly all floodplain development over the past century, to the proposed action.¹⁶ Much of the altered floodplain conditions that NMFS attributes to the

¹¹ See *Nat'l Wildlife Fed'n.*, 524 F.3d at 929.

¹² *Id.* at 930; see also *ALCOA v. Bonneville Power Admin.*, 175 F.3d 1156, 1162 n. 6 (9th Cir.1999) (requiring NMFS to consider the effects of its actions “within the context of other existing human activities that impact the listed species”).

¹³ NMFS acknowledged this during implementation of the NFIP BiOp in the Puget Sound region:

NMFS understands that many Puget Sound floodplain areas are already developed to the point of providing *de minimis* habitat values. In those situations jurisdictions must maintain the residual habitat functions. Although NMFS encourages restoration of floodplain functions to promote the recovery of listed salmonids, restoration of previously developed areas is generally beyond the scope of the RPA unless part of a programmatic approach to mitigating unavoidable adverse effects.

Letter from William Stelle, Jr., Reg'l Adm'r, Nat'l Marine Fisheries Serv., to Kenneth Murphy, Reg'l Adm'r, Fed. Emergency Mgmt. Agency (Feb. 3, 2012).

¹⁴ The baseline must include “[t]he total effects of all past activities . . .” U.S. FISH & WILDLIFE SERV. AND NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK, PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT, 4-30 (Mar. 1998) [hereinafter (“ESA Handbook”)].

¹⁵ *Id.*

¹⁶ See *Nat'l Wildlife Fed'n.*, 524 F.3d at 930-31 (citations omitted) (explaining that current existence of dams must be included in environmental baseline and finding that proposed action must be evaluated in context of the baseline)(emphasis added); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1261 (E.D. Cal. 2010) (same; also noting that “BiOp itself discussed Englebright’s prevention of future migration as part of the analysis of the ‘effects of the action,’ rather than as part of the baseline, distinguishing these future effects

NFIP pre-dates the beginning of this consultation—and even the application of the NFIP to Oregon—and thus should have been included in the baseline, not the effects of the proposed action.¹⁷

B. The BiOp Erroneously Attributes All Floodplain Development to the NFIP.

In addition to this error in the baseline used in the effects analysis, the BiOp also fails to isolate the effects of the NFIP on floodplain development, and consequently which portion of the effects of floodplain development may be attributed to the NFIP. The BiOp is fatally flawed because it provides no analysis of what floodplain development is caused by or results from the NFIP and what floodplain development would occur irrespective of the NFIP. Instead of first determining what, if any, floodplain development is caused by the NFIP and then analyzing the effects of that development on listed species and designated critical habitat, the BiOp conducts the effects analysis assuming 100% of floodplain development is attributable to the NFIP. The BiOp's effects analysis provides a recitation of impacts of floodplain development in general,¹⁸ asserts that the NFIP will cause floodplain development,¹⁹ and then attributes all impacts from floodplain development to the NFIP.²⁰ This is a backwards approach to the effects of analysis.

Significant floodplain development pre-dates the NFIP. Further, absent the NFIP, floodplain development may still be financed by non-federally related financial intermediaries.²¹ Only that floodplain development that results from or is caused by the NFIP may be included in the proposed action.

C. The BiOp Fails to Connect the NFIP to Any Particular Impacts to Listed Species or Designated Critical Habitat.

The BiOp makes no effort to identify the specific effects of floodplain development that may be attributable to the NFIP. The effects analysis does not analyze the physical, biological, and hydrological effects of the NFIP itself on listed species or their critical habitat. Instead, for each species, NMFS includes boilerplate language regarding effects of the action—e.g., “the proposed action is likely to cause a decrease in abundance, productivity, spatial structure, and diversity” of the species in the action area.²² The evidence fails to support these assertions, and the BiOp fails to explain how particular aspects of the NFIP will cause these effects. For example, the effects analysis for the Southern Resident Killer whale relies upon the purported future extinction of the ESA-listed Chinook salmon species in the action area without identifying

from past effects on migration”) (emphasis in original); see also *In re Operation of Missouri River Sys. Litig.*, 421 F.3d 618, 632 (8th Cir. 2005).

¹⁷ *Locke*, 776 F.3d at 1008 (“This baseline is intended to form a basic ‘snapshot’ of the status of the species at a particular moment in time before the action is taken.”); *Rodgers*, 381 F. Supp. 2d at 1212, n. 30 (“[T]he environmental baseline is a ‘snapshot in time,’ which allows agencies to understand existing conditions before they consider the effects of a proposed action on those conditions.”)

¹⁸ See generally BiOp, *supra* note 5, at 146-163.

¹⁹ See generally BiOp, *supra* note 5, at 163-209.

²⁰ BiOp, *supra* note 5, at 141.

²¹ *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1157 (W.D. Wash. 2004).

²² BiOp *supra* note 5, at 221.

evidence or providing a rational explanation for how the NFIP will result in such a drastic loss.²³ The critical habitat effects analysis suffers from the same defects—it identifies purported general effects without any evidence or analysis of location, magnitude or significance on primary constituent elements and includes effects that are not caused by the NFIP.

D. The BiOp Fails to Establish that the Proposed Action Causes Jeopardy or Adverse Modification.

Biological opinions must include a summary of the information upon which the opinion is based, a “detailed discussion of the effects of the action on listed species or critical habitat,” and an opinion as to “whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat”²⁴ The BiOp must determine whether the proposed action, along with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.²⁵ NMFS fails to demonstrate that FEMA’s implementation of the NFIP is likely to cause jeopardy or adverse modification.

