

FAQ: Rescinded Policy on Fish Enhancement Structures in the Floodway

Answers to common questions about the former regional policy and FEMA's decision to rescind it, effective August 17, 2020.

Acronyms

BFE	Base Flood Elevation
CFR	Code of Federal Regulations
CLOMR	Conditional Letter of Map Revision
H&H	Hydraulic and Hydrologic
LOMR	Letter of Map Revision
NFIP	National Flood Insurance Program
SFHA	Special Flood Hazard Area

For more information on the National Flood Insurance Program and the terms used in this FAQ, please visit [FEMA.gov](https://www.fema.gov) or contact your local floodplain administrator.

What was the intention of the former policy?

The intention of the *Policy on Fish Enhancement Structures in the Floodway*, issued by FEMA Region 10 in 1999, was to make it easier for local communities to issue floodplain development permits for fish habitat restoration projects in the floodway if those projects met certain criteria. Under the former policy, if an applicant provided H&H analyses and a feasibility study demonstrating that a habitat restoration project would cause a rise in BFE that could not be avoided through redesign, but was both miniscule and had no effect on structures, a community could permit the project without requiring a CLOMR prior to construction or a LOMR once the project was complete.

BACKGROUND

The regional policy was issued around the time that many Pacific Northwest salmon species were listed as Threatened under the Endangered Species Act. The former policy intended to provide additional support to NFIP communities in their review of floodplain development projects designed to restore, enhance and protect the critical habitat of threatened salmon. Fish habitat restoration projects often occur in the regulatory floodway, a portion of the SFHA where NFIP permitting requirements are the most rigorous. NFIP regulations prohibit the permitting of floodway development unless a community first obtains and reviews H&H analyses certifying that the proposed development will not cause a rise in the BFE anywhere in the community. These analyses are essential to ensuring that floodway development, including habitat restoration, will not cause unknown changes to the flood risk communicated by a community's flood maps. If H&H analyses show a rise in the BFE and the community still wishes to permit the development, federal regulations require a CLOMR and LOMR to alert FEMA to these changes to the maps, a process that adds to the costs and timeline of a project. The former policy attempted to make the permitting process for habitat restoration projects less burdensome by allowing a waiver of the CLOMR/LOMR requirement for some projects.



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Why was the policy rescinded?

FEMA rescinded the policy after determining that it was inconsistent with mandatory NFIP standards for permitting development in the floodway. It also came to FEMA's attention that a number of communities in Region 10 misread the policy as a waiver of the H&H analyses requirement for permitting floodway projects that included habitat benefits or protections in their designs.

BACKGROUND

Federal regulations that govern the NFIP, specifically CFR [Title 44 Parts 60.3\(d\)\(3\)](#) and (4), clearly outline the mandatory steps communities must follow when reviewing proposals for floodway development. FEMA defines development as "any man-made change to improved or unimproved real estate," which includes man-made changes meant to restore habitat and natural floodplain functions. If H&H analyses show that a proposed development will not cause a rise in the BFE, the community may permit it, although a LOMR may be required once work is complete if the analyses show other changes to the flood risk communicated by the maps. If H&H analyses show a rise in BFE and the community wishes to support the project, it must require a CLOMR prior to construction and a LOMR once construction is complete. In 2020, FEMA determined that the former policy's suggestion that even a very small rise could be permitted without following the CLOMR/LOMR process to update the affected flood map was inconsistent with these regulations. FEMA Region 10 offers guidance on how H&H analyses can be conducted to determine if a proposed project will cause a rise in the BFE within the community.

Did the former policy provide a waiver of H&H analyses for habitat restoration projects?

No, the rescinded policy was not a waiver of the H&H requirement for projects designed to benefit or protect habitat. H&H analyses have always been mandatory for floodway development regardless of that development's purpose. Communities that misread the former policy as a waiver of H&H analyses must take steps to correct this deficiency in their floodplain management programs. It is essential that community floodplain officials and proponents of habitat restoration projects work together in the design phase to ensure that all floodplain management regulations are considered.

BACKGROUND

All communities that participate in the NFIP must adopt and enforce a mandatory set of development standards as a condition of their continued participation. Fundamental to these standards is that all development in the SFHA must be reviewed for compliance with adopted regulations and only allowed to proceed when authorized by the community through a development permit. One of the mandatory standards that communities must adopt into ordinance and enforce is [44 CFR 60.3\(d\)\(3\)](#), which prohibits encroachments into the floodway unless H&H analyses are conducted and demonstrate that no rise in the BFE will occur within the community as a result of a proposed project. Issuing permits for development in the floodway without meeting the H&H requirement (as well as following the CLOMR/LOMR process when appropriate) jeopardizes a community's continued participation in the NFIP. Development in violation of the requirements in CFR will require remediation which may include removal of the project and restoration to pre-construction conditions.

Why does FEMA require that habitat restoration projects undergo the same review and permitting process as other floodway development?

