

**Testimony of
Barry Rutenberg**

**On Behalf Of the
National Association of Home Builders**

**Before the
United States House of Representatives
House Financial Services Subcommittee on Housing and
Community Opportunity**

**Hearing on
Legislative Proposals to Reform the National Flood Insurance
Program
March 11, 2011**



Introduction:

Chairman Biggert, Ranking Member Gutierrez and members of the Subcommittee on Insurance, Housing and Community Opportunity, I am pleased to appear before you today on behalf of the more than 160,000 members of the National Association of Home Builders (NAHB) to share our views concerning efforts to reform the National Flood Insurance Program (NFIP). We appreciate the invitation to appear before the Subcommittee on this important issue. My name is Barry Rutenberg; I am a home builder from Gainesville, Florida and First Vice Chairman of the Board of the National Association of Home Builders (NAHB).

NAHB commends the subcommittee for addressing reform of the NFIP program. First and foremost, NAHB strongly supports a five-year program reauthorization. We believe a five-year term is the only way to provide a steady foundation on which to build program revisions and ensure the NFIP is efficient and effective in protecting flood-prone properties. As you know, for the last several years, the NFIP has undergone a series of short-term extensions that have created a high level of uncertainty in the program and caused severe problems for our nation's already troubled housing markets. Unfortunately, during this time between authorization periods, many homebuyers faced delayed or cancelled closings due to the inability to obtain flood insurance for their mortgages. In other instances, builders were forced to stop or delay construction on new homes due to the lack of flood insurance approval, adding unneeded delays and job losses. NAHB believes a five-year program will help ensure the nation's real estate markets operate smoothly and without delay. We therefore commend the subcommittee for making this issue a priority.

Background:

The Federal Emergency Management Agency's (FEMA) National Flood Insurance Program (NFIP) plays a critical role in directing the use of flood-prone areas and managing the risk of flooding for residential properties. The availability and affordability of flood insurance gives local governments the ability to plan and zone their entire communities, including any

floodplains. In addition, if a local government deems an area fit for residential building, flood insurance and mitigation standards allow homebuyers and homeowners the opportunity to live in a home of their choice in a location of their choice, even when the home lies in or near a floodplain. The home building industry depends upon the NFIP to be annually predictable, universally available, and fiscally viable. A strong, viable national flood insurance program helps ensure the members of the housing industry can continue to provide safe, decent, and affordable housing to consumers.

The NFIP provides flood insurance to over 5 million policyholders, enabling them to protect their properties and investments against flood losses. Further, the NFIP creates a strong partnership with state and local governments by requiring them to enact and enforce floodplain management measures, including building requirements that are designed to ensure occupant safety and reduce future flood damage. This partnership, which depends upon the availability of comprehensive, up-to-date flood maps and a financially-stable federal component, allows local communities to direct development where it best suits the needs of their constituents and consumers. This arrangement has, in large part, worked well. Unfortunately, the losses and devastation suffered in the 2004 and 2005 hurricane seasons, have severely taxed and threatened the solvency of the NFIP.

According to FEMA, since the NFIP's inception in 1968 through 2004, a total of \$15 billion has been needed to cover more than 1.3 million losses. The 2004 hurricane season required close to \$2 billion dollars in NFIP coverage, and the 2005 hurricane season resulted in payments totaling over \$13.5 billion. Combined claims for these two years exceeded the total amount paid during the previous 37-year existence of the NFIP program. In addition, the Midwest floods of 2008 further burdened the floundering NFIP. While these losses are severe, they are clearly unprecedented in the history of this important program and, in our opinion, are not a reflection of a fundamentally broken program. Nevertheless, NAHB recognizes the need to ensure the long-term financial stability of the NFIP and looks forward to working with this committee to implement needed reforms including the possibility of privatizing the NFIP.

While NAHB supports reform of the NFIP to ensure its financial stability, it is critical that Congress approach this legislation with care. The NFIP is not simply about flood insurance premiums and payouts. Rather, it is a comprehensive program that guides future development and mitigates against future loss. While a financially-stable NFIP is in all of our interests, the steps that Congress takes to ensure financial stability have the potential to greatly impact housing affordability and the ability of local communities to exercise control over their growth and development options.

NAHB Supports Thoughtful NFIP Reforms:

The unprecedented losses suffered in 2004 and 2005, including the devastation brought about by Hurricanes Katrina, Rita and Wilma, have severely taxed and threatened the solvency of the NFIP. While these events have been tragic, sobering, and have exposed shortcomings in the NFIP, resulting reforms must not be an overreaction to unusual circumstances. Instead, reform should take the form of thoughtful, deliberative, and reasoned solutions. A key step in this process is to take stock of where we are today, what has worked, and what has not.

An important part of the reform process is determining what area or areas of the NFIP are in actual need of reform. In the past, a key tool in the NFIP's implementation, the Flood Insurance Rate Maps (FIRMs), have been recognized by Congress to be inaccurate and out-of-date. Through the strong leadership of this Committee, FEMA is completing its map modernization effort aimed at digitizing, updating, and modernizing the nation's aging flood maps. While FEMA was successful in digitizing most of the FIRMs, many are not based on updated hydrologic data. Likewise, a 2007 National Academy of Sciences report faulted some of the maps because of a lack of reliable topographical data. As a result of these shortcomings there remain large discrepancies between what was mapped as the 1% annual chance of flood decades ago and what the 1% annual chance of flood is today. While FEMA is currently addressing this oversight through the efforts in its RISKMAP program, we believe continued Congressional oversight is necessary. The establishment of a Technical Mapping Advisory Council, as suggested in the Subcommittee's discussion draft, is an important step in ensuring the scientific

validity of the maps, as well as ensuring that they reflect the true risks to property. We are hopeful that such a council, if approved, would also result in improved collaboration and coordination among the agencies and the private sector, and lead to a regular dialog to further ensure that the NFIP is working as intended.

