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## Comments

# The Clash of the Acts: FEMA's Implementation of the National Flood Insurance Program and its Collision with the Endangered Species Act and the National Environmental Policy Act

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### ABSTRACT

The Federal Emergency Management Agency (FEMA) administers the National Flood Insurance Program (NFIP), a federal flood insurance program that also aims to prevent flooding in flood-prone areas. However, the structure and implementation of the NFIP has created mixed results. FEMA's implementation of the NFIP has been found to inadvertently incentivize unsustainable floodplain development, which in turn threatens species and their habitats protected by the Endangered Species Act (ESA).

Over the years, FEMA has engaged in lawsuits and settlements regarding its implementation of the NFIP. As a result of these lawsuits, the National Marine Fisheries Service (NMFS) conducted scientific studies,

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known as biological opinions (BiOp), which found that three particular components of FEMA's implementation of the NFIP are at the root of FEMA's ESA-noncompliance issues.

Additionally, one of these lawsuits resulted in a settlement which required FEMA to conduct a Nationwide Programmatic Environmental Impact Statement (NPEIS), a tool that comes from the National Environmental Policy Act (NEPA), evaluating the environmental impacts of the NFIP. The NPEIS was published in November 2017. In the NPEIS, FEMA asserts that its implementation of the NFIP does not impact floodplain development, and that the agency is compliant with the ESA. Accordingly, in the NPEIS, FEMA suggests four alternatives to the way the NFIP is currently implemented. Then, in May 2018, FEMA issued the Record of Decision (ROD), which finalizes FEMA's decision to implement the NPEIS's Preferred Alternative. The Preferred Alternative requires NFIP communities, meaning state and local governments, to "obtain and maintain documentation" of ESA compliance as a condition to issue floodplain development permits.

This Comment provides an overview of the NFIP, the ESA, the litigation and consultation history, the NPEIS, the ROD, and makes three conclusions: (1) FEMA's imposition of ESA requirements on state and local governments is an impermissible shift of its own ESA-responsibilities onto parties who have no legal obligation to comply with the ESA; (2) FEMA lacks the authority to enforce its preferred alternative under the existing regulation; and (3) the ESA compliance requirement of the alternatives is a significant burden on NFIP communities. Based on these conclusions, FEMA's implementation of its Preferred Alternative is unwise.

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#### I. INTRODUCTION

The National Flood Insurance Program<sup>1</sup> (NFIP) was enacted with the noble intention of providing federally-backed flood insurance to Americans who did not have this form of coverage from the private market.<sup>2</sup> The NFIP was also enacted to prevent future flooding in flood-prone areas.<sup>3</sup> However, the structure of the NFIP is flawed, which has led to severe criticism over the years.<sup>4</sup> The NFIP’s ineffectiveness has been highlighted in the wave of hurricanes in Texas, Florida, and the Caribbean because the NFIP was “not designed to handle catastrophic losses like

1. National Flood Insurance Program, 42 U.S.C. ch. 50 (2012 & Supp. 2017).

2. See 42 U.S.C. § 4001(a), (c) (2012 & Supp. 2017); see also DIANE P. HORN & JARED T. BROWN, CONG. RESEARCH SERV., R44593, INTRODUCTION TO THE NATIONAL FLOOD INSURANCE PROGRAM (NFIP) 2 (2018) (explaining that the interrelated policy purposes of the NFIP are “(1) to provide access to primary flood insurance, thereby allowing for the transfer of some of the financial risk of property owners to the federal government, and (2) to mitigate and reduce the nation’s comprehensive flood risk through the development and implementation of floodplain management standards”).

3. See HORN & BROWN, *supra* note 2, at 2.

4. See *infra* Section II.A.2.

those caused by Harvey, Irma, and Maria.”<sup>5</sup> Moreover, because of the NFIP’s structure, it is unclear how those affected by hurricanes will manage their losses.<sup>6</sup> While a primary criticism of the NFIP is that the program is fiscally unsound, the NFIP has also faced an unexpected clash with the Endangered Species Act of 1973<sup>7</sup> (ESA).<sup>8</sup>

The NFIP’s administering agency, the Federal Emergency Management Agency (FEMA), is at the center of this clash. Courts addressing this issue have concluded that FEMA’s implementation of the NFIP jeopardizes ESA-listed species and their habitats.<sup>9</sup> Courts have reached this conclusion because FEMA’s implementation of the NFIP has been found to encourage development in the floodplain, which in turn jeopardizes these species.<sup>10</sup> The Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively known as the “Services”) conducted scientific studies that echo courts’ findings.<sup>11</sup>

Specifically, three components of FEMA’s NFIP implementation have been linked to perpetuating the ESA clash: (1) FEMA’s minimum floodplain management criteria, (2) FEMA’s Community Rating System Program (CRS Program), and (3) FEMA’s floodplain mapping program.<sup>12</sup> These three components of NFIP implementation were found to be discretionary federal agency actions.<sup>13</sup> Accordingly, FEMA’s obligations under Section 7 of the ESA, which focuses on discretionary, federal agency actions that may jeopardize ESA-species and their habitats, were triggered.<sup>14</sup>

For years, FEMA has been sued for ESA violations, and FEMA settled a number of those cases.<sup>15</sup> In particular, one of FEMA’s settlements resulted in the issuance of a Nationwide Programmatic Environmental Impact Study (NPEIS) for the NFIP.<sup>16</sup>

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5. Mary Williams Walsh, *A Broke, and Broken, Flood Insurance Program*, N.Y. TIMES (Nov. 4, 2017), <https://www.nytimes.com/2017/11/04/business/a-broke-and-broken-flood-insurance-program.html> (internal citations omitted).

6. *See id.*

7. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (2012 & Supp. 2017).

8. *See infra* Section II.C.

9. *See infra* Section II.C.

10. *See infra* Section II.C.

11. *See infra* Section II.C.

12. *See infra* Section II.C.

13. *See infra* Section II.C.

14. 16 U.S.C. § 1536(a)(2) (2012 & Supp. 2017); *see also* SANDRA B. ZELLMER & JAN G. LAITOS, PRINCIPLES OF NATURAL RESOURCES LAW 218 (2014).

15. *See infra* Section II.C.

16. Settlement Agreement at 4, *WildEarth Guardians v. FEMA*, No. 10-CV-863-PHX-NVM (D. Az. Mar. 22, 2012); *see also* Molly Lawrence, *National Flood Insurance Program: The Changing Landscape of Floodplain Insurance & Regulation*, THE WATER

The NPEIS is a study that FEMA conducted which assesses the NFIP's impact on the environment.<sup>17</sup> The NPEIS instructed FEMA to provide "alternatives" for how to implement the NFIP.<sup>18</sup> In accordance with those instructions, FEMA proposed four alternatives.<sup>19</sup> Three of the four alternatives propose changes to the NFIP that would require state and local governments and individuals seeking floodplain development permits to "obtain and maintain documentation" that would demonstrate compliance with the ESA.<sup>20</sup> In May 2018, FEMA announced through the Record of Decision (ROD) that the agency would implement FEMA's "Preferred Alternative," Alternative 2, to modify the NFIP.<sup>21</sup> This Comment will focus on the legality of Alternative 2,<sup>22</sup> and will ultimately conclude that FEMA is unwise for implementing Alternative 2.<sup>23</sup>

This Comment will guide readers through this clash of acts.<sup>24</sup> Specifically, Part II provides background information on the NFIP, the ESA, the litigation history concerning the NFIP-ESA clash, as well as the results of Biological Opinions (BiOps),<sup>25</sup> the NPEIS, and the ROD.<sup>26</sup>

Then, Part III analyzes three specific issues with Alternative 2.<sup>27</sup> First, FEMA impermissibly shifts its ESA responsibilities onto state and local governments, as well as individuals seeking floodplain development

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REP., Jan. 15, 2014, at 1, 11 (Jan. 15, 2014); *infra* Section II.D (discussing the NPEIS requirement of the National Environmental Policy Act).

17. FED. EMERGENCY MGMT. AGENCY, NATIONAL FLOOD INSURANCE PROGRAM: FINAL NATIONWIDE PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT 1-1 (2017) [hereinafter FEMA, NFIP NPEIS].

18. *See id.* at 2-1.

19. *See infra* Section II.D.

20. FEMA, NFIP NPEIS, *supra* note 17, at 2-15 to -17.

21. FED. EMERGENCY MGMT. AGENCY, NATIONAL FLOOD INSURANCE PROGRAM: RECORD OF DECISION 1 (2018) [hereinafter FEMA, NFIP ROD].

22. Alternatives 3 and 4 include similar language to Alternative 2 and pose similar legal issues, but because Alternative 2 is to be enforced, this Comment primarily focuses on Alternative 2.

23. *See infra* Section III.D and Part IV.

24. The collision of FEMA's implementation of the NFIP and the ESA has been a contentious issue for years, and this issue is constantly evolving and has a number of elements. This comment is current regarding FEMA's ROD, but the comment neither considers ongoing litigation on this issue nor potential legislative changes. This comment also does not consider the impact that climate change has on the NFIP. This comment narrowly focuses on the litigation history of this issue and FEMA's NPEIS and ROD. Since publication of this comment, the United States has seen another devastating natural disaster, Hurricane Florence, which likely will also impact statistics, criticism, and updates to the NFIP.

25. BiOps are scientific studies that evaluate the impact of a federal agency's action on the environment and species. *See infra* Section II.C.

26. *See infra* Part II.

27. *See infra* Part III.

permits.<sup>28</sup> Second, FEMA improperly interprets an existing regulation as its authority to impose this requirement onto state and local governments and permit-seekers.<sup>29</sup> Third, FEMA's imposition of these requirements creates a significant burden for permit-seekers as well as state and local governments to bear.<sup>30</sup>

Ultimately, this Comment recommends that FEMA should address its ESA-noncompliance issues directly by modifying its management of the NFIP, instead of implementing Alternative 2.<sup>31</sup> This Comment contends that FEMA should have retracted or revised its proposed Alternatives.<sup>32</sup> Finally, this Comment suggests that FEMA should enact a new regulation that would undergo public notice and comment if the agency feels strongly that the ESA compliance requirements should be part of the NFIP.<sup>33</sup> Part IV provides a summary of this Comment.<sup>34</sup>

## II. BACKGROUND

The clash of the acts resulting from FEMA's implementation of the NFIP is complex, as is the NFIP itself, and requires an explanation of a variety of concepts before this Comment's analysis and recommendation can be fully appreciated.

