




# **Storms Brewing in the National Flood Insurance Program: Understanding the Impacts on Your Community**



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# Why Are Floodplains Issue Important in Your County?

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## *Confluence of Events:*

- FEMA updating floodplain maps = bigger/deeper floodplains
- Endangered Species Act (ESA) lawsuits = More stringent land use regulations becoming applicable within mapped floodplains
- Increasing “natural” disasters and climate change concerns leading to increased scrutiny on NFIP financial soundness and floodplain development
- Flood Insurance Purchase Requirement. *NFIP Reauthorization underway*

# Background

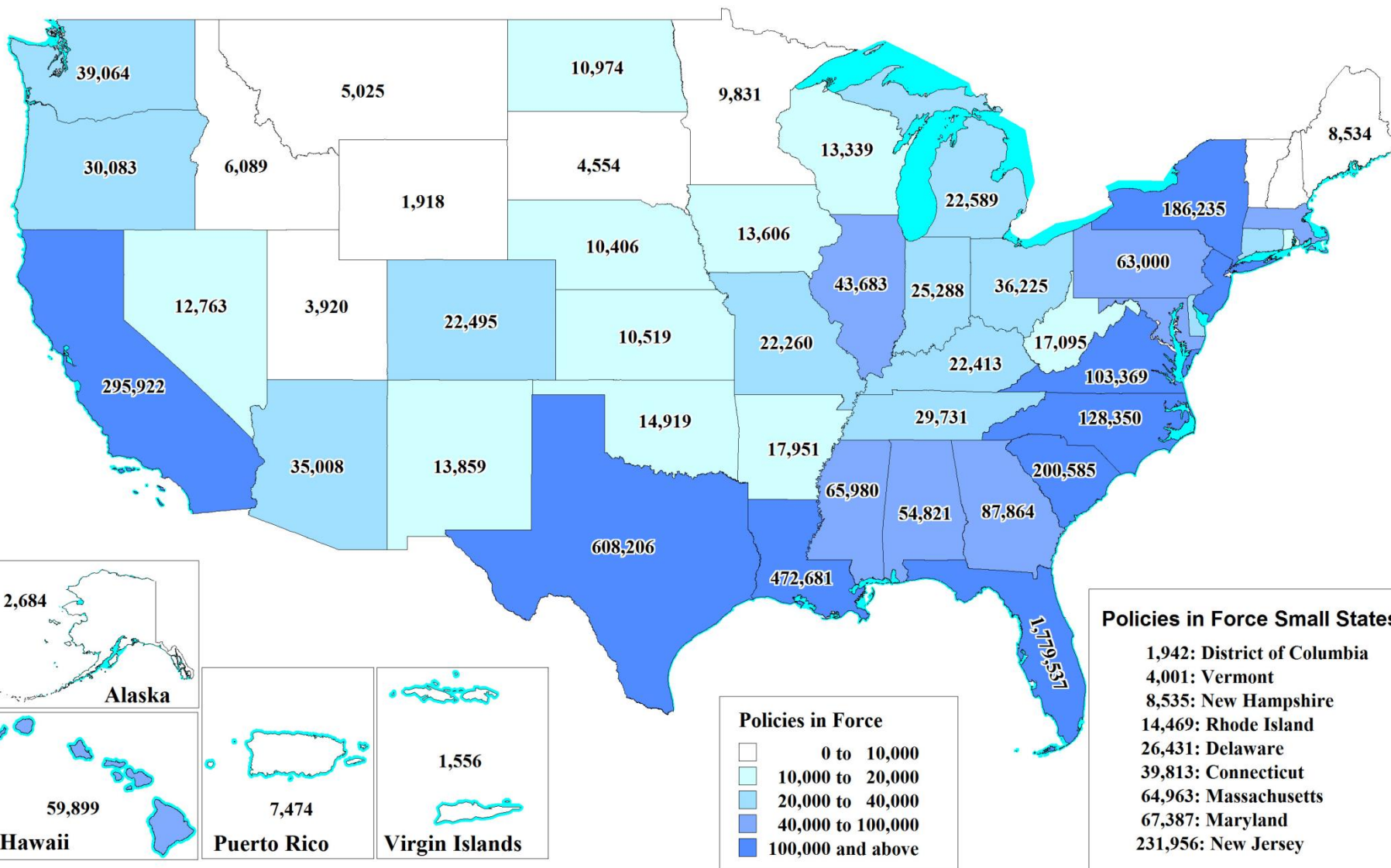
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- Congress adopted the National Flood Insurance Act in 1968; two purposes
- Next:
  - FEMA created minimum development regulations applicable to floodplains.
  - FEMA developed maps depicting the 100-year floodplain
- Intended as a flood-prevention and damage reduction program.
- *Goal: Reduce hazards to humans and structures from flooding events. Not designed to protect floodplain habitat or species.*