Fixing the maps, however, is merely the first step. In an attempt to improve both the solvency of the program and its attractiveness to potential policyholders, NAHB supports a number of reforms designed to allow FEMA, through the NFIP, to better adapt to changes to risk, inflation, and the marketplace. Increasing coverage limits to better reflect replacement costs, for example, would provide more assurances that the legitimate losses will be covered and benefit program solvency by generating increased premiums. Similarly, the creation of a more expansive “deluxe” flood insurance option, or a menu of insurance options from which policyholders could pick and choose, could provide additional homeowner benefits while aiding program solvency. Finally, increasing the minimum deductible for paid claims would provide a strong incentive for homeowners to mitigate and protect their homes, thereby reducing potential future losses to the NFIP.

NAHB also believes that modifying the numbers, location, or types of structures required to be covered by flood insurance may play an important part in ensuring the NFIP’s continued financial stability, but any such decision must be taken with extreme care. Two options have been widely considered in recent years. The first is the mandatory purchase of flood insurance for structures located behind flood control structures, such as levees or dams. The second is that all structures within the 1% annual chance flood obtain flood insurance regardless of whether or not they currently hold a mortgage serviced by a federally-licensed or insured carrier. Both of these strategies would increase the number of residences participating in the NFIP, buttressing the program against greater losses. While these options seem simple, in reality, they are much more complicated.

The NFIP and its implementing provisions were not created solely to alleviate risk and generate premiums -- they were created to balance the needs of growing communities with the need for

reasonable protection of life and property. Part and parcel of this is the need for regulatory certainty and expedient decision-making. First, the NFIP must continue to allow state and local governments, not the federal government, to dictate local land use policies and make decisions on how private property may be used. While officials at all levels of government must work together so that lives, homes, schools, businesses and public infrastructure are protected from the damages and costs incurred by flooding, the local communities must provide the first line of defense in terms of land use policies and practices. It is clear that the NFIP was specifically designed to allow this to occur, as the availability of flood insurance is predicated on the involvement of the community and relies on the breadth of activities that local governments can (and do) take to protect their citizens and properties from flood damage.

Second, FEMA must better coordinate its activities with those of other federal agencies who have oversight of other federal programs. For example, FEMA recently began requiring (under Procedure Memorandum No. 64) certain property owners to demonstrate compliance with the Endangered Species Act (ESA) prior to FEMA issuing them a Conditional Letter of Map Revision. To do so, FEMA must engage the U.S. Fish and Wildlife Service or the National Marine Fisheries Service in an extensive consultation to determine the potential impacts on the endangered species in question and to develop any steps that could be taken to mitigate any adverse effects. FEMA, however, has claimed it does not have the resources to conduct the review and has deflected its responsibilities to the landowner. Not only does this cause confusion, but FEMA's dereliction of duties places landowners in a no-win situation, creating the potential for project delays, increased costs to construction, and an ultimate impact on affordability. As NAHB does not believe that the NFIP is a proper trigger for the ESA, we are hopeful that any legislation will clarify that such consultations are unnecessary. Likewise, we are hopeful that FEMA will work to improve collaboration and cooperation with the other federal, state and local entities as this program continues to evolve (*see Appendix*).

Similarly, NAHB believes that before any reforms are enacted to change the numbers, location, or types of structures required to be covered by flood insurance, FEMA should first demonstrate that the resulting impacts on property owners, local communities, and local land use are more

than offset by the increased premiums generated and the hazard mitigation steps taken. Only after documentation is provided indicating the regulatory, financial, and economic impact of reform efforts, can Congress, FEMA, stakeholders, and the general public fully understand whether or not such actions are appropriate.

NAHB is Concerned with Potential Negative Reforms:

As Congress considers strategies to ensure the availability of insurance and to bolster the financial stability of the NFIP, NAHB cautions against those reforms that have obvious far-reaching and unintended consequences, including reforms that decrease housing affordability and the ability of communities to meet current and future growth needs. For example, we are pleased that the Subcommittee's discussion draft recognizes the financial burdens the NFIP places on homeowners and specifically allows premiums to be paid in installments and rates to be phased-in for newly mapped areas; however, NAHB is concerned about the challenges that could arise from allowing annual premium increases to rise from 10 to 20 percent – especially given today's fragile economy. We are equally concerned about any changes that would expand the Special Flood Hazard Area (SFHA) beyond the 1% annual chance flood, fail to take into account flood-protection structures when setting premiums, or expand the current federal minimum residential design, construction, and modification standards.