### A. *National Flood Insurance Program*

The National Flood Insurance Act of 1968<sup>35</sup> (NFIA) created the NFIP.<sup>36</sup> The NFIP was created to provide federally-supported flood insurance policies to those in flood-prone areas, and to prevent future flooding through a national floodplain management program.<sup>37</sup> The motivation to create such a program stemmed from a gap in flood insurance coverage, as "private insurers either stopped selling flood

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28. *See infra* Section III.A.

29. *See infra* Section III.B.

30. *See infra* Section III.C.

31. *See infra* Section III.D.

32. *See infra* Section III.D.

33. *See infra* Section III.D.

34. *See infra* Part IV.

35. National Flood Insurance Act of 1968, Pub. L. No. 90-448, 82 Stat. 572 (1968) (codified as amended in scattered sections of 42 U.S.C. ch. 50)

36. *Id.*; National Flood Insurance Program, 42 U.S.C. ch. 50 (2012 & Supp. 2017); *see also* HORN & BROWN, *supra* note 2, at 1.

37. 42 U.S.C. § 4001(a), (c); HORN & BROWN, *supra* note 2, at 2 (explaining that the interrelated policy purposes of the NFIP are "(1) to provide access to primary flood insurance, thereby allowing for the transfer of some of the financial risk of property owners to the federal government, and (2) to mitigate and reduce the nation's comprehensive flood risk through the development and implementation of floodplain management standards").

insurance policies or began charging very high premiums because the [flood insurance] business became too risky.”<sup>38</sup> FEMA is the managing agency of the NFIP, and FEMA fulfills its duty through its subcomponent, the Federal Insurance and Mitigation Administration (FIMA).<sup>39</sup>

The NFIP has been amended a number of times.<sup>40</sup> The most relevant amendments to this Comment are the Biggert-Waters Flood Insurance Reform Act of 2012<sup>41</sup> (BW-12) and the Homeowner Flood Insurance Affordability Act of 2014<sup>42</sup> (HFIAA). BW-12 “authorized and funded the national mapping program,” and increased flood insurance rates so that the actual financial risk of flooding would be reflected in the insurance rate.<sup>43</sup> Two years after BW-12 was enacted, HFIAA repealed certain parts of BW-12, put limits on certain insurance rate increases, and updated mechanisms to ensure the fiscal soundness of the NFIP.<sup>44</sup> Although the legislative amendments to the NFIP aimed to improve the program, NFIP implementation continues to face challenges regarding achievement of the program’s intended goals, as well as challenges with ESA compliance.

### 1. Breakdown of NFIP Implementation

In addition to the NFIP’s primary purpose of providing flood insurance, the NFIP is critically important to reducing “comprehensive flood risk[s].”<sup>45</sup> The NFIP relies on community involvement and the adoption of local land use laws and ordinances to achieve the NFIP’s vital flood-minimization goal.<sup>46</sup> To accomplish this goal, the NFIP urges state and local governments to modify their local land use laws to minimize the

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38. Editorial, *The Holes in Flood Insurance*, N.Y. TIMES (Aug. 31, 2017), <https://tinyurl.com/y854hpkw>.

39. 42 U.S.C. § 4011(a) (“[T]he Administrator of the Federal Emergency Management Agency is authorized to establish and carry out a national flood insurance program which will enable interested persons to purchase insurance against loss resulting from physical damage to or loss of real property or personal property related thereto arising from any flood occurring in the United States.”); *see also* HORN & BROWN, *supra* note 2, at 1.

40. *See Flood Insurance Reform – The Law*, FED. EMERGENCY MGMT. AGENCY (Jan. 26, 2018), <https://www.fema.gov/flood-insurance-reform-law>.

41. Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, 126 Stat. 916 (2012) (codified in scattered sections of 42 U.S.C. ch. 50 (2012 & Supp. 2017)).

42. Homeowner Flood Insurance Affordability Act of 2014 Pub. L. No. 113-89, 128 Stat. 1020 (2014) (codified in scattered sections of 42 U.S.C. ch. 50 (2012 & Supp. 2017)).

43. *Flood Insurance Reform - The Law*, *supra* note 40.

44. *See id.*

45. HORN & BROWN, *supra* note 2, at 2 & n.12 (explaining that “comprehensive flood risk means that the risk includes both financial risk (i.e., physical damage to the property), but also the risk to human life”).

46. *See id.* at 2.

development of land that would otherwise be susceptible to flood damage.<sup>47</sup>

Community<sup>48</sup> participation in the NFIP is voluntary, and FEMA is only allowed to provide flood insurance to communities that have adopted land use laws that reflect “the comprehensive criteria for land management and use,” known as the “minimum floodplain management criteria.”<sup>49</sup> The minimum floodplain management criteria were promulgated by FEMA through federal regulation 44 C.F.R. § 60.3.<sup>50</sup> Communities can gain access to the NFIP by adopting FEMA’s minimum floodplain management criteria through enacting local or state laws.<sup>51</sup> These criteria intend to:

- (1) constrict the development of land which is exposed to flood damage where appropriate, (2) guide the development of proposed construction away from locations which are threatened by flood hazards, (3) assist in reducing damage caused by floods, and (4) otherwise improve the long-range land management and use of flood-prone areas.<sup>52</sup>

While FEMA has established minimum standards for NFIP participation through federal regulations,<sup>53</sup> those “standards only have the force of law because they are adopted and enforced by state or local government[s].”<sup>54</sup> Therefore, if state or local governments fail to adopt these standards, participation in the NFIP will not occur and the goals of the NFIP will not be accomplished.<sup>55</sup> FEMA’s implementation of the minimum floodplain management criteria is the first component of NFIP implementation that contributed to FEMA’s noncompliance with the ESA.<sup>56</sup>

After enacting state or local laws, NFIP communities are also responsible for enforcing the minimum floodplain management criteria.<sup>57</sup>

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47. See 42 U.S.C. § 4001(e) (2012 & Supp. 2017).

48. See 44 C.F.R. § 59.1 (2018) (definition of community that participates in the NFIP, also known as “NFIP community”).

49. HORN & BROWN, *supra* note 2, at 2 (citing 42 U.S.C. § 4012(c)(2) (2012 & Supp. 2017)); see also 42 U.S.C. § 4102 (2012 & Supp. 2017) (criteria for land management and use).

50. 44 C.F.R. § 60.3 (2018); see *infra* Section III.B (discussing FEMA’s expansive interpretation of this regulation to support its authority to enforce Alternative 2).

51. HORN & BROWN, *supra* note 2, at 2 (citing 42 U.S.C. § 4012(c)(2)); see also 42 U.S.C. § 4102 (criteria for land management and use).

52. HORN & BROWN, *supra* note 2, at 6 (citing 42 U.S.C. § 4102(c)).

53. 44 C.F.R. § 60.3 (2018).

54. HORN & BROWN, *supra* note 2, at 6.

55. *Id.* at 2.

56. See *infra* Section II.C.

57. See HORN & BROWN, *supra* note 2, at 7.



In fact, these communities can choose to adopt more stringent floodplain management criteria than FEMA's minimum requirements.<sup>58</sup> FEMA incentivizes NFIP communities to adopt more stringent standards through the CRS Program.<sup>59</sup> The CRS Program's purpose is to incentivize measures that "reduce the risk of flood or erosion damage," "protect natural and beneficial floodplain functions," and decrease federal flood insurance losses.<sup>60</sup> Through the CRS Program, FEMA awards points that "increase a community's 'class' rating in the CRS on a scale of 1 to 10."<sup>61</sup> As communities gather points to increase their class, they are given discounts on their policy premiums.<sup>62</sup>

Community participation and adoption of appropriate local land use laws and ordinances are critical to the functionality of the NFIP, and contribute to the flood-reduction goals of the NFIP.<sup>63</sup> While the CRS Program nobly intends to minimize flood risks, this program is the second component of NFIP implementation that contributed to FEMA's noncompliance with the ESA.<sup>64</sup>

In addition to encouraging communities to adopt appropriate land use measures and to participate in the CRS Program, the NFIP addresses its flood-reduction goal through its floodplain mapping process, which begins with FEMA conducting Flood Insurance Studies (FIS).<sup>65</sup> FISs are national studies that identify areas that have "special flood, mudslide, and flood-related erosion hazards."<sup>66</sup> FISs also assess the "flood risk . . . and designate insurance zones."<sup>67</sup> FEMA uses the FISs in collaboration with NFIP communities to develop Flood Insurance Rate Maps (FIRM) that "depict the community's flood risk and floodplain."<sup>68</sup> One important aspect of FIRMs is the specific focus on identifying Special Flood Hazard Areas (SFHA).<sup>69</sup> SFHAs are flood risk zones that have a chance of flooding during a "1 in 100 year flood," meaning that these properties have a "one percent or greater risk of flooding every year."<sup>70</sup>

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58. *See id.*

59. *See id.* 7–8.

60. 42 U.S.C. § 4022(b)(1) (2012 & Supp. 2017).

61. HORN & BROWN, *supra* note 2, at 18.

62. *See id.* at 18–19.

63. *See id.* at 6–7.

64. *See infra* Section II.C.

65. *See* HORN & BROWN, *supra* note 2, at 3.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (internal citations omitted).