NMFS’s jeopardy determination lacks evidentiary support and is arbitrary and capricious. To jeopardize a species, the agency action must cause some deterioration in the species’ pre-action condition.²⁶ NMFS has explained that jeopardy generally results from actions that are “likely to result in significant adverse effects throughout the species’ range.”²⁷ These adverse effects must cause a “considerable or material reduction in the likelihood of survival and recovery” of the species.²⁸ NMFS fails to demonstrate that the 17 species will be jeopardized by FEMA’s proposed action. While the BiOp notes several general “weaknesses” associated with FEMA’s implementation of the NFIP,²⁹ NMFS provides no evidence or analysis regarding the magnitude of any loss or degradation of aquatic systems, the species populations’ ability to tolerate any such impacts, or how any impacts will considerably or materially reduce the likelihood of survival or recovery.³⁰ Absent this evidence and analysis, NMFS’s conclusory statements regarding generalized effects purportedly attributable to NFIP implementation do not provide the requisite basis necessary to support its jeopardy conclusion.

Similarly, NMFS’s determination that the NFIP causes destruction or adverse modification to designated critical habitat also lacks evidentiary support and is arbitrary and

²³ E.g., BiOp *supra* note 5, at 247 (noting that annual reduction in prey availability is “small” and the percentage reduction in prey abundance is “not anticipated to be different from zero by multiple decimal places”).

²⁴ 50 C.F.R. § 402.14(h); see also *Defs. of Wildlife v. U.S. Dep’t of Navy*, 733 F.3d 1106, 1112 (11th Cir. 2013); *Nat’l Parks Conservation Ass’n v. U.S. Dep’t of Interior*, 46 F. Supp. 3d 1254, 1333 (M.D. Fla. 2014)(subsequent history omitted).

²⁵ 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.02,402.12(g)(4).

²⁶ *Nat’l Wildlife Fed’n*, 524 F.3d at 930.

²⁷ ESA Handbook, *supra* note 14, at 4-36.

²⁸ *Oceana, Inc. v. Pritzker*, 125 F. Supp. 3d 232, 239 (D.C. Cir.. 2015) (upholding NMFS’s interpretation of “reduce appreciably”).

²⁹ BiOp, *supra* note 5, at 267.

³⁰ *S. Yuba River Citizens League*, 723 F. Supp. at 1269; *Nat’l Wildlife Fed’n*, 524 F.3d at 936 (NMFS could not make jeopardy conclusion without knowing “in-river survival levels necessary to support recovery” and “at what point survival and recovery will be placed at risk” by habitat degradation).

capricious.³¹ NMFS's longstanding interpretation of "appreciably diminish" requires the proposed action to "considerably reduce the capability of designated . . . critical habitat to satisfy requirements essential to both the survival and recovery of a listed species."³² Further, it is not adverse modification if portions of critical habitat would be degraded or altered when all critical habitat elements would remain functional.³³ In the BiOp, NMFS concludes that "adverse effects from the proposed action will negatively affect the quality, quantity, and function of multiple PCEs at the watershed scale, across all watersheds to a greater or lesser degree, with the overall effect of diminishing conservation values at the designation scale for affected critical habitats."³⁴ The evidence fails, however, to demonstrate that any adverse effects will "considerably reduce" the value of critical habitat.³⁵ On the contrary, the BiOp notes that some habitat aspects have improved in the last 30 to 40 years, and that many watersheds have PCEs that are in good to excellent condition.³⁶ Since the NFIP has only been in effect in Oregon since the late 1970s (at the earliest), this could actually signal that the NFIP has assisted in improving conditions, rather than degrading habitat. Accordingly, NMFS has failed to provide the requisite basis for the BiOp's conclusion that FEMA's implementation of the NFIP destroys or adversely modifies critical habitat.

In sum, by starting the effects analysis with a false premise of a pristine, unaltered floodplain as the environmental baseline rather than current conditions, the BiOp both overstates the effects of the floodplain development on current conditions, and erroneously attributes 100% of floodplain degradation to the NFIP. Moreover, by failing to isolate the floodplain development caused by the NFIP or to analyze the specific effects of that development on listed species or their designated critical habitat, furthers this error and significantly overstates the effects of the NFIP.

³¹ Similar to the jeopardy analysis, NMFS's adverse modification analysis is also flawed because it relies upon an erroneous determination of the environmental baseline and effects of the action, which improperly attributes historic effects and conditions to FEMA's proposed implementation of the NFIP.

³² ESA Handbook, *supra* note 14, at 4-36. NMFS recently opined that "considerably" means "'worthy of consideration' and is another way of stating that we can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of critical habitat." *Definition of Destruction or Adverse Modification of Critical Habitat*, 81 Fed. Reg. 7214, 7218 (Feb. 11, 2016). NMFS's interpretation conflates "appreciably" with any "perceptible effect," which courts have rejected as producing irrational results. *E.g., Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1208 (E.D. Cal. 2008).

³³ *E.g., Conservation Congress v. U.S. Forest Serv.*, 720 F.3d 1048, 1057 (9th Cir. 2013) (upholding no adverse modification when portion of critical habitat would be degraded but no reduction in functionality); *Rock Creek Alliance v. U.S. Fish & Wildlife Serv.*, 663 F.3d 439, 442 (9th Cir. 2011) (upholding no adverse modification when all critical habitat elements would remain functional, although at a lower functional level).