While changes to the NFIP's mandatory flood insurance purchase requirements present one set of issues, a programmatic change of the SFHA presents an entirely different and overwhelming set of concerns. For example, changing the SFHA from a 1% annual chance flood (100-year) standard to a 0.4% annual chance flood (250-year) standard would not only require more homeowners to purchase flood insurance, but would also impose mandatory construction requirements on a completely new set of structures. Furthermore, those homeowners who had complied with the 1% annual chance standard will suddenly find themselves below the design flood elevation for the 0.4 % annual chance of flooding. Although these structures may be grandfathered and be able to avoid higher premiums as a result of their non-compliant status, this ends when the structure is sold or substantially improved. Placing these homes in this category

impacts their resale value in a very real way, as any new buyer may be faced with substantially higher premiums or retrofit and compliance costs.

In addition, any revision of the SFHA standard would not only affects homeowners, but also home builders, local communities, and FEMA. An expanded floodplain means an expanded number of activities taking place in the floodplain and a corresponding increase in the overhead needed to manage and coordinate these activities. A larger floodplain would likely result in an increased number of flood map amendments and revisions, placing additional burdens on federal resources to make these revisions and amendments in a timely fashion. Residents located in a newly-designated SFHA would need to be notified through systematic outreach efforts. Communities would likely need to modify their floodplain ordinances and policies to reflect the new SFHA. In short, the entire infrastructure of flood management and mitigation practice and procedures institutionalized around the 1% standard would need to change, all at a time when FEMA has admitted its lack of resources to provide current services.

Although a revision of the 1% chance of flood SFHA standard has been considered in recent years, even specially-convened policy forums have failed to reach consensus on the issue. What has started to emerge, however, is the recognition of the tremendous implications that changing the SFHA would have on home builders, homebuyers, communities, and the federal government itself. NAHB strongly cautions against making such sweeping changes to the NFIP without first having all the facts in-hand. Only after Congress and FEMA have adequately documented that a drastic revision of the SFHA is absolutely necessary to the continued existence and operation of the NFIP, should a programmatic revision of the SFHA be seriously considered.

Another important component of the NFIP is the ability of communities, with the assistance of the federal government, to design, install, and maintain flood protection structures. In most instances, residential structures located behind dams or levees providing protection to the 1% annual chance of flooding are not currently required to purchase flood insurance. This is because most structures are removed from the SFHA on the relevant FIRM or through the Letter of Map Revision, or LOMR, process. Accordingly, any reforms that contemplate bringing these same

residences back under a mandatory purchase requirement raise very real and powerful equity and fairness issues. If Congress or FEMA produces adequate documentation indicating that the benefits of mandating flood insurance purchase for residences behind flood control structures outweigh the costs to homeowners, NAHB would support these residences being charged premiums at a reduced rate to reflect their reduced risk. A great deal of time and taxpayer money have been invested to provide additional flood protection (i.e. dams and levees) to these residences, and it is only fair that homeowners in these areas, if required to purchase insurance, be recognized for their communities' efforts.

While requiring mandatory flood insurance purchase is one option, another option that has been considered is to require structures to meet federal residential design, construction and modification requirements. NAHB is strongly opposed to expanding such requirements to new classes of structures, including those found behind flood protection structures and those affected by any programmatic change to the SFHA. Any such requirements would substantially increase the cost of home construction and severely impact housing affordability. For example, elevating structures could add \$60,000 to \$210,000 to the cost of a home.¹ It is easy to see the tremendous impact that such reforms would have not only on nation's home builders, but also on the nation's homebuyers. NAHB urges Congress to soften the impact of any programmatic changes to the NFIP by ensuring that construction requirements remain tied to the 1% annual chance flood standard.

Finally, FEMA reports that more than 78% of policyholders are already paying actuarial (risk-based) premiums.² Nevertheless, NAHB believes any reforms aimed at reducing federal subsidies for any subset of the remaining properties must ensure that overall affordability is not adversely affected. NAHB looks forward to working with the committee to strike the proper balance between ensuring the long-term financial viability of the NFIP and ensuring program

¹ Federal Emergency Management Agency, *Homeowner's guide to Retrofitting*, (Dec. 2009) table 3-3 – Using the dollar figures in table 3-3 multiplied by a 2,200 square foot median house size. (See Appendix)

² Federal Emergency Management Agency, *Actuarial Rate Review: In Support of the October 1, 2010, Rate and Rule Changes*, (July 2010) p. 22. (See Appendix)

affordability and equality for those who rely on this valuable government insurance program.

Thank you for this opportunity to share the views of the National Association of Home Builders on this important issue. We look forward to working with you and your colleagues as you contemplate changes to the National Flood Insurance Program to ensure that federally-backed flood insurance remains available, affordable, and financially stable. We urge you to fully consider NAHB's positions on this issue and how this program enables the home building industry to deliver safe, decent, affordable housing to consumers.



Appendix

Resolving Regulatory Confusion - Clarifying the Relationship between the National Flood Insurance Program and the Endangered Species Act

In recent years, environmental groups have targeted the Federal Emergency Management Agency's (FEMA) National Flood Insurance Program (NFIP) by filing procedural lawsuits under the Endangered Species Act (ESA) that allege that FEMA has failed to comply with the ESA's consultation requirements when administering various facets of the National Flood Insurance Program (NFIP).¹ Importantly, these cases are not necessarily focused on protecting species, but are designed to impede development in certain areas. FEMA, for its part, has tried to fight these ESA lawsuits, but unfortunately, a number of federal courts have ruled with the environmental groups. The courts agree that the NFIP, as currently enacted, is a "discretionary" federal program and thus subject to the ESA's consultation requirements. Contrary to these decisions, NAHB does not believe that Congress envisioned the ESA being applied to FEMA's floodplain program and urges it to revisit and amend this timely and problematic issue.