The significance of FIRMs and SFHAs is that these maps and areas help determine both flood insurance rates and whether flood insurance policies are mandatory.<sup>71</sup> Given the significance of FIRMs, NFIP communities must “pass the map into [their] local or state law in order for the map to be effective.”<sup>72</sup> The mapping process is the third component of NFIP implementation that contributed to FEMA’s noncompliance with the ESA.<sup>73</sup>

## 2. Current State of the NFIP

The current state of the NFIP is troublesome, as acknowledged by the U.S. Government Accountability Office’s (GAO) inclusion of the NFIP on its High Risk List.<sup>74</sup> The High Risk List is updated every two years with the start of a new Congress and identifies “the agencies and program areas that are *high risk due to their vulnerabilities to fraud, waste, abuse, and mismanagement, or are most in need of transformation.*”<sup>75</sup>

The primary problem with the NFIP is that it is seriously indebted to the U.S. Department of the Treasury (Treasury).<sup>76</sup> This debt stems from the NFIP’s inability to “generate sufficient revenues to repay” the money that was borrowed from the Treasury “to cover claims from the 2005 and 2012 hurricanes or potential claims related to future catastrophic losses.”<sup>77</sup> The GAO identifies a key problem with the NFIP: “Since the program offers rates that do not fully reflect the risk of flooding, [the] NFIP’s overall rate-setting structure was not designed to be actuarially sound in the aggregate, nor was it intended to generate sufficient funds to fully cover actual losses.”<sup>78</sup>

While there are overarching programmatic problems with the NFIP, FEMA’s implementation of three particular components of the NFIP—(1) the minimum floodplain management criteria, (2) the CRS program, and (3) the mapping process—have brought FEMA into noncompliance with

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71. *See id.* at 9, 14 (noting that the flood insurance can either be NFIP insurance, or it can be private insurance that is “at least as broad as the coverage of the NFIP”) (quoting 42 U.S.C. § 4012a(b) (2012 & Supp. 2017)).

72. HORN & BROWN, *supra* note 2, at 3.

73. *See infra* Section II.C.

74. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-317, HIGH-RISK SERIES: PROGRESS ON MANY HIGH-RISK AREAS, WHILE SUBSTANTIAL EFFORTS NEEDED ON OTHERS 619 (2017) [hereinafter GAO-17-317].

75. *High Risk List*, U.S. GOV’T ACCOUNTABILITY OFFICE, <http://www.gao.gov/highrisk/overview> (last visited Dec. 8, 2018) (emphasis added).

76. GAO-17-317, *supra* note 74, at 619.

77. *Id.*

78. *Id.*

the ESA.<sup>79</sup> Specifically, FEMA is not in compliance with Section 7 of the ESA because courts and BiOps have found that FEMA's implementation of those three components of the NFIP has the potential to jeopardize ESA-listed species.<sup>80</sup>

*B. The Endangered Species Act*

The ESA is a conservation statute that was created after various species of fish, wildlife, and plants in the United States went extinct due to economic growth and development.<sup>81</sup> The ESA's purpose is to use conservation programs to protect species of fish, wildlife, and plants that have been listed as threatened<sup>82</sup> or endangered<sup>83</sup> with extinction.<sup>84</sup> All federal departments and agencies are required to conserve threatened or endangered species in the course of their federal actions.<sup>85</sup>

The NMFS and FWS (collectively known as the "Services") are responsible for administering the ESA.<sup>86</sup> The NMFS's role is to work with federal agencies whose actions may affect a species listed as threatened or endangered for ESA's Section 7(a)(2) consultation requirement.<sup>87</sup> Additionally, the NMFS issues BiOps as part of the consultation requirement.<sup>88</sup> The FWS is responsible for working with states, tribes, private landowners, non-governmental organizations, and federal partners to conserve species and habitats.<sup>89</sup> The FWS also plays a role in consultations and issues BiOps.<sup>90</sup>

BiOps are researched and published by the Services, and detail the Services' opinion as to "whether the Federal [agency] action is likely to jeopardize the continued existence of listed species, or result in the

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79. See *infra* Section II.C.

80. See *infra* Section II.C.

81. See 16 U.S.C. § 1531(a)(1) (2012 & Supp. 2017).

82. 16 U.S.C. § 1532(20) (2012 & Supp. 2017) ("The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.").

83. 16 U.S.C. § 1532(6) ("The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range . . .").

84. See 16 U.S.C. § 1531(b).

85. See 16 U.S.C. § 1531(c)(1).

86. 50 C.F.R. § 402.01(b) (2017).

87. *Endangered Species Act Consultations*, NAT'L MARINE FISHERIES SERV., <https://www.fisheries.noaa.gov/topic/consultations#endangered-species-act-consultations> (last visited Nov. 28, 2018); see *infra* text accompanying note 95.

88. See *Endangered Species Act Consultations*, *supra* note 87.

89. See *ESA Implementation Overview*, U.S. FISH AND WILDLIFE SERVICE, [https://www.fws.gov/endangered/improving\\_esa/index.html](https://www.fws.gov/endangered/improving_esa/index.html) (last updated June 6, 2018).

90. *Consultations*, U.S. FISH & WILDLIFE SERVICE, <https://www.fws.gov/endangered/what-we-do/faq.html#3> (last updated Dec. 6, 2018).

destruction or adverse modification of critical habitat.”<sup>91</sup> If the BiOp concludes that the agency action will jeopardize the species at issue, or its habitat, then the NMFS must suggest “reasonable and prudent alternatives” (RPA) to the agency action that will help the agency avoid jeopardy.<sup>92</sup>

Primarily at issue in this Comment is Section 7 of the ESA. Section 7’s purpose is to ensure that actions “authorized, funded, or carried out” by federal agencies are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . .”<sup>93</sup> Section 7 obligations of a federal agency are triggered when the agency makes an “affirmative, discretionary decision” to undertake the action.<sup>94</sup>

Federal agencies are required by Section 7(a)(2) of the ESA to consult with the FWS or the NMFS to ensure that their agency actions will not jeopardize endangered or threatened species.<sup>95</sup> The consultation with the Services results in a BiOp and the presentation of RPAs if necessary.<sup>96</sup>

Other sections of the ESA that are relevant to this Comment are Section 9 and Section 10. Section 9 of the ESA makes it illegal for any person subject to United States jurisdiction to “take” any ESA-listed species.<sup>97</sup> The ESA defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>98</sup> Section 10 of the ESA, on the other hand, issues permits which allow for an action to occur that would otherwise be considered a “take” under the ESA.<sup>99</sup> These are referred to as “incidental take permits.”<sup>100</sup> As part of the permit issuance, the permittee must create a conservation plan that demonstrates the “impact that will result from such taking,” the steps and funding that the permittee will take and secure to minimize and mitigate the impacts, and the alternative actions that were considered by the applicant.<sup>101</sup>

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91. *Id.*

92. *See* ZELLMER & LAITOS, *supra* note 14, at 218.

93. 16 U.S.C. § 1536(a)(2) (2012 & Supp. 2017).

94. ZELLMER & LAITOS, *supra* note 14, at 218.

95. 16 U.S.C. § 1536(a)(2). This process is commonly referred to as “Section 7 consultation.”

96. ZELLMER & LAITOS, *supra* note 14, at 219.

97. 16 U.S.C. § 1538(a)(1) (2012 & Supp. 2017).

98. 16 U.S.C. § 1532(19) (2012 & Supp. 2017).

99. 16 U.S.C. § 1539 (2012 & Supp. 2017).

100. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 508 (3d ed. 2013).

101. 16 U.S.C. § 1539(a)(2)(A).

Because of the unintended adverse impact that FEMA's implementation of the NFIP has on ESA-listed species and their habitats, there is a clash between FEMA's agency action of implementing the NFIP and the agency's responsibilities under Section 7 of the ESA.<sup>102</sup>

C. *Litigation History of the NFIP-ESA Clash and Results of the BiOps*

For a number of years, FEMA has been engaged in litigation focused on whether the agency's administration and implementation of the NFIP jeopardizes endangered species.<sup>103</sup> A number of court holdings, settlement agreements, and BiOps issued by the Services ultimately found that FEMA's implementation of the NFIP did in fact put endangered species at risk,<sup>104</sup> thus triggering the agency to fulfill its ESA responsibilities.<sup>105</sup>

In *Florida Key Deer v. Paulison*,<sup>106</sup> the Eleventh Circuit ruled on years of litigation and consultations with the FWS regarding FEMA's implementation of the NFIP in the Florida Keys.<sup>107</sup> The court found that FEMA's implementation of the NFIP in Florida jeopardized Florida Key deer and other ESA-listed species.<sup>108</sup> Specifically, the court held that Section 7 requirements were triggered by FEMA's administration of the NFIP because (1) certain components of FEMA's administration of the NFIP are discretionary and therefore trigger Section 7 obligations, and (2) FEMA's administration of the NFIP is "a relevant cause of jeopardy to the listed species" because FEMA has the authority to prevent the indirect effects associated with the issuance of flood insurance.<sup>109</sup> To support this latter statement, the court provided an example of FEMA's ability to modify flood insurance eligibility requirements to prevent jeopardy to listed species.<sup>110</sup> The court also pointed out that the FWS consultation process found that "the NFIP jeopardizes listed species because

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102. See *infra* Section II.C.

103. See *infra* Section II.C.

104. See *supra* Section II.A (discussing the three components of the NFIP that have been found to violate the ESA); see also Section II.C (discussing these three NFIP components in the context of judicial decisions, settlements, and BiOps).

105. See *infra* Section II.C.

106. *Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008).

107. *Id.* at 1148.

108. *Id.* at 1139–40.

109. *Id.* at 1141–44 ("[FEMA's] administration of the NFIP is a relevant cause of jeopardy of listed species . . . because development is encouraged and in effect authorized by FEMA's issuance of flood insurance.").

110. *Id.* at 1144.

development is encouraged and in effect authorized by FEMA's issuance of flood insurance."<sup>111</sup>

In *National Wildlife Federation v. FEMA*,<sup>112</sup> the National Wildlife Federation (NWF) and Public Employees for Environmental Responsibility sued FEMA "alleging that FEMA violated Section 7(a)(2) of the ESA by not consulting with the [NMFS] on the impacts of the [NFIP] on the Puget Sound chinook salmon, a threatened species."<sup>113</sup> The plaintiffs argued that FEMA's agency action of implementing the NFIP in Washington State's Puget Sound might put the endangered salmon species at risk because "some aspects of the NFIP encourage development in the floodplains," and the salmon rely on the affected habitat.<sup>114</sup> In response, FEMA argued that the ESA consultation requirement did not apply to them because "the NFIP is not a discretionary 'agency action' subject to Section 7(a)(2) of the ESA," and the plaintiffs had not demonstrated that "FEMA's implementation of the NFIP 'may affect' the Puget Sound chinook salmon."<sup>115</sup>

The court held that FEMA's implementation of the NFIP did trigger Section 7 obligations for two reasons.<sup>116</sup> First, FEMA's implementation of the NFIP indeed fell under the definition of "agency action," and is a discretionary action, thus Section 7(a)(2) applies to FEMA.<sup>117</sup> Second, FEMA's agency action of implementing the NFIP impacts development which may affect the listed species.<sup>118</sup> The court noted that even though the impact is an indirect effect, the action still triggers ESA requirements.<sup>119</sup>

The court ultimately ordered a formal consultation with the NMFS, which resulted in a BiOp for the Puget Sound.<sup>120</sup> The BiOp examined the three components of FEMA's implementation of the NFIP that the court in *NWF v. FEMA* held required ESA consultation: (1) the floodplain mapping program, (2) the minimum floodplain management criteria for

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111. *Id.*

112. *Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d 1151 (W.D. Wash. 2004).