³⁴ BiOp, *supra* note 5, at 270.

³⁵ While NMFS provides a general recitation of potential effects of the proposed action to critical habitat, there is no evidence or analysis of the magnitude of any effects, the scope or location of effects in relation to human development or existing habitat conditions, or how any diminishment will impact functionality of the critical habitat or its value for the conservation of the affected species.

³⁶ BiOp *supra* note 5, at 114-120, 268.

3. The BiOp Fails to Use the Best Available Science.

In fulfilling the Section 7 consultation requirements, NMFS is required to use the best scientific and commercial data available.³⁷ While NMFS is not required to conduct independent studies, “[t]he best available data requirement merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.”³⁸ Here, NMFS failed to consider existing scientific and commercial data. One example of this is NMFS’s repeated assertion that floodplain development will impact habitat by promoting the runoff of pollutants such as herbicides and pesticides.³⁹ However, the best available data demonstrate that concentrations of pesticides are not exceeding aquatic life criteria.⁴⁰ Similarly, NMFS identifies forestry as one of the activities contributing to a limiting factor for several listed species,⁴¹ but NMFS cites no authority for the proposition. To the contrary, there is abundant evidence that modern forest practices are not impairing aquatic life.⁴² These are only a few examples of the pattern that plagues the entire effects analysis. By failing to consider the best available scientific and commercial data available, the BiOp fails to meet the requirements of the ESA.

4. The Reasonable and Prudent Alternative Is Arbitrary and Capricious and Not In Accordance with the Law and Relevant Regulatory Requirements.

Building on the flaws and inadequacies of the BiOp’s analysis and conclusions, the RPA is similarly erroneous. An RPA must meet four basic criteria to be considered a “reasonable and prudent alternative.” An RPA must be: (1) capable of being implemented in a manner consistent with the intended purpose of the action, (2) capable of being implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction, (3) be economically and

³⁷ 16 U.S.C. § 1536(a)(2); *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (The purpose of the best available data requirement is to “ensure that the ESA [will] not be implemented haphazardly, on the basis of speculation or surmise.”)

³⁸ *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006) (quotation omitted); *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (agency “cannot ignore available biological information”).

³⁹ *See, e.g.*, BiOp, *supra* note 5, at 146, 150, 246.

⁴⁰ *See, e.g.*, USGS/Eugene Water and Electric Board, *Reconnaissance of Land-Use Sources of Pesticides in Drinking Water, McKenzie River, Oregon* (2012). This study involved twice yearly sampling from various sites in the lower McKenzie River basin from 2002 through 2010. The samples were tested for 175 compounds (including a large number of herbicides, insecticides, and fungicides) and found no significant detections of any pesticide compounds.

⁴¹ *See, e.g.*, BiOp, *supra* note 5, at 58, 59, 62, 64, 66, 76, 79, 82, 84, 230, 231, 234.

⁴² Oregon State University is the home of the Watersheds Research Cooperative, which has conducted “[t]hree paired watershed studies of unprecedented scope” analyzing “the environmental effects caused by contemporary forest management activities at a watershed scale.” WATERSHEDS RESEARCH COOPERATIVE, <http://www.watershedsresearch.org> (last visited Nov. 16, 2016). These studies have repeatedly found that modern forest practices have virtually eliminated negative environmental impacts due to logging. *See, e.g.*, Douglas S. Batemen et al., *Effects of Stream-Adjacent Logging in Fishless Headwaters on Downstream Coastal Cutthroat Trout*, *Can. J. Fish. Aquat. Sci.* 73: 1-16 (2016) (finding that “logging did not have significant effects on the coastal cutthroat trout population for the duration of the sample period.”); Kevin D. Bladon, et. al., *A Catchment-Scale Assessment of Stream Temperature Response to Contemporary Forest Harvesting in the Oregon Coast Range*, 379 *Forest Ecology and Management* 153-164 (2016) (finding that “[t]here was no evidence that the (a) 7-day moving mean of daily maximum stream temperature, (b) mean daily stream temperature, or (c) diel stream temperature changed in the study stream reaches following ;contemporary forest harvesting practices,” and that “current harvesting practices have improved protection for stream water temperatures.”)

technologically feasible, and (4) be an alternative to the proposed action that NMFS believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.⁴³ The RPA included in the BiOp fails to meet at least three of these criteria: it is unable to be implemented within the scope of FEMA's authority, it is not economically and technically feasible, and NMFS fails to explain how it would avoid jeopardy or adverse modification.

A. The RPA Cannot Be Implemented Consistent with the Scope of FEMA's Authority.

1. FEMA's Authority is Limited to Protecting People and Property from Flood Hazards.

The RPA's proposed changes to the NFIP's mapping and regulatory programs are beyond the scope of FEMA's authority under the National Flood Insurance Act ("NFIA"). The ESA, a later-enacted statute, does not operate to amend the NFIA or add additional statutory authority.⁴⁴ Although the ESA directs agencies to "utilize their authorities" to carry out the ESA's objectives, it does not *expand* the powers conferred on an agency by its enabling act.⁴⁵ FEMA has no ability or obligation to implement those provisions of the RPA for which it lacks legal authority.

FEMA, through three separate letters sent to NMFS and numerous meetings and calls over the course of the consultation, explained that the RPA adopted in the BiOp is not within its authority.⁴⁶ Most recently during a hearing before the Committee on Transportation and Infrastructure in the U.S. House of Representatives, Michael Grimm, Assistant Administrator for Mitigation for FEMA, was asked whether FEMA has "the authority to regulate privately funded development on private land under the NFIP?" Mr. Grimm responded simply, "No."

