U.S. Department of Homeland Security
500 C Street, SW
Washington, DC 20472

FEMA

Attachment C
to Exhibit 24

April 24, 2009

Barry Thom
Acting Regional Administrator
Northwest Regional Office
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
7600 Sand Point Way Northeast
Seattle, Washington 98115

RE: **FEMA Adoption of Reasonable Prudent Alternative for Implementation of the NFIP in Puget Sound**

Dear Mr. Thom:

This letter is in response to the National Marine Fisheries Service (NMFS) letter dated September 22, 2008, and the Biological Opinion prepared under Section 7 of the Endangered Species Act (ESA) and the Magnuson-Stevens Fishery Conservation and Management Act (MSA). I appreciate the assistance your office has provided in assessing the impacts of the current implementation of the National Flood Insurance Program (NFIP) on threatened and endangered species and federally designated critical habitat in Puget Sound in the State of Washington. The Department of Homeland Security, Federal Emergency Management Agency (FEMA), reviewed the Reasonable Prudent Alternative (RPA) elements provided under Section 7 of ESA and Essential Fish Habitat Conservation Recommendations (CRs) provided under MSA. As a result of its review and evaluation, FEMA has concluded it can implement the RPA elements and CRs in the following manner:

RPA Elements and CRs That Will Be Implemented

A. Notice (RPA Element 1 and CR 1)

FEMA provided the recommended notice to the NFIP participating communities in the Puget Sound region on October 21, 2008. The notice provided information about the findings of the Biological Opinion and recommended communities adopt a temporary moratorium on floodplain development that would adversely impact the species habitat.

B. Mapping (RPA Element 2 and CR 2)

FEMA will implement the element and recommendation your office provided by conducting the following:

a. Engage in ESA Section 7 consultation with your office before approving Conditional Letters of Map Change (CLOMR, CLOMA, or CLOMR-F) to ensure adequate consideration of endangered species, threatened species, and their habitat. For processing other letters of map change submissions (LOMA, LOMR, and LOMR-F), FEMA will continue its practice of requiring applicants to obtain the applicable ESA permits, and having communities verify that the applicants have obtained these permits;

b. Work with Puget Sound communities with Tier 1 and Tier 2 populations to prioritize flood insurance mapping efforts;

c. Develop guidance on the use of steady-state and unsteady-state modeling techniques and how to incorporate habitat considerations;

d. Allow communities to submit "predictive land-use/cover change" information for depiction in Flood Insurance Rate Maps; and

e. Provide outreach and educational materials on the risks associated with living behind levees, targeted to those communities in the Puget Sound region.

I also want to make you aware FEMA is engaging in a study to evaluate the impacts of climate change on the NFIP. This study will include program options and alternatives for taking into account these impacts and other climate change challenges in the FEMA implementation of the NFIP. These may include changes to the FEMA proposal for RPA Element 2 component D and CR 5 component D for considering "predictive land-use/cover change" in FEMA mapping activities. I anticipate this study will be completed by early 2010.

C. Implementation of Floodplain Management Criteria (RPA Element 3 and CR 3)

FEMA will implement this element and recommendations by encouraging Puget Sound communities to comply with one of the following options:

a. Adopt a FEMA-developed voluntary model ordinance that meets the fisheries habitat requirements identified in RPA Element 3 and Appendix 4 of the Biological Opinion;

b. Demonstrate adoption of fish habitat requirements identified in RPA Element 3 and Appendix 4 of the Biological Opinion by: (i) developing and negotiating with your office a Habitat Conservation Plan (HCP) for the community development or

land-use regulations and ordinances, in accordance with Section 10 of ESA, (ii) demonstrating through a FEMA-approved checklist that the current community development and land-use requirements already meet the requirements RPA Element 3 and Appendix 4, or (iii) consulting with the NMFS on community-specific ESA Section 4(d) practices for protection of threatened species; or

c. At a minimum demonstrate ESA compliance through permit-by-permit coordination with your office under ESA Section 10 for any new development in the floodplain.

FEMA will recommend Puget Sound communities choose one of these options within three (3) years from the issuance of the Biological Opinion (September 22, 2008), as required by the NMFS. In the interim period, FEMA will request communities to report on permits issued for development in the floodplain.[1]

D. *Changes to Community Rating System (CRS) (RPA Element 4 and CR 4)*

FEMA will implement the majority of the recommendations in RPA Element 4. The CRS Task Force is currently evaluating the recommendation on awarding points for setting levees back, restoring riparian and floodplain function, and dismantling pre-existing levees to restore floodplain function, in order to determine whether and how it can be implemented.

E. *Levee-Related Changes (RPA Element 5 and CR 5)*

FEMA will implement RPA Element 5 and CR 5 component C by encouraging Hazard Mitigation Assistance (HMA) grantees and subgrantees to take advantage of the opportunities available under those FEMA HMA programs for eligible acquisition that could also benefit the enhancement or protection of salmon habitat or habitat characteristics.