113. *Id.* at 1153–54.

114. *Id.* at 1154.

115. *Id.* at 1168.

116. *Id.* at 1169, 1172–77.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1176–77; see NAT'L MARINE FISHERIES SERV., NMFS TRACKING NO. 2006-00472, FINAL BIOLOGICAL OPINION FOR THE ON-GOING NATIONAL FLOOD INSURANCE PROGRAM CARRIED OUT IN THE PUGET SOUND AREA IN WASHINGTON STATE (2008) [hereinafter NMFS, WASH. BIO. OP.].

community inclusion in the NFIP, and (3) the CRS Program.<sup>121</sup> The BiOp concluded that “FEMA’s activities do lead to floodplain development in Washington State, some of which affects the habitat of listed species.”<sup>122</sup> The BiOp found that the “three elements of the NFIP [listed above] directly and indirectly lead to changes in the floodplain environments and eventually lead to floodplain development. These changes in the floodplain environment adversely affect the habitat and habitat forming processes for listed species in the Puget Sound region.”<sup>123</sup>

In addition to the case in Washington State that resulted in a BiOp, another BiOp was issued as a result of a lawsuit in Oregon.<sup>124</sup> In 2010, FEMA entered into a settlement agreement with the Audubon Society of Portland, the North West Environmental Defense Center and other entities.<sup>125</sup> FEMA was engaged in this litigation as a result of the groups’ claim that FEMA’s implementation of the NFIP threatened ESA-listed species in Oregon.<sup>126</sup> FEMA settled this lawsuit by agreeing to consult with the NMFS to fulfill its Section 7 obligations.<sup>127</sup>

The NMFS released the BiOp for the affected Oregon area in April 2016.<sup>128</sup> The BiOp analyzed both the direct and indirect effects of FEMA’s implementation of the NFIP in Oregon on ESA-listed species.<sup>129</sup> Specifically, the BiOp focused on the discretionary elements of FEMA’s NFIP implementation: (1) regulatory floodplain management criteria, (2) floodplain mapping, and (3) the CRS Program.<sup>130</sup> The BiOp addressed “whether FEMA’s implementation of the NFIP can be said to ‘cause’

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121. NMFS, WASH. BIO. OP., *supra* note 120, at 3–23, 83.

122. *Id.* at 3.

123. *Id.* at 83; *see also* NAT’L MARINE FISHERIES SERV., NMFS TRACKING NO. NWR-2011-3197, BIOLOGICAL OPINION FOR THE IMPLEMENTATION OF THE NATIONAL FLOOD INSURANCE PROGRAM IN THE STATE OF OREGON 138 (2016) [hereinafter NMFS, OR. BIO. OP.] (stating that in the Washington BiOp, the question of whether FEMA’s implementation of the NFIP could “cause” floodplain development was considered, and NMFS concluded that the “NFIP both facilitates floodplain development and establishes the land-use and construction standards pursuant to which such development may occur”).

124. *Biological Opinion on the NFIP in Oregon*, OREGON DEP’T OF LAND CONSERVATION & DEV., <https://www.oregon.gov/lcd/NH/Pages/BiOp.aspx> (last visited Nov. 28, 2018).

125. Settlement Agreement and Proposed Order at 1–2, *Audubon Soc’y of Portland v. FEMA*, No. 3:09-cv-729-HA (D. Or. 2010) (adopted by court July 12, 2010) [hereinafter *Audubon Settlement*].

126. Lawrence, *supra* note 16, at 9; *see also* *Audubon Settlement*, *supra* note 125, at 1–2.

127. Lawrence, *supra* note 16, at 9; *see also* *Audubon Settlement*, *supra* note 125, at 1–2.

128. *See* NMFS, OR. BIO. OP., *supra* note 123, at 1.

129. *See id.* at 6, 138.

130. *Id.* at 11.

floodplain development, which affects habitat functions and features relied on by [the ESA-listed species.]”<sup>131</sup> The BiOp concluded that the three discretionary components of NFIP implementation lead to development in the floodplain.<sup>132</sup> Moreover, the BiOp found that FEMA’s implementation of the NFIP had several “weaknesses,” and the NMFS concluded that these weaknesses indicate that NFIP implementation does not guarantee the survival and recovery of these species.<sup>133</sup>

As part of the BiOp, the NMFS provided FEMA with RPAs to more effectively administer the NFIP in a manner that would not jeopardize ESA-listed species or their designated habitats.<sup>134</sup> FEMA has an obligation to act on the RPAs, but as of June 6, 2017, the date on which the public comment period<sup>135</sup> for the NPEIS closed, FEMA had not provided Oregon with any direction regarding what to do with the BiOp findings and RPAs.<sup>136</sup> Commentators on the NPEIS stated that this has caused a state of uncertainty in Oregon because the parties responsible for permitting and other governmental functions are unclear as to how the NPEIS and Oregon BiOp are supposed to interact, and these parties are effectively at a standstill without guidance from FEMA on how to proceed.<sup>137</sup>

In addition to the cases from Florida and Washington State that saw their way through the courts and the settlement in Oregon, FEMA settled

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131. *Id.* at 138.

132. *Id.* at 141.

133. *Id.* at 142.

134. *Id.* at 274.

135. *See infra* Section II.D for discussion of the NPEIS process.

136. Jim Rue, Dir., Or. Dep’t of Land Conservation and Dev., Comment Letter on Proposed NFIP NPEIS (June 2, 2017) [hereinafter Rue Comment], <https://www.regulations.gov/document?D=FEMA-2012-0012-0062>; *see also* Alexandra Howard, FEMA BiOp Program Manager, City of Portland Office of Mgmt. and Finance, Comment Letter on Proposed NFIP NPEIS (June 6, 2017) [hereinafter Howard Comment], <https://www.regulations.gov/document?D=FEMA-2012-0012-0065>.

137. Rue Comment, *supra* note 136; Howard Comment, *supra* note 136.



lawsuits in New Mexico,<sup>138</sup> California,<sup>139</sup> and Arizona<sup>140</sup> regarding the issue of whether FEMA's implementation of the NFIP jeopardizes ESA-listed species in specific regions of those states. The settlement in Arizona is notable because it resulted in FEMA's obligation to prepare the NPEIS.<sup>141</sup>

The common thread among the above-mentioned cases, BiOps, and settlement agreements is the three components of the NFIP that are implemented by FEMA and found to jeopardize ESA-listed species. These components are (1) the minimum floodplain management criteria, (2) floodplain mapping, and (3) the CRS Program. FEMA has an obligation to address the issues with these components. Indeed, by conducting the NPEIS, FEMA began to accept responsibility for the flaws in its implementation of the NFIP.<sup>142</sup> However, there are a number of issues with the NPEIS, and this Comment will specifically focus on three issues with the Alternative 2.<sup>143</sup>

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138. Ben Rubin, *FEMA Settles Another Lawsuit Challenging Implementation of the National Flood Insurance Program*, ENDANGERED SPECIES LAW & POL'Y (Nossaman LLP, Feb. 24, 2011), <https://bit.ly/2DICsBY>. Here, FEMA settled a lawsuit with the environmental nonprofit WildEarth Guardians. As part of the settlement, FEMA was required to engage the Services in formal consultation for its Section 7 obligations in order to determine the effect of the NFIP's implementation on ESA-listed species in New Mexico. Specifically, the consultation was required to evaluate the impact of FEMA's implementation of the minimum floodplain management criteria, FEMA's mapping practices, and the implementation of the CSR Program. *See* Stipulated Settlement Agreement & Proposed Order at 3, *WildEarth Guardians v. FEMA*, No. 1:09-cv-00882-RB/WDS (D.N.M. Feb. 11, 2011) [hereinafter *WildEarth Settlement*].

139. *See* *Coal. for a Sustainable Delta v. FEMA*, 812 F. Supp. 2d 1089 (E.D. Cal. 2011); *see also* Settlement Agreement & Proposed Order at 2–3, *Coal. for a Sustainable Delta v. FEMA*, No. 1:09-cv-02024-LJO-BAM (E.D. Cal. 2012) [hereinafter *CSFAD Settlement*]; *FEMA Settles Citizen Suit; Agrees to Consult on Floodplain Program's Impacts on Listed Fish in the Delta*, ENDANGERED SPECIES LAW AND POL'Y (Nossaman LLP, Feb. 24, 2011), <https://bit.ly/2qsqFZW>. Here, FEMA entered into a settlement agreement with the Coalition for a Sustainable Delta and the Kern County Water Agency, regarding FEMA's administration of the NFIP in certain areas of California. *CSFAD Settlement*, *supra*, at 1–2. The settlement required FEMA to enter into formal consultation with the Services based on the agency's Section 7 obligations to determine the effects of the agency's implementation of the NFIP on ESA-listed species in the Sacramento-San Joaquin River Delta. *Id.* at 2–3.

140. *WildEarth Settlement*, *supra* note 138, at 2; *see also* Lawrence, *supra* note 16, at 11. Here, FEMA entered into yet another settlement agreement with WildEarth Guardians regarding the agency's implementation of the NFIP in Arizona, and how the implementation impacts ESA-listed species.

141. *WildEarth Settlement*, *supra* note 138, at 4.

142. *See* *Nat'l Wildlife Fed'n v. FEMA*, No. C11-2044-RSM, 2014 U.S. Dist. LEXIS 151386, at \*12–13, \*22–58 (W.D. Wash. Oct. 23, 2014) (discussing FEMA's implementation of RPAs from the Washington BiOp).

143. *See infra* Section II.D.