Ignoring FEMA's steady assertions, the BiOp nevertheless proclaims that FEMA has the authority to implement the RPA. NMFS does not have the expertise to make such a judgment, and NMFS cannot override or ignore FEMA's interpretation of its own enabling statute.⁴⁷ Indeed, NMFS's own guidance documents declare that NMFS is to defer to FEMA regarding FEMA's interpretation of its authority. The ESA Handbook recognizes that action agencies are "the only ones who can determine if an alternative is within their legal authority and jurisdiction

⁴³ 50 C.F.R. § 402.02; *see also San Luis & Delta-Mendota Water Auth. v. Salazar*, 666 F. Supp. 2d 1137, 1145 (E.D. Cal. 2009).

⁴⁴ *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007).

⁴⁵ *See Platte River Whooping Crane Critical Habitat Maint. Trust v. F.E.R.C.*, 962 F.2d 27 (D.C. Cir. 1992); *see also Am. Forest and Paper Ass'n v. U.S. Evtl. Prot. Agency*, 137 F.3d 291, 299 (5th Cir. 1998) ("the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their existing authority in a particular direction"); *Evtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509-10 (9th Cir. 1995).

⁴⁶ Letter from Roy E. Wright, Deputy Assoc. Adm'r, Federal Insurance and Mitigation Admin., Fed. Emergency Mgmt. Agency, to William Stelle, Reg'l Adm'r, Nat'l Marine Fisheries Serv. (May 29, 2014); Letter from Mark Carey, Director, Fed. Emergency Mgmt. Agency, to Kim Kratz, Assistant Reg'l Adm'r, Nat'l Marine Fisheries Serv. (Jan. 14, 2015); Letter from Mark Carey, Director, Fed. Emergency Mgmt. Agency, to Kim Kratz, Assistant Reg'l Adm'r, Nat'l Marine Fisheries Serv. (June 3, 2015).

⁴⁷ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.")

...⁴⁸ NMFS and USFWS' prior approaches to RPAs demonstrate deference to the action agency regarding the scope of the agency's authority. Both agencies have revised RPAs in final biological opinions to align with the action agency's understanding of its authority.⁴⁹ Here, NMFS opted to ignore FEMA's statements regarding its authority, and press its own agenda.

FEMA's concerns in its letters are valid. The statutory authority conferred upon FEMA by the NFIA does not authorize FEMA to take action for the purpose of protecting animal and plant species. The scope and purpose of the NFIA is limited to protecting people and property from flood hazards. No provision under the NFIA (including 42 U.S.C. §§ 4001-4002, which set forth the purpose of the NFIA; 4101-4101c, which set forth FEMA's mapping obligations; or 42 U.S.C. § 4102, which establishes the boundaries for the NFIP's minimum criteria for land development) authorizes⁵⁰ FEMA to adopt measures for the benefit of threatened and endangered species with disregard for the primary purposes of the NFIA—avoidance of flood damage and flood losses.⁵¹ Although NMFS attempts to insulate the RPA by stating that it will also provide corollary flood protection benefits for people and property, NMFS's proposed development restrictions go far beyond what is necessary to achieve the NFIP's purpose and intent.⁵² As FEMA has explained, the NFIA does not permit FEMA to limit or prohibit all floodplain development. Instead, the NFIA limits FEMA to development restrictions that are "necessary" and "practicable" to protect people and property from flood damages and loss.⁵³ In many cases, implementation of the RPA would require actions antithetical to protecting people and property from floods.

NMFS cites several historical studies and reports that discuss the "natural and beneficial functions of floodplains" in the context of the NFIA. NMFS's attempt to rely on these materials ignores the simple fact that the only provision in the NFIA that mentions "natural and beneficial floodplain functions" is the community rating system ("CRS").⁵⁴ The CRS, however, is a program of *voluntary* additional measures that may be undertaken by local communities. This CRS provision may not be used to expand FEMA's authority to encompass adoption of mandatory development restrictions for protection of threatened and endangered species. Even if the "natural and beneficial floodplain functions" language from the CRS applied across the

⁴⁸ ESA Handbook, *supra* note 14, at 4-43.

⁴⁹ See, e.g., *Sw. Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 518 (9th Cir.1998) (explaining that USFWS revised a draft RPA after Bureau of Reclamation indicated that it lacked discretion to take measures required by the RPA).

⁵⁰ NMFS asserts that the NFIA gives FEMA broad discretion in developing the federal floodplain management standards, citing 42 U.S.C. § 4002(b) and 42 U.S.C. § 4102. In making this argument, NMFS conflates the concept of "discretion" for purposes of triggering the requirement to consult under 50 C.F.R. § 402.03, with the concept of "authority" which is a required component of an RPA under 50 C.F.R. § 402.02. This is apparent from NMFS's misplaced reliance on *Nat'l Wildlife Fed'n*, 345 F. Supp. 2d at 1173-74 and *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1142 (11th Cir. 2008), both of which determined that FEMA's proposed action was discretionary, and therefore, subject to the consultation requirement under 50 C.F.R. § 402.03. If, however, "discretion" were the same as "authority", there would be no reason to list "authority" as one of the criteria for a valid RPA. Based on canons of statutory construction, "authority" must require a separate analysis to support an RPA.

⁵¹ See, e.g., *Nat'l Ass'n of Home Builders*, 551 U.S. at 671 ("Nothing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application.")