Habitat restoration floodway projects have the potential to alter the risk communicated by a community's flood maps and therefore must undergo the same rigorous review as other floodway development. NFIP regulations provide one set of requirements for all floodway development.

BACKGROUND

FEMA recognizes that habitat restoration projects promote the natural and beneficial functions of floodplains and contribute significantly to a community's proactive long-term management of its flood risks as well as the recovery and sustainability of threatened species. However, the installation of bioengineered revetments, large woody debris, and other elements of channel complexity meant to provide shelter to fish, encourage meanders, or otherwise restore the river or stream to a more natural state can also slow the current, increase the accretion of sediment and alter the channel of the stream. The replacement and relocation of perched and undersized culverts also make significant changes to the dynamics of a waterbody. These activities can result in changes in the BFE and to the boundaries of the mapped floodway and SFHA.

Communities must ensure that their support of these important projects includes the same level of rigorous analysis and permitting requirements that apply to all potential encroachments in the floodway so that habitat restoration efforts can proceed without increasing flood hazards or invalidating the maps that communicate those hazards. Any potential impacts must be anticipated, through H&H analyses, while the project is still in its design phase, carefully reviewed and understood by the community that will assume responsibility for the development it chooses to permit, and communicated to FEMA through the CLOMR/LOMR process so that the maps can be revised to reflect the best available data. It is essential that community floodplain officials and proponents of habitat restoration projects work together in the design phase to ensure that all floodplain management regulations are considered.

What if we have projects in progress that were designed and permitted based on the former policy?

Projects completed in full compliance with the policy prior to its rescindment will be reviewed on a case-by-case basis. Important to remember is that the former policy never waived the requirement of H&H analyses for projects in the floodway. Permitting projects in the floodway without that analysis or allowing development to occur anywhere in the SFHA without permits are violations of minimum NFIP standards.

Our community requires H&H analyses and we allow a rise up to 0.10' for habitat projects without requiring a CLOMR. Why can't we continue to do that?

Allowing development to cause any rise in the floodway is a violation of [44 CFR 60.3\(d\)\(3\)](#); however, per 60.3(d)(4), a community can allow projects that would cause a rise but only if the CLOMR process, as laid out in [44 CFR 65.8](#), is followed prior to the start of construction. The "No Rise" standard is 0.00.'

Do we need to remove references to the former policy from our regulations/publications?

Yes, references to the rescinded policy in regulations, ordinances, policies, guidance or other materials distributed by NFIP communities and state agencies must be removed. Communities are encouraged to reach out to their State NFIP Coordinators or FEMA for technical assistance.

Are flood easements an alternative to obtaining letters of map revision (CLOMR/LOMR)?

No, the permitting process, including H&H analyses for floodway development and the CLOMR/LOMR process for any map changes, must be followed for each individual development proposal. Communities must alert FEMA to alterations to the floodplain within 180 days so that flood maps are always based on the best available data.

Can a rise be permitted without a CLOMR/LOMR if the rise is isolated on one property or doesn't affect structures?

No. If a community wishes to approve a project that has shown through H&H analyses that it will cause a rise in BFE anywhere in the community, they must require a CLOMR prior to construction and a LOMR once the project is complete. If analyses confirm no rise in the BFE but show other alterations to the SFHA, those changes must be communicated to FEMA through the LOMR process, even if a CLOMR was not required prior to construction.

Who can perform H&H analyses and certify that no rise in the BFE will occur?

[44 CFR 60.3\(d\)](#) does not specify professional qualifications for who can conduct the H&H analyses, but states that the analyses must be “performed in accordance with standard engineering practice.” In Region 10, H&H analyses must be conducted as outlined in the regional guidance, “Procedures for ‘No-Rise’ Certification for Proposed Developments in the Regulatory Floodway.” Local ordinances may require that a professional engineer perform the analyses and certify the results. FEMA recommends that communities only accept analyses from qualified hydraulic and hydrologic professionals as licensed in your state. Technical questions that are unanswered by the guidance can be directed to the Region 10 Risk Analysis Branch.

Is there guidance available on preparing an application for a letter of map revision (CLOMR/LOMR)?

Yes, the MT-2 application includes instructions that provide information on the data that must be submitted. Details on this application process can be found at <https://www.fema.gov/flood-maps/change-your-flood-zone/paper-application-forms/mt-2>.

The rescindment of this policy may make some restoration projects cost prohibitive. Will FEMA funds be available to offset the significant costs of H&H and CLOMR/LOMR?

No, the cost of H&H analyses, as well as the fees associated with the CLOMR/LOMR process, are the responsibility of the applicant and should be included in early planning and budgeting for habitat restoration projects. The former policy did not provide a waiver for H&H analyses, which have always been required when applying for permits for any kind of floodway development. It is essential that community floodplain officials and proponents of habitat restoration projects work together in the design phase to ensure that all floodplain management regulations are considered and all potential impacts to cost and timeline are fully understood.