D. *Overview of FEMA's Nationwide Programmatic Environmental Impact Statement*

The NFIP is in need of modification, and as the administrator of the NFIP, FEMA must make modifications to the program for two reasons: (1) to comply with the legislative requirements of BW-12 and HFIAA, and (2) to “comply, or demonstrate compliance, with the requirements of Section 7 of the [ESA].”<sup>144</sup> In the NPEIS, FEMA explained that the drivers behind the program changes required by BW-12 and HFIAA are the “fiscal soundness” of the NFIP, and the need for premium rates to reflect the true risks faced by these properties as a consequence of flooding.<sup>145</sup> To explain the programmatic changes required to demonstrate ESA compliance, FEMA stated:

The need to demonstrate compliance with the ESA stems from the many and varying statements from Federal agencies and the public about FEMA's compliance with the ESA, and the *perception* about the nature of the NFIP and its effects on ESA-listed species and designated critical habitats. *FEMA determined that it is currently in compliance with the ESA*, but recognizes the need to make program changes that demonstrate ESA compliance to the public.<sup>146</sup>

FEMA prepared the NPEIS based on its obligations under the National Environmental Policy Act<sup>147</sup> (NEPA).<sup>148</sup> NEPA “requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions.”<sup>149</sup> NEPA also requires federal agencies to “prepare detailed statements assessing the environmental impact of and alternatives to major federal actions significantly affecting the environment.”<sup>150</sup>

Another component of the EIS process is the requirement that the EIS be updated on the Federal Register and open for public comments.<sup>151</sup> FEMA published the draft NPEIS in April 2017 and allowed a 60-day comment period during which 29 comments from individuals,

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144. FEMA, NFIP NPEIS, *supra* note 17, at 1-6, 2-1.

145. *Id.* at 1-6.

146. *Id.* (emphasis added).

147. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331–35, 4341–47 (2012 & Supp. 2017).

148. FEMA, NFIP NPEIS, *supra* note 17, at 1-23.

149. *What is the National Environmental Policy Act?*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/nepa/what-national-environmental-policy-act>.

150. *Id.* These statements are commonly referred to as Environmental Impact Statements (EIS) and Environmental Assessments (EA).

151. FEMA, NFIP NPEIS, *supra* note 17, at 1-24 to -26.

environmental non-profits, non-profits representing various interests, and city and state governments were submitted.<sup>152</sup>

FEMA determined that the NEPA analysis should be conducted at a nationwide programmatic level, as programmatic environmental documents are “prepared when an agency is proposing to carry out a broad action, program, or policy.”<sup>153</sup> FEMA prepared the NPEIS to evaluate the proposed modifications to the NFIP.<sup>154</sup> The NPEIS evaluated the potential impacts on the natural and human environment associated with the NFIP, and also evaluated alternative NFIP-modification proposals.<sup>155</sup> Based on the completion of the NPEIS, FEMA stated that it had met its NEPA obligations to “consider potential environmental impacts of the Alternatives,” and that the NPEIS will “assist[] in the decision-making process on future program modifications to the NFIP.”<sup>156</sup>

The Final NPEIS was published in November 2017, and the purpose of the study was to provide a “baseline analysis of the environmental impacts of the NFIP, as well as the impacts of implementing certain changes required by BW-12 and HFIAA and demonstrating compliance with the ESA.”<sup>157</sup>

Under NEPA, “any agency proposing a major Federal action . . . must consider a range of reasonable alternatives” to the considered action.<sup>158</sup> FEMA included four alternatives as part of the NPEIS.<sup>159</sup> Alternative 1 is the “No Action” alternative, which would continue implementation of the NFIP as it currently exists.<sup>160</sup> No Action alternatives are generally included in environmental impact statements as a “benchmark against which impacts of the alternatives can be evaluated.”<sup>161</sup>

Alternative 2 is FEMA’s “Preferred Alternative” and ultimately the alternative decided upon in the ROD.<sup>162</sup> Alternative 2 includes changes that would address the legislative change requirements of BW-12 and HFIAA.<sup>163</sup> In addition to those changes, Alternative 2 would require NFIP

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152. See Comments on National Flood Insurance Program Nationwide Programmatic Environmental Impact Statement, <https://bit.ly/2PQ5POz> (last visited Dec. 19, 2018).

153. FEMA, NFIP NPEIS, *supra* note 17, at 1-23; 40 C.F.R. § 1502.4(b) (2018).

154. See FEMA, NFIP NPEIS, *supra* note 17, at 1-1.

155. *Id.*

156. *Id.* at 1-23.

157. *Id.* at 1-24.

158. *Id.* at 2-1 (“major Federal action” is defined in 40 C.F.R. § 1508.18 (2018)).

159. See *id.* at 2-15 to -17.

160. *Id.* at 2-16.

161. *Id.*

162. *Id.*

163. *Id.*

communities, pursuant to 44 C.F.R. § 60.3(a)(2),<sup>164</sup> to “obtain and maintain documentation of compliance with the appropriate Federal or State laws, including the ESA, as a condition of issuing permits to develop in the floodplain.”<sup>165</sup> Additionally, Alternative 2 would require that flood map change requests (also known as Letter of Map Change or LOMC) be “contingent on the community, or the project proponent on the community’s behalf, submitting documentation of compliance with the ESA.”<sup>166</sup>

Similar to Alternative 2, Alternatives 3 and 4 include the legislatively required changes, and include language that would delegate ESA compliance responsibilities to the NFIP communities.<sup>167</sup> Whether FEMA can make communities responsible for these requirements is debatable, and a number of commentators on the draft NPEIS argued against the aspects of FEMA’s alternatives that delegate ESA responsibility to NFIP communities.<sup>168</sup>

#### *E. Overview of FEMA’s Record of Decision*

In May 2018, FEMA published the ROD, which announced that the agency will implement Alternative 2 to modify the NFIP.<sup>169</sup> FEMA found that Alternative 2 “is fully within FEMA’s discretion” and “meets FEMA’s purpose and need, causes no adverse environmental impact, and meets FEMA’s desired timeframe for taking action.”<sup>170</sup> In the ROD, FEMA again stated<sup>171</sup> that the agency would have preferred to implement Alternatives 3 or 4, but the agency could not reach an agreement with the Services.<sup>172</sup> FEMA also reiterated that the agency has no land use

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164. 44 C.F.R. § 60.3 (2018) sets out the minimum floodplain management criteria for NFIP communities, and 44 C.F.R. § 60.3(a)(2) governs the permitting aspect of the minimum floodplain management criteria. FEMA’s expansive interpretation of this regulation is discussed in Section III.B.

165. FEMA, NFIP NPEIS, *supra* note 17, at 2-16.

166. *Id.*

167. *Id.* at 2-16 to -17.

168. *See infra* Part III.

169. FEMA, NFIP ROD, *supra* note 21, at 1, 13 (“FEMA’s decision is to proceed with the preferred alternative, Alternative 2, to implement the legislatively required changes, floodplain management criteria guidance, and mapping modifications.”).

170. *Id.* at 1, 5.

171. *See* FEMA, NFIP NPEIS, *supra* note 17, at 2-21 (“Alternatives 3 and 4 would meet the purpose and need, but after an extensive coordination effort with the Services, FEMA has been unable to secure the Services’ concurrence on either alternative.”).

172. FEMA, NFIP ROD, *supra* note 21, at 1-2, 7, 11, 13 (“FEMA’s original preference was to pursue PEIS Alternative #3 which would have allowed FEMA to demonstrate compliance with both sections 7(a)(1) and 7(a)(2) of the ESA in this effort.”). Alternative 3 was the “Environmentally Preferred Alternative.” FEMA, NFIP ROD, *supra* note 21, at

authority.<sup>173</sup> The ROD incorporates the Draft and Final NPEIS by reference.<sup>174</sup>

In the ROD, FEMA highlights that the agency addressed the issue of the effects of the implementation of the NFIP through the Biological Evaluation<sup>175</sup> (BE) it completed in connection with the NPEIS.<sup>176</sup> FEMA reiterates that the BE found that “because the NFIP does not cause, incentivize, facilitate, or otherwise encourage private floodplain development to occur, the implementation of the NFIP at the national level had no effects on ESA-listed species and habitat.”<sup>177</sup> FEMA also explains that ESA compliance is achieved through Alternative 2 because “floodplain management and mapping-related clarifications made in PEIS Alternative 2 clarify that private project proponents are responsible for ensuring that private floodplain development is carried out in an ESA-compliant manner and that NFIP communities are responsible for obtaining and maintaining documentation that private floodplain development is ESA-compliant.”<sup>178</sup> The ROD also says that FEMA is meeting with the Services “on a monthly basis to discuss a number of changes proposed by FEMA in furtherance of its obligations under Section 7(a)(1) of the ESA.”<sup>179</sup>

Thus far, this Comment has provided an overview of the NFIP, the ESA, and the litigation history and BiOps reflecting FEMA’s noncompliance with the ESA.<sup>180</sup> Additionally, this Comment has provided an overview of the NPEIS and ROD.<sup>181</sup> These concepts are key to understanding the ultimate argument of this Comment.

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10. Under NEPA, when an agency prepares an EIS and then publishes a subsequent ROD, the agency is required to identify the Environmentally Preferred Alternative, which is the alternative that is considered to be “environmentally preferable”. 40 C.F.R. § 1505.2 (2018). The Environmentally Preferred Alternative is “the alternative that causes the least damage to the biological and physical environment; it also means the alternative that best protects, preserves, and enhances historic, cultural, and natural resources.” FEMA, NFIP ROD, *supra* note 21, at 10.

173. FEMA, NFIP ROD, *supra* note 21, at 2; *see also infra* Section III.A for FEMA’s position on its land use authority as stated in the NPEIS.

174. FEMA, NFIP ROD, *supra* note 21, at 2.

175. *See supra* Section III.A

176. FEMA, NFIP ROD, *supra* note 21, at 13.

177. *Id.*

178. *Id.* at 13–14.

179. *Id.* at 14.

180. *See supra* Sections II.A, II.B, II.C.

181. *See supra* Section II.D.

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### III. ANALYSIS

This Comment argues that FEMA abused its authority as NFIP administrator in setting the terms of Alternative 2 and ultimately deciding to implement this alternative.<sup>182</sup> FEMA abused its authority because the agency improperly and expansively interpreted an existing regulation to support Alternative 2, and Alternative 2 impermissibly shifts the burden of complying with a federal act onto state and local governments, as well as individuals who are seeking floodplain development permits.<sup>183</sup> This Comment concludes that FEMA was unwise to implement Alternative 2 through its ROD.