⁵² BiOp, *supra* note 5, at 306.

⁵³ 42 U.S.C. §§ 4001(e), 4102(c).

⁵⁴ 42 U.S.C. § 4022(b).

NFIA—which it does not—the consideration of “natural and beneficial floodplain functions” is not equivalent to consideration of endangered and threatened species. As used in the NFIA, the term “natural and beneficial floodplain functions” means:

(A) the functions associated with the natural or relatively undisturbed floodplain that (i) moderate flooding, retain flood waters, reduce erosion and sedimentation, and mitigate the effect of waves and storm surge from storms, *and (ii) reduce flood related damage*; and

(B) ancillary beneficial functions, including maintenance of water quality and recharge of ground water, *that reduce flood related damage*.⁵⁵

Even this definition incorporates the requirement of flood damage prevention. It demonstrates that there is only limited overlap between “natural and beneficial functions” as used in the NFIA and the concerns raised by NMFS in the BiOp.

Further, NMFS reads 42 U.S.C. § 4102(c)(4), which provides FEMA with authority to guide development to “otherwise improve the long-range land management and use of flood-prone areas,” as authorizing FEMA to change the NFIP to incorporate ESA concerns. NMFS takes this phrase out of its proper context to reach this stretched interpretation, in violation of basic tenants of statutory construction: “where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated.”⁵⁶ The three provisions in 42 U.S.C. § 4102(c) preceding this final “catch all” all relate exclusively to reducing flood risk and damage and do not encompass endangered species consideration.⁵⁷

Also, although 42 U.S.C. § 4024 requires FEMA to coordinate the NFIP with other programs, neither NMFS nor the ESA are mentioned. Instead, the requirement to coordinate is limited to agencies having responsibility for flood control, flood forecasting, or flood damage prevention in order to assure that the programs of such agencies and the NFIP are mutually consistent.

2. RPA Elements 2, 4 and 5 Depend on the Actions by Third Parties Who Were Not Participants in the Consultation.

RPA Elements 2, 4, and 5 are also invalid because they rely on acts by third parties. As the courts have previously declared, FEMA has no land use authority and issues no permits.⁵⁸ For the RPA to affect the outcome NMFS intends, cities and counties in Oregon (and throughout the United States) will need to adopt the changes into their local development codes. Because participation in the NFIP is voluntary, adoption of such measures by local governments is also voluntary. FEMA can change its regulations, but unless/until local governments adopt those

⁵⁵42 U.S.C. § 4121(12) (emphasis added).

⁵⁶ *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980); *Wa. Dep’t of Social Servs. v. Keffeler*, 537 U.S. 371, 384 (2003).

⁵⁷ 42 U.S.C. § 4102(c)(1)-(3).

⁵⁸ *Nat’l Wildlife Fed’n v. Fed. Emergency Mgmt. Agency*, No. C11-2004-RSM, 2014 WL 5449859, at *20 (W.D. Wa. Oct. 24, 2014).

changes through their own local regulations, the RPA will have no effect. As the ESA Handbook explains, where corrective action depends on the actions of third parties who were not party to the consultation, the proposed measure is not an RPA.⁵⁹

3. *NMFS Cannot Rely on a Scheme to Implement RPA Element 2 that NMFS Has Stated is Invalid and Outside FEMA's Existing Authority.*

FEMA's ability to implement the Interim Measures depends on FEMA relying on a legal theory that NMFS expressly denounced in the BiOp. In explaining its proposed action in the *Program Level Biological Assessment from the National Flood Insurance Program in Oregon*, FEMA asserted that 44 C.F.R. § 60.3(a)(2) authorizes it to require local governments to compel applicants to demonstrate ESA compliance prior to issuing a floodplain permit.⁶⁰ FEMA now intends to use the same basis to authorize implementing RPA Element 2 *before* FEMA completes rulemaking or National Environmental Policy Act ("NEPA") review. Contrary to FEMA's current interpretation, 44 C.F.R. § 60.3(a)(2) requires only that local communities "[r]eview proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law, including section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1334."⁶¹

In the BiOp, NMFS plainly denounced FEMA's proposed reliance on 44 C.F.R. § 60.3(a)(2) to authorize implementing any of the changes called for by the RPA. NMFS wrote:

A significant flaw in this aspect of FEMA's proposed action is the reliance on local entities "complying with the ESA" prior to issuing a floodplain development permit.

While FEMA indicates that ESA section 10(a)(1)(B) permits are that vehicle, they misunderstand how that section of the ESA operates – ESA section 10 permits are not a required permit. The services' regulations at 50 CFR 222.301 state "any person who desires to obtain permit privileges" for take incidental to an otherwise lawful activity must apply for that permit in accordance with applicable regulatory provisions. *In other words, section 10 permits are elective, not required, and therefore do not appear to fall within the purview of 44 CFR 60.3(a)(2).*⁶²

Having rejected FEMA's proposed reliance on 44 C.F.R. § 60.3(a)(2) as part of FEMA's proposed action, NMFS can hardly now depend on that same interpretation as providing FEMA authority to require local governments to implement the Interim Measures. Instead, FEMA would need to complete rulemaking to require local governments to implement RPA Element 2.

⁵⁹ ESA Handbook, *supra* note 14, at 4-44.

⁶⁰ Fed. Emergency Mgmt. Agency, Program Level Biological Assessment for National Floodplain Insurance Program, Oregon State, at 2-40-41 (Feb. 2013).

⁶¹ 44 C.F.R. § 60.3(a)(2) (emphasis added).