Background:

The Endangered Species Act (ESA) authorizes the federal government to regulate endangered and threatened species and their habitat on private as well as public property. Because the Act's fundamental prohibitions are absolute and driven by biological factors and not — as in other environmental statutes — based on a balancing test that takes into account economic impacts, the ESA is a potent source of federal land use regulation. With the number of endangered and

¹ *E.g.*: *National Wildlife Federation v. Furgate*, 10-22300, (S.D. Fl. 2011) (Settlement requiring FEMA to initiate consultation); *Audubon Society of Portland v. Federal Emergency Management Agency*, no. 09-00729 (D. Or. 2010) (settlement requiring FEMA to consult with the FWS over certain activities); *WildEarth Guardians v. Federal Emergency Management Agency*, no. 10-00863 (D. Az., Complaint filed Aug. 26, 2009); *Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008) (affirming an injunction prohibiting FEMA from issuing flood insurance for new developments in suitable habitats of listed species); *National Wildlife Federation v. Federal Emergency Management Agency*, 345 F.Supp.2d 1151 (W.D. Wash. 2004) (holding that FEMA was required to engage in ESA consultation with regard to its mapping activities, setting eligibility criteria, and implementing community rating system (CRS); but that FEMA had no duty to formally consult with regard to the effect of sale of flood insurance on salmon).

threatened species protected by the Act rising steadily, the ESA is an increasingly important hurdle for projects across the country.

Since the early 2000's, special interests groups have worked to broaden the application of the ESA to include essentially any activity that alters the landscape. While earlier attempts mainly focused on the ESA's application to portions of the Clean Water Act (CWA) and larger projects, over time a new attack has been launched concerning the applicability of the ESA to the NFIP. In short, the reasoning articulated in these lawsuits is premised on a simplistic and shrewd "but for" hypothesis; that is, were it not for the NFIP, residential development or development of any kind could not occur in many areas of the country. Therefore, these groups argue that in geographic areas that have been designated as "critical habitat" by the U.S. Fish and Wildlife Service (FWS) or NOAA Fisheries (hereafter referred to as the Service), FEMA must "consult" with the Service over its administration of the NFIP.

The position that NFIP must be subject to the ESA in order to protect endangered species is problematic in that it is overly broad and ignores the fact that the ESA, independent of NFIP program, already prohibits the "taking" of endangered species. Likewise, it fails to adhere to the statutory limits of the ESA, which only require consultation for "discretionary" actions.

According to the special interests, ESA consultation should occur in any area that has been designated as critical habitat. Presently, there are over 1,200 species listed as "endangered" under the ESA. To date, the Service has only designated critical habitat for half of these species (603), but that has still resulted in the designation of tens of millions of acres. Moreover, the critical habitats are concentrated primarily in a handful of states, including Florida – a state that has a significant portion of its land area located within the floodplain. The economic burden of critical habitat designation is disproportionately borne at the county level. Since most counties push for promoting economic development and population growth, the burden of ESA permitting compliance typically falls on the residential construction industry in comparison to other industries. The cost of ESA compliance ultimately results in project delays, increases the cost of construction and adversely impacts affordability. Requiring consultation within the NFIP will clearly exacerbate these difficulties.

Equally problematic are the claims that additional protections are necessary to conserve species. The ESA's take prohibition expressly disallows any action (public or private) that results in the death or injury of a federally-protected species.² Furthermore, the ESA's consultation requirements already apply to all publicly funded projects and any private project that necessitates a "discretionary" federal permit or approval.³ For residential construction activities, a typical "trigger" for the ESA consultation is a CWA Section 404 wetlands permit issued by the U.S. Army Corps of Engineers. Another common ESA trigger is the CWA's Section 402 construction general permit issued by the U.S. Environmental Protection Agency (EPA). According to the Service, over 35,000 consultations were conducted during 2009, the most recent year for which data is available.⁴ Requiring FEMA to comply with the ESA for all aspects of the NFIP program is clearly duplicative and unnecessary.

Further, because the current legal and regulatory threshold for determining whether or not a specific federal action is subject to the ESA's consultation requirement is entirely dependent on whether the specific federal action is discretionary (subject to ESA consultation requirements) or non-discretionary (not subject to ESA's consultation requirements), an examination of where the action falls is critical to determining any subsequent consultation obligations.

One Example:

In response to the ESA court ruling, last August FEMA issued Procedure Memorandum No. 64 (PM 64) to all FEMA Regional Division Directors. PM 64 established new procedures for how FEMA will demonstrate compliance with the ESA.⁵ FEMA's memorandum requires all landowners seeking Conditional Letters of Map Revision (CLOMR) or Conditional Letter of Map Revision based on Fill (CLOMR-Fs) to demonstrate compliance with the ESA prior to seeking letters from FEMA. FEMA issued PM 64 not as a typical federal rulemaking subject to public notice and comment, but rather as an agency directive that became effective on October 1, 2010.

² 16 U.S.C. § 1538.

³ 50 C.F.R. § 402.03.