FEMA's abuse of authority in implementing Alternative 2 to address the agency's ESA-noncompliance is threefold. First, Alternative 2 imposes its Section 7 responsibilities onto state and local governments, which do not have a legal responsibility to bear this burden.<sup>184</sup> Second, FEMA justifies its ability to shift the ESA compliance burden onto state and local governments through Alternative 2 by interpreting an existing regulation<sup>185</sup> to support its delegation of this requirement; however, this regulation does not support FEMA's proposed requirement.<sup>186</sup> Third, from a public policy standpoint, requiring state and local governments and individual permit seekers to maintain documentation that demonstrates ESA compliance imposes a significant administrative and financial burden on groups that do not have the responsibility, knowledge, expertise, or resources to comply with the ESA.<sup>187</sup>

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182. This analysis was influenced by the arguments written by a number of commentators on the NPEIS. In particular, the author relied heavily on a letter written by Molly Lawrence, Partner at Van Ness Feldman LLP. *See* Molly Lawrence, Partner, Van Ness Feldman LLP, Letter on Proposed NFIP NPEIS to FEMA Regulatory Affairs Division on behalf of Oregonians for Floodplain Protection (December 2, 2017) (on file with author) [hereinafter Lawrence Letter]. Uncited statements are the author's original analysis or elaboration on the arguments made by commentators.

183. *See infra* Part III; *see also* Lawrence Letter.

184. *See infra* Section III.A.

185. *See infra* Section III.B.

186. *See* Sarah Kogel-Smucker, Assistant Corp. Counsel, N.Y.C. Law Dep't, Comment Letter on Proposed NFIP NPEIS (June 6, 2017), <https://www.regulations.gov/document?D=FEMA-2012-0012-0056> [hereinafter Kogel-Smucker Comment]; *see also* Lawrence Letter, *supra* note 182.

187. *See infra* Section III.C.

A. *FEMA Impermissibly Shifts Its Section 7 ESA Compliance Obligations onto NFIP Communities*

Alternative 2 is a delegation of the agency's Section 7 obligations onto the state and local governments which are responsible for issuing floodplain development permits, and the individuals who apply for these permits.<sup>188</sup> FEMA does not have the legal authority to delegate this responsibility, as the federal government does not have the authority to compel states to implement or enforce federal acts.<sup>189</sup>

Courts, BiOps, and settlement agreements found that FEMA's implementation of the NFIP does contribute to floodplain development.<sup>190</sup> Accordingly, FEMA's Section 7 obligations were triggered because three particular components of FEMA's federal agency action of administering and implementing the NFIP were found by the aforementioned authorities to be discretionary actions that had jeopardized ESA-listed species.<sup>191</sup> Section 7 responsibilities are imposed on federal agencies for their discretionary agency actions, not on state and local governments.<sup>192</sup> Therefore, FEMA, not state and local governments, is responsible for carrying out its Section 7 obligations in regards to the implementation of the NFIP.<sup>193</sup>

A number of positions that FEMA stated in the NPEIS are germane to this section of the analysis. First is FEMA's position on its compliance with the ESA:

The need to demonstrate compliance with the ESA stems from the many and varying statements from Federal agencies and the public about FEMA's compliance with the ESA, and the *perception* about the nature of the NFIP and its effects on ESA-listed species and designated critical habitats. *FEMA determined that it is currently in compliance with the ESA, but recognized the need to make program changes that demonstrate ESA compliance to the public.*<sup>194</sup>

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188. See Lawrence Letter, *supra* note 182.

189. See *New York v. United States*, 505 U.S. 144 (1992); see also *Printz v. United States*, 521 U.S. 898 (1997); Lawrence Letter, *supra* note 182.

190. See *supra* Section II.C.

191. See *supra* Section II.C.

192. See *supra* Section II.B.

193. See *supra* Section II.B.

194. FEMA, NFIP NPEIS, *supra* note 17, at 1-6 (emphasis added).

Second is FEMA's stance on whether the implementation of the NFIP has an impact on floodplain development:

FEMA does not fund, authorize, or carry out private floodplain development through the NFIP. Similarly, *the NFIP does not cause private floodplain development to occur*. As discussed in Appendix C, NFIP Biological Evaluation, available research and studies suggest that *the NFIP is not a determining factor in the decision of whether or not to develop in the floodplain*. Nevertheless, *some perceive that certain actions taken under the NFIP . . . encourage some floodplain development*.<sup>195</sup>

Third is FEMA's position on its land use authority, and the legal authority of state and local governments:

The power to regulate development in the floodplain, including requiring and approving permits, inspecting property, and citing violations requires land use authority. *FEMA has no land use authority. The regulation of land use falls under the State's police powers*, which the Constitution reserves to the States, and the States delegate this power down to their respective political subdivisions. The NFIP was designed so that floodplain management would be carried out at the State and local levels, where land use authority resides.<sup>196</sup>

Fourth is the agency's stance on its role in floodplain development and ESA compliance:

Moreover, *these proposed program modifications do not constitute an improper shift of FEMA's Section 7 responsibilities under the ESA to the communities or project proponents* because the documentation requirements relate to the compliance of private project proponents with sections of the ESA that are applicable to private floodplain development (i.e., Sections 9 and 10 of the ESA). FEMA does not authorize, fund, undertake, or encourage private floodplain development. As such, *it has no responsibilities under Section 7 of the ESA with respect to such private development*.<sup>197</sup>

Ultimately, FEMA is confusing the issue at hand, and does not address the three actions related to the implementation of the NFIP which triggered its Section 7 obligations. Moreover, contrary to FEMA's fourth statement, FEMA is improperly shifting its Section 7 responsibilities onto NFIP communities and individual permit applicants. FEMA does not have

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195. *Id.* at 2-9 (emphasis added).

196. *Id.* at 1-6 (emphasis added).

197. *Id.* at 2-12 (emphasis added).



the authority to impose the ESA documentation compliance requirement on state and local governments, and individual permit applicants.<sup>198</sup> There are three other issues that make FEMA's shift of this responsibility not just impermissible, but also unscrupulous.

First, FEMA is clearly more concerned about the "perception" of its compliance status with the ESA than with whether the agency is actually in compliance with the ESA. Second, FEMA further detaches itself from its Section 7 obligations by stating that the NFIP does not cause floodplain development, as quoted in the second statement above; BiOps, however, have found that NFIP implementation does indeed influence floodplain development.<sup>199</sup> Third, FEMA does not establish a federal nexus that would justify imposing this requirement onto NFIP communities.<sup>200</sup> FEMA altogether rejects its Section 7 obligations as related to floodplain development, evidenced in FEMA's fourth statement, which is suspicious given years of litigation regarding that exact issue.<sup>201</sup> Moreover, given that FEMA disconnects itself from its own ESA-obligations, it is alarming that FEMA in its Alternatives pins this obligation onto NFIP communities.

The first issue is FEMA's supposed "perception" problem. Because of the "perception" problem, FEMA believes that the agency needs to make changes to the NFIP so that ESA compliance is demonstrated to the public.<sup>202</sup> However, FEMA's "perception" issue stems from the reality of findings of courts, settlements, and BiOps that the agency is not in compliance with the ESA.<sup>203</sup> By imposing ESA obligations on state and local communities to "demonstrate ESA compliance to the public,"<sup>204</sup> and by amending the NFIP, FEMA is shifting its own burden to comply with the ESA onto state and local governments which would then have to address the issue.<sup>205</sup>

FEMA has an obligation to address the three components of NFIP implementation that courts and BiOps have identified as FEMA's ESA-noncompliance triggers, and to work to amend those actions so that the "perception" of noncompliance dissipates. FEMA has taken responsibility for its ESA-obligations before, particularly in Washington, where FEMA

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198. See *New York v. United States*, 505 U.S. 144 (1992); see also *Printz v. United States*, 521 U.S. 898 (1997); Lawrence Letter, *supra* note 182.

199. See NMFS, WASH. BIO. OP., *supra* note 120, at 3; see also NMFS, OR. BIO. OP., *supra* note 123, at 141.

200. See Lawrence Letter, *supra* note 182.

201. See *supra* Section II.C.

202. See *supra* text accompanying note 194.

203. See *supra* Section II.C.

204. See *supra* text accompanying note 194.

205. See Lawrence Letter, *supra* note 182.

addressed its responsibilities after the BiOp was issued, and took measures to implement the RPAs suggested by the NMFS.<sup>206</sup> However, around the country FEMA still has ESA-obligations to address, which renders the agency's first statement—that FEMA is in compliance with the ESA—suspect. For example, in Oregon, FEMA has yet to implement the RPAs suggested by the NMFS in 2016.<sup>207</sup> Because FEMA has not acted on its obligations in Oregon, FEMA's assertion that the agency is "currently in compliance with the ESA"<sup>208</sup> is questionable.

The second issue is FEMA's rejection of the connection between NFIP implementation and floodplain development. FEMA's second statement illustrates that it rejects the findings of courts and BiOps that FEMA's implementation of the NFIP does in fact have an impact on floodplain development. The BE that FEMA refers to in its second statement is a study that FEMA conducted and published in an appendix to the NPEIS.<sup>209</sup> The BE was conducted "pursuant to Section 7 of the ESA to evaluate the potential effects of . . . the current implementation of the NFIP, as modified by recent legislation and other proposed program changes, on ESA-listed species and designated critical habitats within floodplains across the nation."<sup>210</sup> The BE states that FEMA has no Section 7 obligations in regards to floodplain development because floodplain development is not an NFIP action.<sup>211</sup> Additionally, the BE reiterates FEMA's position on its land use authority, and the agency's position that it has nothing to do with issuing floodplain development permits, which also means that this aspect of the NFIP falls outside of FEMA's Section 7 obligations.<sup>212</sup>

Ultimately in the BE, FEMA maintains that the agency has "no compliance responsibilities under the ESA with respect to private floodplain development."<sup>213</sup> However, FEMA's statements in the NPEIS and BE are contrary to the findings of Washington and Oregon BiOps and court holdings which have found that FEMA's implementation of the NFIP does indirectly contribute to floodplain development.<sup>214</sup>

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206. See *Nat'l Wildlife Fed'n v. FEMA*, No. C11-2044-RSM, 2014 U.S. Dist. LEXIS 151386, at \*12–13, \*22–58 (W.D. Wash. Oct. 23, 2014), for the court's discussion of FEMA's implementation of RPAs from the Washington BiOp.