⁶² BiOp, *supra* note 5, at 40 (emphasis added).

Because FEMA cannot realistically complete the necessary notice and comment rulemaking process and attendant NEPA review by the March 15, 2018 “deadline” established in the BiOp, implementing RPA Element 2 as proposed is practically impossible. This legal and practical impossibility renders the RPA arbitrary and capricious.

B. The RPA Is Not Technically and Economically Feasible.

The RPA also fails because it is not technically and economically feasible.⁶³ The requirement that the RPA be economically and technologically feasible requires that the action agency have the resources and technology necessary to implement the RPA.⁶⁴ This requires “analysis of whether the corrective measures required by an RPA can be implemented from a purely budgetary perspective.”⁶⁵

NMFS’s analysis of economic feasibility of the RPA amounts to a heavily skewed cost-benefit analysis that fails to consider FEMA’s budget. The BiOp contains no evidence or indication that NMFS analyzed the actual costs of implementing the RPA or FEMA’s ability to bear those costs. NMFS was required to determine that FEMA has the resources and technology necessary to implement the RPA.⁶⁶

Again, as FEMA explained to NMFS throughout the consultation process, FEMA does not have the budgetary resources to implement the substantive elements of the RPA.⁶⁷ NMFS should have deferred to FEMA’s judgment that the RPA is not economically feasible.

As one example, RPA Element 3 would require FEMA to significantly revise its floodplain mapping program, including replacing its current steady-state mapping protocols with more elaborate modelling techniques (e.g., multi-dimensional and unsteady-state models), and mapping areas that FEMA until now has not modelled (e.g., erosion zones, channel migration zones).⁶⁸ As of December 2015, since the inception of the NFIP in 1968, FEMA has invested approximately \$7 billion (adjusted to 2012 dollars) in floodplain mapping *nationwide*.⁶⁹ The cost to maintain accurate and up-to-date flood maps using a *steady-state only* model ranges from \$116 million to \$275 million annually. This does not include the additional costs for more elaborate mapping techniques proposed in RPA Element 3. Further, the Technical Mapping

⁶³ 50 C.F.R. § 402.02; *see also Bennett*, 520 U.S. at 177 (“economic consequences are an explicit concern of the ESA ...”).

⁶⁴ *See In re: Operation of the Missouri River Sys. Litig.*, 363 F. Supp. 2d 1145, 1161 (D. Minn. 2004).

⁶⁵ *In Re Consolidated Salmonid Cases*, 791 F. Supp. 2d 802, 921 (E.D. Cal. 2011).

⁶⁶ *See In re: Operation of the Missouri River Sys. Litig.*, 363 F.Supp.2d at 1161.

⁶⁷ Letter from Roy E. Wright, Deputy Assoc. Adm’r, Federal Ins. and Mitigation Admin., Fed. Emergency Mgmt. Agency, to William Stelle, Reg’l Adm’r, Nat’l Marine Fisheries Serv. (May 29, 2014); Letter from Mark Carey, Director, Fed. Emergency Mgmt. Agency, to Kim Kratz, Assistant Reg’l Adm’r, Nat’l Marine Fisheries Serv. (Jan. 14, 2015); Letter from Mark Carey, Director, Fed. Emergency Mgmt. Agency, to Kim Kratz, Assistant Reg’l Adm’r, Nat’l Marine Fisheries Serv. (June 3, 2015).

⁶⁸ BiOp, *supra* note 5, 282-83.

⁶⁹ Technical Mapping Advisory Council, *TMAC Annual Report*, 4-100 (Dec. 2015), https://www.fema.gov/media-library-data/1454954097105a94df962a0cce0eef5f84c0e2c814a1f/TMAC_2015_Annual_Report.pdf [hereinafter (“TMAC Report”)].

Advisory Council⁷⁰ has estimated the cost to incorporate future conditions risk assessments in map revisions—which is only one piece of what NMFS calls for in RPA Element 3—at between \$4 billion and \$7 billion nationwide. This is in abrupt contrast to FEMA’s actual budget. As NMFS acknowledges in the BiOp, “FEMA had about one million dollars of discretionary funding in 2012 for all of Region X (Alaska, Washington, Idaho, Oregon), which would fund approximately 1½ watersheds.”⁷¹

Further, based on the National Hydrographic Dataset, there are 3.5 million miles of streams in the nation. Currently, only 1.2 million miles have flood maps. As of December 2015, Oregon had between 10,000 and 20,000 miles of unknown river that still need to be mapped.⁷² This figure does not include the additional erosion zones that NMFS states FEMA must map under RPA Element 3. Although the BiOp indicates it would cost approximately \$300/mile to complete the floodplain mapping suggested in the RPA, this significantly underestimates the actual cost, which is between \$1,500–\$2,500 per mile of river and \$3,000–\$4,000 per linear mile of coastline.⁷³

Finally, the NFIP incurred substantial debt to help affected homeowners who maintained flood insurance coverage. Because of these natural disasters, the NFIP was \$23 billion in debt as of December 31, 2014. NMFS appears to have entirely failed to consider the costs of its proposed mapping protocols in light of actual mapping costs and FEMA’s budgetary constraints.