⁴ U.S. Fish and Wildlife Service. Consultation with Federal Agencies: Section 7 of the Endangered Species Act. Questions and Answers. November 2010. FWS website last visited on March 4, 2011. <http://www.fws.gov/endangered/>

⁵ U.S. Department of Homeland Security, Federal Emergency Management Agency (FEMA). Procedure Memorandum 64 – Compliance with the Endangered Species Act (ESA) for Letters of Map Change. August 18, 2010. FEMA's website last visited on March 7, 2011. <http://www.fema.gov/library/viewRecord.do?id=4312>

Historically, landowners seeking CLOMR or CLOMR-F letters from FEMA were not required to provide written documentation of ESA compliance prior to seeking a revision to a FIRM. PM 64 has the potential to add significant confusion, delays, and expense for landowners. Under the ESA's consultation regulations, the Service has a minimum of 90 days to complete a consultation. However, the Service can extend that timeframe by an additional 60 days if the applicant agrees in writing. In practice, consultations performed by the Service routinely take six months or longer. Another method for demonstrating ESA compliance highlighted in PM 64 is the use of the ESA's Incidental Take Permits (ITP).⁶ The ITPs are even more problematic than the consultation process because unlike Section 7 Consultations, the ITP process contains no specified deadlines, requires separate public notice and comment before issuance, and takes the Service typically two years to complete.⁷

Taken at face value, FEMA's memorandum has the potential to add significant confusion, expense and delay for landowners who are seeking simple revisions to federal flood plain maps to complete projects and secure affordable flood insurance. While it is possible under FEMA's guidance for landowners whose projects have obtained proof of ESA compliance through another federal permitting process, questions remain about how FEMA's guidance will be implemented.

A Possible Solution:

In a landmark U.S. Supreme Court ruling, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*,⁸ (hereinafter *NAHB v. Defenders*) the U.S. Supreme Court held that the ESA's consultation obligation is triggered *only* for federal *discretionary* actions, meaning an action a federal agency *may* take (e.g., providing federal funding). Moreover, the Court held that the ESA's consultation provisions do *not* apply to federal actions that are non-discretionary, meaning an action a federal agency *must* take pursuant to federal law. In *NAHB v. Defenders*, environmental groups argued that the U.S. (EPA) delegation of the CWA § 402 NPDES permitting authority to the State of Arizona was subject to the ESA's consultation requirements.

⁶ U.S. Department of Homeland Security, Federal Emergency Management Agency (FEMA). Procedure Memorandum 64 – Compliance with the Endangered Species Act (ESA) for Letters of Map Change. August 18, 2010. Page 3 of FEMA's memo. FEMA's website last visited on March 7, 2011. <http://www.fema.gov/library/viewRecord.do?id=4312>

⁷ 50 C.F.R. § 17.22(d)(2)(ii).

⁸ 551US 644 (2007).

The Supreme Court disagreed; finding the EPA's decision to delegate the CWA § 402 program was not a discretionary action. As the Court explained, once EPA had determined the State of Arizona met the criteria set forth under the statute; EPA had no discretion in determining whether or not to delegate the CWA program to the State of Arizona.⁹ As the Court noted “[w]hile EPA may exercise some judgment in determining whether a state has demonstrated that it has the authority to carry out § 402(b)'s enumerated statutory criteria, the statute clearly does not grant it [EPA] the discretion to add another entirely separate prerequisite to that list.”¹⁰

NAHB believes that *NAHB v. Defenders* provides the members of this Subcommittee with the perfect context on how to ensure the NFIP program once reauthorized by Congress, is not subject to ESA's consultation provisions. EPA itself has tried to leverage *NAHB v. Defenders* to prevent the ESA from obstructing its ability to delegate permitting authority under the CWA section 404 (as opposed to section 402) program. EPA's Assistant Administrator for Water, Mr. Peter S. Silva, sent a letter to the Environmental Council of the States (ECOS) in December 2010, clarifying EPA's position that state delegation of the CWA Section 404 wetlands program is not subject to the ESA Consultation provisions.¹¹ Unfortunately, FEMA cannot similarly utilize *NAHB v. Defenders* because federal courts have already ruled that the NFIP program is a discretionary federal program and thus subject to the ESA's requirements. NAHB, therefore, urges this Subcommittee to examine ways to reauthorize the NFIP and specifically state that it is a non-discretionary program. This will ensure that the NFIP is subject to, and benefits from, the flexibility afforded by *NAHB v. Defenders*.

NAHB believes that the NFIP was not, and should not, be designed as an environmental protection statute. Rather, the purpose of the NFIP is to protect human lives and property. As a result, FEMA should not be saddled with demonstrating compliance with the ESA in accomplishing its mission. Therefore, in light of this and the arguments put forth above, NAHB strongly urges Congress to exempt the NFIP and FEMA's administration of it from the ESA's consultation requirements.

⁹ 33 U.S.C. § 1342(b).

¹⁰ *NAHB*, 551 U.S. at 671.