F. *Addressing Unmitigated Development During Interim Period (RPA Element 6 and CR 6)*

FEMA will provide outreach and technical assistance to communities during the interim period. Technical assistance will be related to the impacts of floodplain development on endangered and threatened species and their habitats (including federally designated critical habitat). It will also include providing guidance documents and educational materials to meet the other RPA elements and CRs.

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[1] The interim period is the period of time from the FEMA response to the NMFS and the community adoption of one of the options.

G. Monitoring (RPA Element 7 and CR 7)

FEMA will implement the element and recommendation your office provided by conducting the following:

a. Develop a website that will contain policy guidance and other information related to FEMA implementation of the RPAs in Puget Sound; and

b. Develop a standard electronic form to collect from communities the permit information required by the NMFS.

RPA Element Components That Will Not Be Implemented

As a result of its review and evaluation of the information contained in the Biological Opinion and our existing legal authorities for the NFIP, FEMA determined it cannot implement RPA Element 5 and CR 5 components A, B, and D.

A. RPA Element 5 component A and CR 5 component A

FEMA cannot implement component A of RPA Element 5 and CR 5 because it is beyond its statutory authority and discretion. It is not within FEMA statutory or regulatory authority to prescribe any levee maintenance standard other than protection from the flooding having a 1-percent chance of occurring in any given year. Congress delegated the responsibility to the U.S. Army Corps of Engineers (USACE) to develop standards for levee design, operation, and maintenance. Implementing component A of RPA Element 5 would place FEMA in the position of assuming a responsibility not placed on it by Congress.

The FEMA levee certification regulations (44 CFR 65.10) are based strictly on whether the levee provides protection against the 1-percent-annual-chance flood. These regulations are neutral on the presence of woody vegetation on levees. FEMA could recognize those levees designed and maintained with woody vegetation, as long as they provide the required level of flood protection. However, FEMA does not have the discretion to refrain from recognizing a levee that provides the required level of flood protection but fails to allow woody vegetation. It is the responsibility of the certifying engineer or agency to determine whether allowing woody vegetation would impact the required flood protection.

The FEMA levee certification regulations are not an essential cause of the effects on species and/or species habitat associated with the removal of woody vegetation from levees. The certifying engineer or agency is an intervening factor in this cause and effect relationship. They have to make the independent decision or take the independent action of either designing the levee system to allow woody vegetation or allow woody vegetation in an

already existing levee system in a manner that also maintains the level of flood protection required by FEMA regulations.

B. RPA Element 5 component B and CR 5 component B

FEMA cannot implement component B because it would be a duplication of programs, prohibited by Section 312 of the Stafford Act and 44 CFR 206.191. FEMA provides emergency funding for repairs of levees under its Public Assistance Grant Program. The Stafford Act has rules and procedures that implement the Section 312 restrictions against duplication of benefits and programs. The levee policy referenced in component B stipulates the FEMA funding for emergency levee repairs is only available if the levee is not within the USACE Rehabilitation and Inspection Program (RIP). USACE RIP levees include those levees that are active and the ones determined inactive because they do not meet the USACE inspection and operation requirements. To allow FEMA funding for the RIP levees determined to be inactive because they do not meet the USACE vegetation standards would be a duplication of programs and contrary to general principles of Federal appropriations law.

C. RPA Element 5 component D and CR 5 component D

As stated above, FEMA cannot establish additional standards to recognize levees other than protection from the 1-percent chance of flooding occurring in any given year. It is beyond FEMA statutory authority to require additional criteria that do not relate to the 1-percent-annual-chance standard.

Although FEMA does not have the statutory authority to implement these components of RPA Element 5 and CR 5, the Agency will collaborate with your office and the USACE on efforts to address the issues associated with vegetation standards and habitat considerations for levees as recommended by your office under Section 7(a)(1).

Conclusion

FEMA will implement the RPA Elements and CRs as outlined above. The FEMA point of contact for the implementation of the RPA is Mark Carey, Regional Mitigation Division Director, who will be advised on these environmental matters by Mark Eberlein, FEMA Regional Environmental Officer (REO). Both are in the FEMA Region X Office in Bothell, Washington.

FEMA takes seriously its responsibility to insure its actions are not likely to jeopardize the continued existence of species and do not destroy or adversely modify federally designated critical habitat, and to consult with your agency on actions which could adversely affect Essential Fish Habitat.

I appreciate the amount of effort and level of assistance your office has provided in this matter. FEMA looks forward to continue working collaboratively with you to meet its ESA and MSA responsibilities in implementing the NFIP.

Sincerely,

Michael K. Buckley,
Acting Assistant Administrator
Mitigation Directorate