RPA Elements 2 and 4, which would require changes to the minimum floodplain development criteria, are similarly flawed. The BiOp contains no evidence that NMFS considered the costs to FEMA of implementing either the Interim Measures (RPA Element 2) or the substantial permanent regulatory changes proposed in RPA Element 4. Further, while ordinarily it might have been acceptable for NMFS to consider only the costs to FEMA of changing its regulations (something which NMFS failed even to do), in this case implementation of RPA Elements 2 and 4 depends on more than 250 NFIP participating communities in Oregon adopting FEMA’s revised program into their own regulations. This will require each local jurisdiction to go through a separate public rulemaking process to amend its existing flood hazard regulations at significant cost. Because the efficacy of the RPA depends on the adoption by local governments, the costs to local governments must be considered when evaluating the economic feasibility of the RPA.

Ultimately, there is no evidence that NMFS analyzed whether the changes proposed by the RPA were within the budgetary means of either FEMA or the NFIP participating communities. Without any evidence that NMFS considered the financial feasibility of its proposed mandates, the RPA is arbitrary and capricious.

⁷⁰ The Technical Mapping Advisory Council is a federal advisory committee established to review and make recommendations to FEMA on matters related to the national flood mapping program authorized under the *Biggert-Waters Flood Insurance Reform Act of 2012*.

⁷¹ BiOp *supra* note 5, at 17.

⁷² TMAC Report, *supra* note 69, at 4-106.

⁷³ TMAC Report, *supra* note 69, at 4-102.

C. The BiOp Fails to Explain How the RPA Avoids Jeopardy or Adverse Modification.

NMFS also failed to explain how the RPA “would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.”⁷⁴ First, the BiOp makes no distinction between whether the RPA is intended to address jeopardy to the species or adverse modification to critical habitat. Second, the BiOp contains no evidence or explanation for how the RPA will address the underlying effects causing jeopardy and adverse modification for each particular species and each critical habitat designation.

Further, the RPA establishes a “no net loss” standard for floodplain functions.⁷⁵ Nowhere in the BiOp or RPA does NMFS explain or provide data supporting the broad and uniform imposition of a “no net loss” standard. The imposition of “no net loss” goes well beyond what is necessary to avoid jeopardy or adverse modification.

While NMFS has flexibility in the identification of an RPA, and is not required to propose the least restrictive alternative, the RPA is still limited to those measures necessary to satisfy the ESA’s jeopardy and adverse modification standards. NMFS failed to demonstrate that the avoidance or mitigation of any adverse impacts to the species or critical habitat is necessary to prevent jeopardy or adverse modification.⁷⁶ Even if such a standard were appropriate in some instances/environments, NMFS also failed to demonstrate that such requirements are uniformly necessary throughout the action area, and uniformly necessary for all the implicated species and critical habitat, when floodplain functions vary by location and degree of existing development.⁷⁷ Finally, NMFS failed to provide a “thorough explanation” of how the RPA, and its component elements, would avoid jeopardy and adverse modification.⁷⁸

Absent evidence or analysis demonstrating that the RPA meets the regulatory criteria for a reasonable and prudent alternative, the RPA is arbitrary and capricious.

D. NMFS Should Withdraw the BiOp and Reinitiate Consultation to Develop a Defensible BiOp.

Finally, since issuing the RPA in April, NMFS has held a number of meetings and calls with FEMA and the Oregon Department of Land Conservation and Development to explain to local governments and property owners the meaning and effect of the Interim Measures. At those meetings, NMFS has routinely described the RPA as less restrictive than it appears in

⁷⁴ 50 C.F.R. § 402.02; 16 U.S.C. § 1536(b)(4)(A).

⁷⁵ BiOp, *supra* note 5, at 278-79, 290.

⁷⁶ *E.g., Butte Envtl. Council v. U.S. Army Corps of Eng’rs*, 620 F.3d 936, 948 (9th Cir. 2010) (“An area of a species’ critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species’ survival or recovery”).

⁷⁷ For example, RPA Element 4 recognizes that there could be different conditions, but RPA Element 2 imposes uniform compensatory storage and 170 foot riparian buffer zones with use restrictions irrespective of existing conditions.

⁷⁸ ESA Handbook, *supra* note 14, at 4-43; *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 635 (9th Cir. 2014).

writing in the BiOp. For example, nothing in subsections A or B of RPA Element 2 suggests that floodplain redevelopment proposals would not be subject to the prescriptive standards as written. Yet during meetings, NMFS has suggested that redevelopment that creates any net benefit as compared to existing conditions would be permissible.

The Coalition acknowledges and appreciates NMFS's efforts to be responsive to feedback and local conditions. However, NMFS must align the words in the BiOp with its in-person interpretations because FEMA, local communities, and property owners will be held to the language on the page, not the less restrictive interpretation stated by NMFS staff in-person. Furthermore, the gap between the written words in the BiOp and NMFS's oral explanations and interpretations demonstrates that NMFS itself does not believe the extremely restrictive provisions written in the BiOp are in fact necessary to achieve its ESA goal. This gap demonstrates the arbitrary and capricious nature of the RPA as issued.

Conclusion

Thank you for considering this notice. We request that NMFS withdraw the BiOp and reinitiate consultation to address the myriad defects identified in this letter. We welcome the opportunity to work with NMFS and FEMA to identify approaches that work within the bounds of FEMA's authority and budget, and existing state and local programs aimed at recovering endangered species and their habitat. If you have any questions regarding this notice, please do not hesitate to contact the undersigned.