¹¹ U.S. Environmental Protection Agency. [Letter from EPA Assistant Administrator, Office of Water to Environmental Council of the States \(ECOS\) on ESA's Consultation requirements under CWA §404 Wetlands Program](http://www.ecos.org/files/4324_file_Silva_Reply_on_ESA_Consultation.pdf). December 27, 2010. ECOS's website last visited on March 4, 2011. http://www.ecos.org/files/4324_file_Silva_Reply_on_ESA_Consultation.pdf

Table 3-3. Approximate Square Foot Costs of Elevating a Home (2009 Dollars)

Construction Type	Existing Foundation	Retrofit	Cost (per square foot of house footprint)
Frame (for frame house with brick veneer on walls, add 10 percent)	Basement or Crawlspace	Elevate 2 Feet on Continuous Foundation Walls or Open Foundation	\$29
		Elevate 4 Feet on Continuous Foundation Walls or Open Foundation	\$32
		Elevate 8 Feet on Continuous Foundation Walls or Open Foundation	\$37
	Slab-on-Grade	Elevate 2 Feet on Continuous Foundation Walls or Open Foundation ¹	\$80
		Elevate 4 Feet on Continuous Foundation Walls or Open Foundation ¹	\$83
		Elevate 8 Feet on Continuous Foundation Walls or Open Foundation ¹	\$88
Masonry	Basement or Crawlspace	Elevate 2 Feet on Continuous Foundation Walls or Open Foundation	\$60
		Elevate 4 Feet on Continuous Foundation Walls or Open Foundation	\$63
		Elevate 8 Feet on Continuous Foundation Walls or Open Foundation	\$68
	Slab-on-Grade	Elevate 2 Feet on Continuous Foundation Walls or Open Foundation ¹	\$88
		Elevate 4 Feet on Continuous Foundation Walls or Open Foundation ¹	\$91
		Elevate 8 Feet on Continuous Foundation Walls or Open Foundation ¹	\$96

¹Price shown is for raising the house with the slab attached.

NATIONAL FLOOD INSURANCE PROGRAM

Effects of Rate Revision on Average Annual Written Premium (plus FPF) per Policyholder*
Based on Projected Distribution of Business and Projected Amounts of Insurance

	Distribution of Business	Average Annual Premium with October 2010 Rates	Increase over Annual Premium with Current Rates
REGULAR PROGRAM - ACTUARIAL RATES			
AE	28.9%	498.87	5.9%
A	1.7%	816.70	5.3%
<u>AO, AH, AOB & AHB</u>	<u>8.1%</u>	<u>387.76</u>	<u>1.1%</u>
ZONES AE,A,AO,AH,AOB,AHB	38.7%	489.36	5.0%
POST-81 V,VE	0.9%	2,806.86	9.2%
B,C,X (Standard)	7.7%	611.74	7.4%
<u>PRP</u>	<u>31.3%</u>	<u>343.65</u>	<u>0.0%</u>
TOTAL ZONES B,C,X	39.0%	396.52	2.1%
SUBTOTAL ACTUARIAL	<u>78.5%</u>	<u>469.10</u>	<u>4.0%</u>
REGULAR PROGRAM - SUBSIDIZED RATES			
Pre-FIRM AE	16.2%	1,166.27	2.6%
Pre-FIRM V,VE	0.7%	1,806.75	3.4%
<u>Pre-FIRM Other</u>	<u>3.8%</u>	<u>1,068.81</u>	<u>2.6%</u>
PRE-FIRM SUBSIDIZED	20.8%	1,176.41	2.7%
75-81 POST V,VE	0.1%	1,468.36	9.5%
A99 & AR	0.5%	895.95	9.0%
EMERGENCY	0.0%	402.20	0.0%
SUBTOTAL SUBSIDIZED	<u>21.5%</u>	<u>1,170.07</u>	<u>2.9%</u>
TOTAL	<u>100.0%</u>	<u>619.79</u>	<u>3.6%</u>

*Computations are based on counting and pricing units insured under Condo Master Policies separately.

** Includes all other Pre FIRM zones, including AO, AH, AOB, AHB, D, AR, and A99.

Exhibit A. Effects of Rate Revisions on Written Premium, Page 1



FEMA

August 18, 2010

MEMORANDUM FOR: Regional Division Directors
Regions I - X

A handwritten signature in black ink, appearing to read "D. Bellomo", written over a horizontal line.

FROM: Doug Bellomo, P.E.
Director, Risk Analysis Division

SUBJECT: Procedure Memorandum 64 – Compliance with the Endangered Species Act (ESA) for Letters of Map Change

EFFECTIVE DATE: All Conditional Letter of Map Change submittals received as of October 1, 2010

Background: The purpose of the ESA is to conserve threatened and endangered species and the ecosystems upon which they depend. Congress passed the ESA in 1973 with recognition that the natural heritage of the United States was of “esthetic, ecological, educational, recreational, and scientific value to our Nation and its people.” Congress understood that, without protection, many of our nation’s living resources would become extinct. Species at risk of extinction are considered endangered, whereas species that are likely to become endangered in the foreseeable future are considered threatened. At present approximately 1,900 species are listed as threatened or endangered under the ESA. The U.S. Department of Interior’s Fish and Wildlife Service and the U.S. Department of Commerce’s National Marine Fisheries Service (collectively known as “the Services”) share responsibility for implementing the ESA.

Section 7 of the ESA requires each federal agency to insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or result in the destruction of adverse modification of designated critical habitat¹.

Section 9 of the ESA prohibits anyone from “taking” or “harming” endangered wildlife and similar prohibitions are generally extended through regulations for threatened wildlife. If an action might harm² a threatened or endangered species, an incidental take authorization is required from the Services under Sections 7 or 10 of the ESA.

Issue: Conditional Letters of Map Change (LOMCs) are issued before a physical action occurs in the floodplain and are FEMA’s comments as to whether the proposed project would meet minimum National Flood Insurance Program (NFIP) requirements and how the proposed changes would impact the NFIP maps. Because Conditional Letters of Map Revision based-on Fill (CLOMR-Fs) and Conditional Letters

¹ In accordance with Section 4 of the ESA, critical habitat includes specific areas essential to conservation of a species and those areas which may require special management considerations or protection.