207. See Rue Comment, *supra* note 136; see also Howard Comment, *supra* note 136.

208. See *supra* text accompanying note 194.

209. FEMA, NFIP NPEIS, *supra* note 17, apps. at C-iii.

210. *Id.*

211. *Id.* apps. at C-vi.

212. *Id.*

213. *Id.*

214. See NMFS, WASH. BIO. OP., *supra* note 120, at 3; see also NMFS, OR. BIO. OP., *supra* note 123, at 141.

The BE focuses its Section 7-obligation analysis on FEMA's issuance of flood insurance, FEMA's floodplain management activities through the minimum floodplain management criteria established by FEMA, and the mapping program.<sup>215</sup> Ultimately in the BE, FEMA concludes that the Proposed Action of NFIP implementation with the modifications from the proposed alternatives will have no effect on ESA-listed species or their habitats.<sup>216</sup> However, FEMA's findings in the BE are contrary to the Washington and Oregon BiOps, which found that FEMA's floodplain management based on the minimum floodplain management criteria and the mapping program do have an effect on ESA-listed species and their habitats.<sup>217</sup>

FEMA's alarming departure from the findings of courts and BiOps was also highlighted by commentators during the NPEIS's draft stage. A number of commentators took issue with the fact that FEMA stated that there was no connection between the implementation of the NFIP and floodplain development.<sup>218</sup> One commentator went so far as to criticize the NPEIS as "devoid of historical context and reality," and explained that "[t]he NFIP does, in fact, promote the development of floodplains through the land use and mapping criteria, 44 C.F.R. Parts 60.3 and 65, respectively."<sup>219</sup>

The third issue is that FEMA imposes an ESA compliance requirement on state and local governments when FEMA failed to establish a nexus that would trigger a non-federal government agency's responsibility for federal requirements that FEMA would impose through Alternative 2.<sup>220</sup> While there is an obligation under Section 9 of the ESA for individuals to not "take" a listed species, and under Section 10 of the ESA exception permits can be sought, Section 7 of the ESA is geared

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215. FEMA, NFIP NPEIS, *supra* note 17, apps. at C-v.

216. *Id.* apps. at C-xii.

217. See NMFS, WASH. BIO. OP., *supra* note 120, at 83; see also NMFS, OR. BIO. OP., *supra* note 123, at 141.

218. See Chad Berginnis, Exec. Dir., Ass'n of State Floodplain Managers, Inc., Comment Letter on Proposed NFIP NPEIS (June 6, 2017), <https://www.regulations.gov/document?D=FEMA-2012-0012-0059>; Bob Sallinger, Conservation Dir., Audubon Soc'y of Portland, Comment Letter on Proposed NFIP NPEIS (June 6, 2017), <https://www.regulations.gov/document?D=FEMA-2012-0012-0075>; Joel Scata, Attorney, Nat. Res. Def. Council, Comment Letter on Proposed NFIP NPEIS (June 6, 2017), <https://www.regulations.gov/document?D=FEMA-2012-0012-0069>.

219. Rob Evans, State Floodplain Manager/NFIP Coordinator, VT Dep't of Envtl. Conservation, Comment Letter on Proposed NFIP NPEIS (June 6, 2017), <https://www.regulations.gov/document?D=FEMA-2012-0012-0058>.

220. See Lawrence Letter, *supra* note 182.

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toward federal agencies and their discretionary actions that effect ESA-listed species and their habitats.<sup>221</sup>

FEMA's third position, quoted above, illustrates that FEMA does not believe it has any connection to issuing development permits, and that this authority is instead vested in state and local governments. Because FEMA has disconnected itself from the permit process, and effectively severed a federal connection by doing so, the agency has no authority to dictate that, as a condition of issuing a floodplain development permit, the issuing agency must obtain and maintain documentation of compliance with the ESA.<sup>222</sup> In fact, FEMA is not the agency responsible for administering the ESA, and thus has even less authority to impose an ESA requirement on state and local governments.<sup>223</sup> Overall, the federal government cannot force a federal requirement onto state and local governments.<sup>224</sup>

Moreover, FEMA further severs the nexus with its fourth position, quoted above. Molly Lawrence ("Lawrence"), an attorney representing the non-profit corporation Oregonians for Floodplain Protection, poignantly argues in an NPEIS commentary letter to FEMA the key problem with FEMA's impermissible shift in responsibility.<sup>225</sup> Lawrence writes, "If FEMA has no Section 7 responsibility with respect to floodplain development, there is simply no basis for incorporating ESA compliance requirements into the eligibility requirements for NFIP. FEMA cannot add these additional burdens to local communities based on a perception—that the NFIP causes floodplain development—that FEMA firmly disavows."<sup>226</sup>

Ultimately, FEMA is circumventing its Section 7 obligations, which courts and the Services have established, by imposing the ESA compliance documentation requirement on NFIP communities. FEMA's NPEIS and Alternative 2 mask the root of the agency's ESA-problem that FEMA has a legal obligation to confront. Instead of imposing this requirement, FEMA should amend its implementation of the NFIP to address the three components that are connected to ESA noncompliance.

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221. See *supra* Section II.B.

222. See also Lawrence Letter, *supra* note 182.

223. See Section II.B for a discussion of ESA administration, which is done by the Services.

224. See *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997). See also Lawrence Letter, *supra* note 182.

225. Lawrence Letter, *supra* note 182.

226. *Id.*

B. *FEMA Improperly Interprets an Existing Regulation as its Legal Authority to Enforce Alternative 2*

In Alternative 2, FEMA relies on 44 C.F.R. § 60.3(a)(2) to impose ESA compliance responsibilities on to state and local governments, and parties seeking development permits.<sup>227</sup> The overall regulation at 44 C.F.R. § 60.3 sets out the minimum floodplain management criteria for NFIP communities, and 44 C.F.R. § 60.3(a)(2) governs the permitting aspect of the minimum floodplain management criteria:

When the Federal Insurance Administrator has not defined the SFHA within a community, has not provided water surface elevation data, and has not provided sufficient data to identify the floodway or coastal high hazard area, but the community has indicated the presence of such hazards by submitting an application to participate in the Program, the community shall . . . review 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.<sup>228</sup>

In Alternative 2, FEMA is relying on existing regulation 44 C.F.R. § 60.3(a)(2) to impose the requirement of obtaining and maintaining documentation regarding ESA compliance onto NFIP communities.<sup>229</sup> However, FEMA is improperly interpreting its own regulation to impose this requirement onto state and local governments.<sup>230</sup>

Currently, the doctrine that governs agency interpretation of its own regulations comes from *Auer v. Robbins*.<sup>231</sup> *Auer* “provides that courts will uphold agencies’ interpretations of their own regulations unless they are plainly erroneous, on the theory that the agency should know what its own

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227. FEMA, NFIP NPEIS, *supra* note 17, at 2-16.

228. 44 C.F.R. § 60.3(a)(2) (2018) (emphasis added).

229. Note that each Alternative proposes a different method for imposing this requirement. See FEMA, NFIP NPEIS, *supra* note 17, at 2-16 to -17. Alternative 3 proposes enacting new regulations to mandate the ESA compliance documentation requirement. *Id.* at 2-16. Based on the language of Alternative 4, it is unclear whether FEMA intends to interpret 44 C.F.R. § 60.3(a)(2) to support its mandate, or if it would enact new regulations to impose the requirement. *Id.* at 2-17.

230. See Lawrence Comment, *supra* note 182; see also Kogel-Smucker Comment, *supra* note 186.

231. *Auer v. Robbins*, 519 U.S. 452 (1997).

regulation means.”<sup>232</sup> However, since that decision was handed down, the doctrine has been challenged.<sup>233</sup>

Although this issue has not yet reached the courts, there is a case to be made at the outset that FEMA’s interpretation of 44 C.F.R. § 60.3(a)(2) is questionable. FEMA maintains that the agency is clarifying the “all necessary permits” language of 44 C.F.R. § 60.3(a)(2) to mean that “the community must obtain and maintain documentation of compliance with the ESA for proposed floodplain development.”<sup>234</sup> In addition to placing an ESA compliance requirement on issuing permits, FEMA would require the community or project proponent to provide documentation of compliance with the ESA before a Letter of Map Revision (LOMR) or Letter of Map Revision-Based on Fill (LOMR-F) request is processed.<sup>235</sup>

FEMA’s justification for this requirement is as follows:

By documenting that the private floodplain development for which a LOMR or LOMR-F is sought is ESA-compliant, FEMA can demonstrate that it is only issuing LOMRs or LOMR-Fs for ESA-compliant floodplain development (and, thus, not encouraging floodplain development that adversely impacts ESA-listed species and designated critical habitat).<sup>236</sup>

Germane to this analysis is FEMA’s position on expanding 44 C.F.R. § 60.3(a)(2) to include a requirement of ESA compliance documentation retention as part of the NFIP. FEMA maintains:

[The agency] is not, through these proposed program modifications, expanding the requirements applicable to private floodplain development under the ESA. Project proponents of private floodplain development have always been required to ensure their project does not cause a “take” in violation of Section 9 of the ESA, or in the alternative, to secure a Section 10 incidental take permit authorizing the incidental take of threatened and endangered species. FEMA is merely clarifying that the existing requirement under 44 C.F.R. §

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232. Jud Mathews, Presidential Administration in the Obama Era 11 (Jan. 31, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2927494>.

233. See *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, at 1212–13 (2015) (Scalia, J., concurring) (explaining that *Auer* deference to agencies is a problem because it will leave agency power unchecked because the agency will be able to write regulations as broadly as it wants, so that the agency can later interpret its regulations at its will); see also *Decker v. Northwest Environmental Defense Center*, 548 U.S. 597 (2013); *Christopher v. SmithKline Beecham Corp.*, 576 U.S. 142 (2012); *Gonzales v. Oregon*, 546 U.S. 243 (2006); Mathews *supra* note 232, at 11.