Very truly yours,

Oregon Homebuilders



Jon Chandler, CEO

Oregon Association of Realtors



Jenny Pakula, General Counsel & VP Business Development

BOMA Oregon



Susan Steward, Executive Director

Oregon Concrete and Aggregate Producers Association



Richard Angstrom, President

Oregon Farm Bureau



David Dillion, Executive Vice President

Association of Oregon Industries



Mike Freese, Vice President

cc: Congressman Peter DeFazio
 Congressman Jeffrey Merkley
 Congressman Roy Wyden
 Congressman Kurt Schrader
 Congresswoman Suzanne Bonamici
 Congressman Greg Walden
 Mark Carey, Mitigation Director, FEMA Region X
 Kenneth Murphy, Regional Administrator, FEMA Region X
 Jim Rue, Director, Oregon DLCD
 Christine Shirley, Natural Hazards and Floodplain Specialist, Oregon DLCD
 Mike McArthur, Executive Director, Association of Oregon Counties
 Mike McCauley, Executive Director, League of Oregon Cities
 Sandra McDonough, President & CEO, Portland Business Alliance
 Mark Landauer, Executive Director, Oregon Public Ports Association
 Kristin Meira, Pacific Northwest Waterways Association

Waldport Public Library

Monthly Circulation FY 2016-17

Patron Category	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	March	April	May	June	TOTAL
LCLD-Adult	3,073	3,068	2,655	2,874	2,858	3,093							
LCLD-Youth	176	174	117	96	60	37							
Waldport Adult	2,200	2,070	1,854	1,860	1,920	1,951							
Waldport Youth	126	110	67	56	79	52							
CITIES (Adult & Juv)	58	28	26	41	30	25							
Temporary 1 yr	49	64	62	81	64	66							
Temporary	152	62	3	15	8	2							
OCCC	1	21	19	20	22	4							
Oregon Passport	86	60	71	77	92	67							
Interlibrary loan out	<u>50</u>	<u>64</u>	<u>80</u>	<u>83</u>	<u>60</u>	<u>50</u>							
Chinook Circ	5,971	5,721	4,954	5,203	5,193	5,347							
% circ in public lib	50%	48%	48%	45%	48.40%	48.67%							
* Non-cataloged Library2Go *	766	n/a	n/a	438	454	542							
	<u>179</u>	<u>186</u>	<u>202</u>	<u>220</u>	<u>238</u>	<u>177</u>							
	945	186	202	658	692	719							
GRAND TOTAL	6,916	5,907	5,156	5,861	5,885	6,066							
<i>Last Year</i>	6,379	6,613	6,016	5,948	5,456	6,097	6,487	6,026	6,333	5,755	5,385	6,363	72,858
Interlibrary loan In	49	53	*35	45	63	59							
Computers	1,058	1,268	979	1,018	1,093	1,034							
WiFi	362	n/a	n/a	194	258	268							
Patrons added	36	30	37	53	33	31							
Program attendance	552	342	151	329	496	229							

*Previous ly reported

*Beginning Closure: Aug. no mag. pb. or 9 hours
 Closure: Aug. no mag. pb. or 9 hours
 Closure: as 229. Corrected to 35.

Public Works Department

Report for the month of December 2016

Water Treatment Plant

Plant Production:	<u>6.35</u>	MG
Rainfall:	<u>10.1</u>	inches

Wastewater Treatment Facility

Effluent Flow:	<u>9.8</u>	MG
Rainfall:	<u>11</u>	Inches

Public Works Dept.

Alarm call outs:	<u>1</u>
Locates:	<u>8</u>
Sewer plugs:	<u>1</u>
Water service installations:	<u>0</u>
Sewer connections:	<u>0</u>
Water Leaks:	<u>2</u>

Department General Overview

The City of Waldport Public Works Department has been working hard during the past month to protect our infrastructure and serve the citizens of Waldport. Our work includes maintaining our proactive state by identifying issues and tackling them in the best manner possible.

A few of the public works crew projects completed in December included the addition of a new culvert to the access road off the end of Park Street following a washout. The washout caused a main line water break. We also installed a new storm pump on Mill Street, built a liquid deicing unit which uses Melt Down Deicer with corrosion inhibitor, and rebuilt our picnic benches and trash can holders at Keady Wayside Park.

The plant operators are doing an exceptional job operating and maintaining the city's water treatment facilities. The operators spent their time responding to the winter storm events.

Administratively, we have been working very hard planning our future direction as a successfully operating department. December was spent reacting to storms and recording data to help with future readiness projects.

**City of Waldport
2016 LAND USE / BUILDING PERMIT ACTIVITY**

Date	Application/ Activity	Applicant	Zoning	Tax Map/Lot Location	Description	Status
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For the Period December 1, 2016 through December 31, 2016

12/16/16	Flood Hazard Zone Permit for Development Involving a Structure	Oregon Dept. of Transportation	R-2 and C-2	13-11-20CA/2300 McKinney Slough	Flood hazard permit for replacing the McKinney Slough bridge	Approved 12/16/16
12/16/16	Flood Hazard Zone Permit for Development Not Involving a Structure	Oregon Dept. of Transportation	R-2 and C-2	13-11-19AD/802 Lint Slough	Flood hazard permit for at Lint Slough to mitigate the impact of 0.13 acres of tidal marsh at the McKinney Slough bridge replacement project.	Approved 12/16/16
12/20/16	Building Permit	Al Erikson	C-1	13-11-18DD/2100 1145 Broadway St	2 nd story addition and remodel to single family dwelling	Approved 12/23/16
12/20/16	Land Use Compatibility Statement (LUCS)	Cross Development	D-D	13-11-19AC/3200 380 Hemlock St	LUCS for Hwy 34 sidewalk improvements associated with Dollar General development	Completed 12/23/16