² Harm can arise from “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering” [50 CFR Part 17.3].

of Map Revision (CLOMRs) are submitted to FEMA prior to construction, there is an opportunity to identify if threatened and endangered species may be affected by the potential project. If potential adverse impacts could occur, then the Services may require changes to the proposed activity and/or mitigation.

For LOMC requests involving floodplain activities that have already occurred, private individuals and local and state jurisdictions are required to comply with the ESA independently of FEMA's process. These requests do not provide the same opportunity as Conditional LOMCs for FEMA to comment on the project because map changes are issued only after the physical action has been undertaken.

The following table provides a general summary of FEMA's ESA requirements.

Request	ESA-related Action	ESA Requirement Related to FEMA Process
<i>Conditional LOMC Requests</i>		
CLOMA	No physical modification to floodplain is proposed.	ESA compliance is required independently of FEMA's process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA's regulations.
CLOMR-F	Proposed placement of fill in the floodplain.	ESA compliance must be documented to FEMA prior to issuance of CLOMR-F. FEMA must receive confirmation of ESA compliance from the Services.
CLOMR	Proposed modifications of floodplains, floodways, or flood elevations based on physical and/or structural changes.	ESA compliance must be documented to FEMA prior to issuance of CLOMR. FEMA must receive confirmation of ESA compliance from the Services.
<i>LOMC Requests</i>		
LOMA	No physical modification to floodplain has occurred.	ESA compliance is required independently of FEMA's process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA's regulations.
LOMR-F	Placement of fill in floodplain has occurred.	ESA compliance is required independently of FEMA's process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA's regulations.
LOMR	Modifications of floodplains, floodways, or flood elevations have occurred based on physical and/or structural changes.	ESA compliance is required independently of FEMA's process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA's regulations.

Action Taken: For CLOMR-F and CLOMR applications, the submittal will be reviewed based on:

- Required data elements cited in the NFIP regulations
- Required data elements cited in the MT-1 and MT-2 Application/Certification Form instructions
- Demonstrated compliance with the ESA

The CLOMR-F or CLOMR request will be processed by FEMA only after FEMA receives documentation from the requestor that demonstrates compliance with the ESA. The requestor must demonstrate ESA compliance by submitting to FEMA either an Incidental Take Permit, Incidental Take Statement, "not likely to adversely affect" determination from the Services or an official letter from the Services concurring that the project has "No Effect" on listed species or critical habitat. If the project is likely to cause jeopardy to listed species or adverse modification of critical habitat, then FEMA shall deny the Conditional LOMC request. This Procedure Memorandum will not change the review process for Conditional Letters of Map Amendment (CLOMA), Letter of Map Amendment (LOMA), Letter of Map Revision based-on Fill (LOMR-F), or Letter of Map Revision (LOMR) applications. In addition, FEMA's Cooperating Technical Partners will be required to comply with this Procedure Memorandum.

Attachment:

Guidance for Compliance with the Endangered Species Act for Conditional Letters of Map Change

Cc: See Distribution List

Distribution List (electronic distribution only):

Office of Chief Counsel

Risk Analysis Division

Risk Reduction Division

Environmental and Historic Preservation Unit

Regional Mitigation Divisions

Regional Environmental Officers

Legislative Affairs Division

Production and Technical Services Contractors

Customer and Data Services Contractor

Cooperating Technical Partners

Guidance for Compliance with the Endangered Species Act for Conditional Letters of Map Change

This document supplements the Federal Emergency Management Agency's (FEMA's) Procedure Memorandum No. 64. It highlights additional resources and frequently asked questions to help guide Conditional Letter of Map Revision (CLOMR) and Conditional Letter of Map Revision based on Fill (CLOMR-F) applicants in the Endangered Species Act (ESA) compliance process. The following sections identify helpful web resources, while the final section includes responses to frequently asked questions.

NATIONAL FLOOD INSURANCE PROGRAM AND LETTERS OF MAP CHANGE

Additional information about the National Flood Insurance Program (NFIP) and Letters of Map Change (LOMC) is available from FEMA.

NFIP: <http://www.fema.gov/hazard/flood/info.shtm>

LOMCs: <http://www.fema.gov/hazard/map/lomc.shtm>

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Additional information about the ESA and Endangered Species Programs is available from the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS). These two agencies, collectively known as "the Services," share responsibility for implementing the ESA and assisting all individuals (public and private) in the ESA compliance process.

NMFS: <http://www.nmfs.noaa.gov/pr/laws/esa/>

USFWS: <http://www.fws.gov/endangered/whatwedo.html>

GETTING STARTED WITH ESA COMPLIANCE AND WHO TO CONTACT

CLOMR and CLOMR-F applicants are responsible for demonstrating to FEMA that ESA compliance has been achieved prior to FEMA's review of a CLOMR or CLOMR-F application. The applicant may begin by contacting a local Service office, State wildlife agency office, or independent biologist to identify whether threatened or endangered species exist on the subject property and whether the project associated with the CLOMR or CLOMR-F request would adversely affect the species. These entities are also available to discuss questions pertaining to listed species and ESA compliance.