234. FEMA, NFIP NPEIS, *supra* note 17, at 2-12.

235. *Id.*

236. *Id.*

60.3(a)(2)—that NFIP-participating communities ensure that all required Federal permits are obtained as a condition of issuing a permit for development in the floodplain—also includes a documentation requirement so that FEMA can verify that the community is implementing and enforcing this requirement.<sup>237</sup>

Although FEMA maintains that the agency is not expanding the requirements applicable to private floodplain development by interpreting 44 C.F.R. § 60.3(a)(2) to support the ESA compliance documentation requirement, that is exactly what FEMA is doing. To be sure, 44 C.F.R. § 60.3(a)(2) requires NFIP communities to ensure that necessary permits have been received from the federal or state agencies that issue the applicable permits as part of the floodplain development permit process.<sup>238</sup> However, FEMA does not draw a clear connection between maintaining ESA-compliance documentation with acquiring “necessary permits.” Because FEMA does not justify the ESA compliance documentation requirement, FEMA is in fact expanding the requirements applicable to private floodplain developers. Moreover, those looking to develop property already have an obligation under Section 9 of the ESA to ensure that they are not “taking” ESA-listed species through their actions.<sup>239</sup> Because there is already an ESA obligation on those individuals through Section 9, it is bizarre that FEMA is adding this requirement to the NFIP through a regulation that has to do with minimum floodplain management criteria, and it is similarly bizarre that FEMA is imposing the requirement onto state and local governments responsible for permitting. This is a clear example of FEMA circumventing their Section 7 obligations.

Moreover, based on the language of Alternative 2, FEMA conditions the issuance of the permit on whether the permit-issuer in the NFIP community obtains and maintains ESA-compliance documentation.<sup>240</sup> This condition in itself is not supported by the language of 44 C.F.R. § 60.3(a)(2). The regulation requires that before a permit is issued, necessary federal and state permits are received by the applicant; whether the permit-issuer of the NFIP community maintains documentation of compliance with the ESA has no bearing on whether the permit applicant has obtained the necessary permits required by the applicant to receive a floodplain development permit.<sup>241</sup>

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237. *Id.*

238. 44 C.F.R. § 60.3(a)(2) (2018).

239. *See* Lawrence Letter, *supra* note 182.

240. FEMA, NFIP NPEIS, *supra* note 17, at 2-16.

241. *See* Lawrence Letter, *supra* note 182; *see also* Kogel-Smucker Comment, *supra* note 186.

In Alternative 2, FEMA abuses its discretion to interpret the regulation as the agency see fits. This interpretation of 44 C.F.R. § 60.3(a)(2) is an abuse of discretion because such an interpretation effectively forces NFIP communities to ensure that the permit and the resulting development will not violate the ESA, which in turn will help FEMA convey to the public that the NFIP is ESA-compliant.<sup>242</sup> However, FEMA, not NFIP communities, is responsible for bringing the NFIP into compliance with Section 7 of the ESA because FEMA is the program administrator.<sup>243</sup>

FEMA is responsible for how the agency's governance of the minimum floodplain management criteria<sup>244</sup> impacts the agency's compliance with the ESA.<sup>245</sup> Therefore, FEMA abuses its authority by reading 44 C.F.R. § 60.3(a)(2), the minimum floodplain management criteria regulation, to require state and local governments to bear the responsibility to demonstrate compliance with the ESA, when there is judicial history that identifies that FEMA is responsible for addressing the minimum floodplain management criteria to bring FEMA into compliance with Section 7 of the ESA.

As highlighted in Section II.C, courts have held FEMA responsible for Section 7 compliance for three components of the NFIP.<sup>246</sup> In the NPEIS, FEMA writes that they are in favor of imposing the ESA compliance requirement on NFIP communities so they can ensure compliance with the ESA.<sup>247</sup> However, FEMA is effectively forcing the compliance work onto parties in NFIP communities who do not have a legal responsibility to demonstrate this compliance, which is especially troublesome since FEMA has a responsibility to amend its implementation of the NFIP to reach ESA compliance.

C. *The ESA Compliance Requirement of Alternative 2 is a Significant Burden on NFIP Communities*

Another central problem with Alternative 2 in imposing ESA compliance obligations onto state and local governments responsible for issuing floodplain development permits, and individuals seeking these permits, is that NFIP communities do not have the bandwidth to manage

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242. See Kogel-Smucker Comment, *supra* note 186.

243. See *supra* Section II.B.

244. 44 C.F.R. § 60.3(a)(2) (2018).

245. See *supra* Section II.C.

246. See *supra* Section II.C.

247. See *supra* text accompanying note 236.



ESA responsibilities. ESA compliance requires funding and individuals who have the knowledge and expertise to navigate this complicated and dense federal act.<sup>248</sup> Additionally, the NPEIS vaguely describes the expectations and instructions for state and local governments who are expected to manage this new requirement.<sup>249</sup>

A number of commentators on the NPEIS were officials from city governments, and their letters described the ESA compliance requirements as “overly burdensome” and “costly and challenging.”<sup>250</sup> The City of Portland highlighted that “[Alternative 2] will require new review procedures, ensuring staff has the appropriate knowledge and skills to review application materials for compliance with federal rules, in addition to local and state rules; and it will require applicants to invest notably more time, money, and effort in their projects.”<sup>251</sup> Similarly, attorneys from the City of New York Law Department stated:

[T]he City agencies that review development applications, Department of Buildings and the New York City Department of Small Business Services, do not have the staff or resources to affirmatively engage in the correspondence needed to document ESA compliance on behalf of a private applicant for all floodplain development, nor to maintain records of this documentation.<sup>252</sup>

Additionally, officials from Oregon and Washington highlight that for their states, Alternative 2 creates an even more taxing situation because both of these states have directives from BiOps and RPAs that need to be addressed by FEMA, and changes to NFIP implementation that would result from Alternative 2 further confuses their situations.<sup>253</sup>

Although FEMA does provide an overview of how it envisions the ESA compliance process, this overview is not nearly as comprehensive as it needs to be.<sup>254</sup> In terms of the amount of time FEMA believes it will take for NFIP communities to comply with the proposed changes, “FEMA estimates that a community would spend an average of approximately 30 minutes (0.5 hours) reviewing, processing, filing, and maintaining ESA

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248. See Howard Comment, *supra* note 136; see also Kogel-Smucker Comment, *supra* note 186.

249. See FEMA, NFIP NPEIS, *supra* note 17, at 2-1 to -17, apps. at I-1 to -7.

250. See Howard Comment, *supra* note 136; see also Kogel-Smucker Comment, *supra* note 186.

251. See Howard Comment, *supra* note 136.

252. See Lawrence Letter, *supra* note 182.

253. See Rue Comment, *supra* note 136; see also David Radabaugh, State NFIP Coordinator, Wash. Dep’t of Ecology, Comment Letter on Proposed NFIP NPEIS (June 6, 2017), <https://www.regulations.gov/document?D=FEMA-2012-0012-0068>.

254. FEMA, NFIP NPEIS, *supra* note 17, apps. at I-1.

documentation.”<sup>255</sup> However, FEMA does not specify the increment on this estimate. Is the estimate that communities will spend 30 minutes every year, every month, every week, every day, every hour on the new ESA compliance requirement? Moreover, FEMA does not specify whether this is 30 minutes per application or in general.

Additionally, “FEMA assumes this action would be completed by the equivalent of a general and operations manager.”<sup>256</sup> However, general and operations managers likely do not have the knowledge or expertise to carry out the process of “reviewing [and] processing”<sup>257</sup> ESA-compliance documentation. FEMA estimates that it would cost communities \$369,278 to \$3,232,456, with a mid-estimate of \$1,846,388, per year for the communities to retain ESA-related documentation.<sup>258</sup> Whether a community faces a cost on the low, mid, or high end of FEMA’s estimate, the entire spectrum of costs poses a significant financial burden for communities to bear.

#### *D. Recommendation*

Ultimately, FEMA needs to address its ESA-noncompliance head-on. The agency needs to implement changes to the three components of the NFIP that courts, settlements, and BiOps have identified as actions that put ESA-species at risk. One way to address this is for FEMA to look to the RPAs recommended by the NMFS in the Washington and Oregon BiOps, and attempt to apply those recommendations to the three components of NFIP implementation, not just to the implementation of the NFIP in Washington and Oregon, but to other parts of the country. If those recommendations are too specific to Washington and Oregon, FEMA should look to those recommendations as models for how they should adapt their implementation in other parts of the country.

Ultimately, FEMA unwisely chose to implement Alternative 2 to address the agency’s responsibility to update the NFIP because Alternative 2 impermissibly delegates ESA obligations onto NFIP communities. If FEMA feels strongly that state and local governments and individual permit applicants should be responsible for demonstrating ESA compliance, then FEMA should enact a new regulation mandating this

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255. *Id.* apps. at I-2.

256. *Id.*

257. *Id.*

258. *Id.* apps. at I-3.

requirement which would go through a public notice and comment process.<sup>259</sup>

#### IV. CONCLUSION

The NFIP and the ESA are both massive, detailed, and complex statutes that have many positive intended outcomes. However, FEMA's administration and implementation of the NFIP has caused a clash between these two acts, which resulted in more harm than good despite the noble intentions of both of these acts.<sup>260</sup> In an effort to manage the NFIP, FEMA has jeopardized ESA-listed species, and FEMA has a legal obligation to address the issues that its actions have caused.<sup>261</sup>

The NPEIS<sup>262</sup> is a step in the right direction for FEMA to address the environmental impacts caused by its implementation of the NFIP. However, within the NPEIS, FEMA has failed to effectively address its ESA obligations because the proposed alternatives to NFIP implementation do not address the root of FEMA's ESA problem.<sup>263</sup> Rather, through the proposed alternatives, specifically Alternative 2, FEMA impermissibly shifts its federal obligations onto state and local governments and individual permit-seekers.<sup>264</sup> By shifting its responsibilities, FEMA abuses and misconstrues its authority, and also generates an extensive burden on these groups.<sup>265</sup> FEMA should not implement Alternative 2 and instead should focus its attention on amending the three components of NFIP implementation that are the root of FEMA's ESA-troubles so that the agency will come into compliance with Section 7 of the ESA.<sup>266</sup>

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259. See Lawrence Comment, *supra* note 182; see also Kogel-Smucker Comment, *supra* note 186.

260. See *supra* Sections II.C, III.A.

261. See *supra* Section II.C.

262. See *supra* Section II.D.

263. See *supra* Section III.

264. See *supra* Section III.A.

265. See *supra* Sections III.B, III.C.

266. See *supra* Section III.D.