APPLICATION FEE WAIVER FOR ELIGIBLE PROJECTS

Some habitat restoration projects are eligible for a waiver of the application fees charged by FEMA for map change requests (CLOMR/LOMR). In accordance with the Homeowner Flood Insurance Affordability Act of 2014 (Public Law 113-89, section 22), a project proponent is eligible for this fee waiver if the project meets the following criteria: 1) the primary purpose is habitat restoration (as defined in the Partners for Fish and Wildlife Act, [16 USC § 3772](#) (5)),

and 2) the project is funded either in whole or in part with federal or state funds. This fee waiver includes projects for dam removal, culvert redesign and the installation of fish passage. To request this fee waiver, an explanation of the project's qualification must be provided as an attachment to the MT-2 form upon application for the CLOMR/LOMR. For more information on processing and review fees, please contact the [FEMA Map Information eXchange \(FMIX\)](#) at 1-877-336-2627 or FEMAMapSpecialist@riskmapcds.com. More information on fees and fee waivers is available at www.fema.gov/flood-map-related-fees.

Revised Code of Washington (RCW) 77.55.181 says that local communities cannot require permits or fees for projects that qualify for the streamlined Fish Habitat Enhancement Project Hydraulic Project Approval (FHEP HPA). How does this state law and FEMA's rescindment of this regional policy affect NFIP communities in Washington?

The former regional policy only related to [RCW 77.55.181](#) in that it also addressed habitat restoration projects. FEMA is aware that some Washington communities have interpreted RCW 77.55.181(4) as prohibiting them from requiring floodplain development permits for projects that qualify for the FHEP HPA. However, RCW 77.55.181 did nothing to change FEMA's requirement that participating communities in Washington comply with all mandatory NFIP standards in the CFR. These communities are, and have always been, required to manage development in the SFHA through local ordinances and permitting processes that ensure compliance with the minimum standards. Allowing development to occur in the SFHA without a permit is a violation that can result in a community's suspension from the NFIP. Communities that misread the former regional policy as a waiver of the H&H analyses requirement and/or interpret RCW 77.55.181 as prohibiting floodplain development permits for qualifying projects must take immediate steps to correct these deficiencies in their floodplain management programs.

The State of Washington is also an NFIP community with floodplain management responsibilities and authorities ([RCW 86.16](#)). The Department of Ecology is the agency responsible for coordinating floodplain management at the state level and ensuring that state activities comply with NFIP standards, including the requirement to obtain local floodplain permits for development in the SFHA.

If you have questions about RCW 77.55.181, floodplain management at the state level, or other Washington laws and policies that relate to development in the SFHA, please contact the Washington Department of Ecology.

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Policy on Fish Enhancement Structures in the Floodway

The balance required between anadromous fish and the human environment is unique to the Northwest. Maintaining that balance often makes implementing regulations a challenge. Sometimes the local, State and Federal regulations contradict each other. This is the case with fish enhancement structures.

FEMA's regulations require communities to prohibit encroachments in regulated floodways unless provided with a no-rise analysis. The current listing and proposed listing of certain anadromous fish species as Threatened or Endangered requires the restoration of their habitat to ensure their survivability. Restoring that habitat often entails encroaching in the floodway. A strict interpretation of this standard could require a relatively expensive analysis that might exceed the cost of the enhancement project.

FEMA recognizes this. While we believe the best course of action is to preserve the floodway encroachment standard as it exists, an informed judgment regarding fish enhancement structures can be made as to exceptions for which less than the maximum hydraulic analyses are required. The community official often does not have the qualifications to make an informed judgment regarding the impacts of these structures on flood hazards. Therefore, FEMA will allow the community to defer to the "judgment" of a qualified professional regarding such impacts. Such qualified hydraulic or hydrology professionals would include staff of Rural Conservation and Development and the Natural Resource Conservation Service. It would also include similarly qualified staff of fisheries, natural resource, or water resources agencies.

The qualified professional should, as a minimum, provide a feasibility analysis and certification that the project was designed to keep any rise in 100-year flood levels as close to zero as practically possible and that no structures would be impacted by a potential rise. Additionally, routine maintenance of any project would be necessary to sustain conveyance over time and the community should commit to a long-term maintenance program in their acceptance of the project. FEMA also recommends a condition be placed on the projects emphasizing the dynamics of a river and, if the community deems necessary, further analysis be required.

We believe this is preferable to trying to specify in the ordinance language all the different types of "development" that need not comply with the "no rise" standard. Typically, any rise caused would require some offsetting action such as compensatory storage, channel alteration, or removal of existing encroachment. One of these alternatives would be appropriate to compensate for any rise and still preserve the integrity of the floodplain standards.

FEMA Region 10 feels this policy is in keeping with the concept of wise floodplain management which means enjoying the benefits of floodplain lands and waters while still minimizing the loss of life and damage from flooding and at the same time preserving and restoring the natural resources of floodplains as much as possible. If you have any questions regarding this policy, please contact the Mitigation Division at (425) 487-4737.

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