NMFS Regional Offices: <http://www.nmfs.noaa.gov/regional.htm>

USFWS Office Directory: <http://www.fws.gov/offices/>

DEMONSTRATING COMPLIANCE WITH THE ESA

If species may be affected adversely by the project, the applicant (as a non-Federal entity) would be required to obtain compliance through the Section 10 process. This process includes applying for an Incidental Take Permit (ITP) and preparing a habitat conservation plan (HCP). Additional information about Section 10 requirements and the permit application process is available from NMFS and USFWS.

ITPs and NMFS: http://www.nmfs.noaa.gov/pr/permits/faq_esapermits.htm

ITPs and USFWS: <http://www.fws.gov/endangered/hcp/hcpplan.html>

HCPs and NMFS: <http://www.nwr.noaa.gov/Salmon-Habitat/Habitat-Conservation-Plans/Index.cfm>

HCPs and USFWS: <http://www.fws.gov/endangered/hcp/index.html>

NMFS Permit applications: http://www.nmfs.noaa.gov/pr/permits/esa_permits.htm

USFWS Permit application: <http://www.fws.gov/forms/3-200-56.pdf>

To demonstrate to FEMA that ESA compliance has been achieved, the requestor must provide an ITP, an Incidental Take Statement, a “not likely to adversely affect” determination from the Services, or an official letter from the Services concurring that the project has “No Effect” on proposed or listed species or designated critical habitat. If the project is likely to cause jeopardy of a species’ continued existence or adverse modification to designated critical habitat, then FEMA shall refuse to review the CLOMR or CLOMR-F request without prior project approval from the Services. If a Federal entity is involved in a proposal or project for which a CLOMR or CLOMR-F has been requested, then the applicant may coordinate with that agency to demonstrate to FEMA that Section 7 ESA compliance has been achieved through that other Federal agency.

Frequently Asked Questions

For which map change applications does FEMA require demonstrated ESA compliance?

FEMA requires applicants to demonstrate compliance for CLOMRs and CLOMR-Fs only.

Why is ESA compliance required before FEMA can review my CLOMR or CLOMR-F application?

All individuals in this country (private and public) have a legal responsibility to comply with the ESA. FEMA recognizes that potential projects for which a CLOMR or CLOMR-F has been requested may affect threatened and endangered species. As a result, FEMA requires documentation to show that potential projects comply with the ESA before a CLOMR or CLOMR-F application can be reviewed.

Why does FEMA not require demonstration of ESA compliance for other LOMC applications?

Many LOMC requests involve floodplain activities that have occurred already. As a result, FEMA does not have the opportunity to comment on these projects in terms of ESA compliance prior to the physical changes taking place. Private individuals and local and state jurisdictions are required to comply with the ESA independently of FEMA’s process.

What will FEMA require from CLOMR and CLOMR-F applicants to demonstrate ESA compliance?

As part of the CLOMR or CLOMR-F application, the requestor must provide an ITP, an Incidental Take Statement, a “not likely to adversely affect” determination from the Services, or an official letter from the Services concurring that the project has “No Effect” on proposed or listed species or designated critical habitat.

How much time will be required to achieve ESA Compliance?

The timeframe needed to achieve ESA compliance will depend entirely on the complexity of the project, the extent to which species may be affected by the project, the quality of biological analyses conducted by the applicant, and the review process as determined by the Services. Therefore, we recommend that LOMC applicants coordinate with the Services as soon as possible within the project development process.

Who is available to answer my questions about ESA compliance?

NMFS and the USFWS both have staff available around the country to answer questions about threatened and endangered species and ESA compliance. Refer to the *NMFS Regional Offices* and *USFWS Office Directory* links on Page 1 of this guidance document to identify the nearest available Service office. FEMA does not have staff available to assist with this process.

How do I determine if there are threatened or endangered species or critical habitat in my project area?

The applicant may begin by contacting a local Service office, state wildlife agency office, or independent biologist to identify whether threatened or endangered species exist on the subject property and whether the project associated with the CLOMR or CLOMR-F would adversely affect the species.

Do I need to hire a biologist for this process?

While hiring a biologist may be unnecessary, doing so may help facilitate the process. Biologists familiar with subject species and the regulatory process can help adequately complete many of the studies required as part of the Section 10 process and fulfill other Section 10 requirements.

How are the following ESA-related terms defined?

“Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct and may include habitat modification or degradation.

“Harm” can arise from significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

“Section 7” requires all Federal agencies, in consultation with USFWS or NMFS, to use their authorities to further the purpose of the ESA and to ensure that their actions are not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat.

“Section 10” lays out the guidelines under which a permit may be issued to non-Federal parties to authorize prohibited activities, such as take of endangered or threatened species.

“ITP” or incidental take permit is a permit issued under section 10(a)(1)(B) of the ESA to a non-Federal party undertaking an otherwise lawful project that might result in the “take” of an endangered or threatened species. Application for an incidental take permit is subject to certain requirements, including preparation by the permit applicant of a HCP.

“HCP” or habitat conservation plan is a legally binding plan that outlines ways of maintaining, enhancing, and protecting a given habitat type needed to protect species. It usually includes measures to minimize impacts and may include provisions for permanently protecting land, restoring habitat, and relocating plants or animals to another area. An HCP is required before an incidental take permit may be issued to non-Federal parties.

Other ESA-related terms not described here may be defined on the following website:
<http://www.fws.gov/endangered/pdfs/glossary.pdf>