# National Flood Insurance Program

## Total Number of Policies in Force

AS OF SEPTEMBER 30, 2016



# How are Properties Affected by the NFIP?

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- To participate in the NFIP, local governments are required to adopt flood hazard regulations at least as stringent as FEMA minimum standards, 44 CFR §60.3
- Properties in the floodplain are subject to at least one, and more often several, additional layers of development restrictions
- Result: *More difficult, time consuming and expensive to develop, redevelop and/or maintain property mapped in the floodplain*

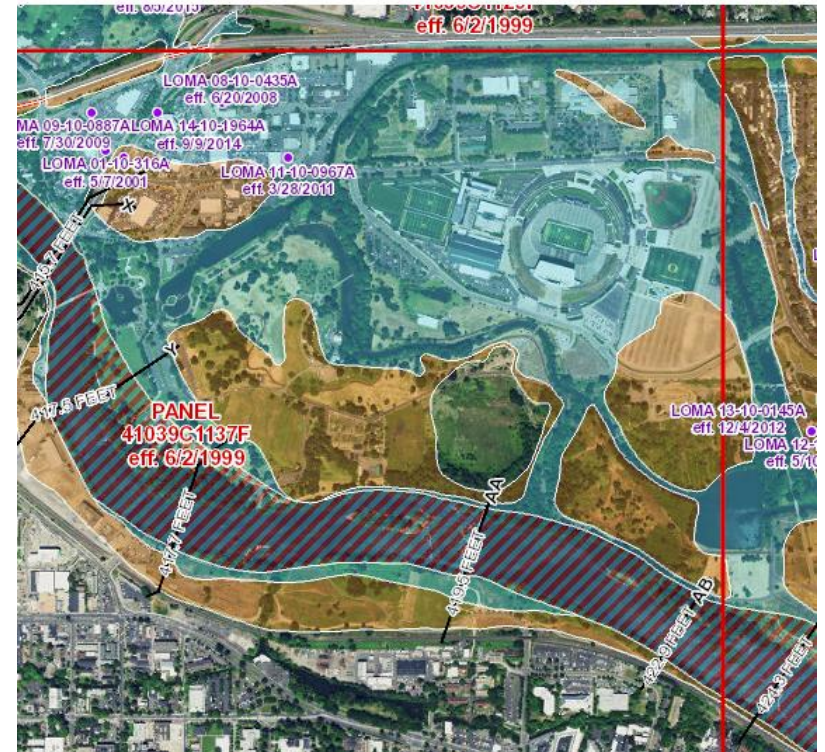
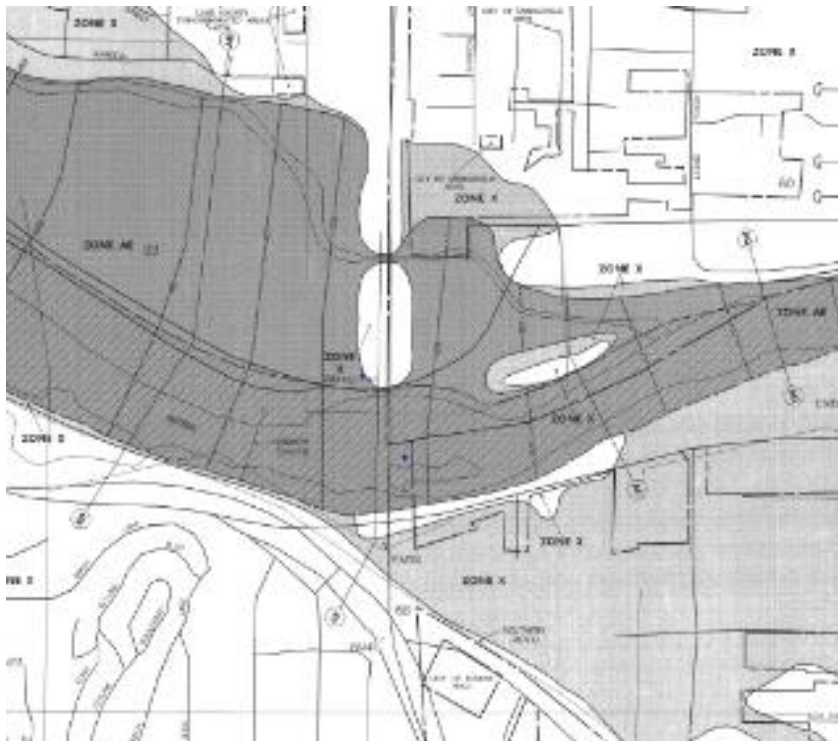
# Hazards of the NFIP?

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- Mandatory flood insurance purchase requirements
- Local community must participate in NFIP to qualify for certain disaster relief
- Property owners must have flood insurance to qualify for disaster relief following flood event
- Result: *Voluntary program effectively rendered mandatory*
- Impacts if Congress fails to timely reauthorize

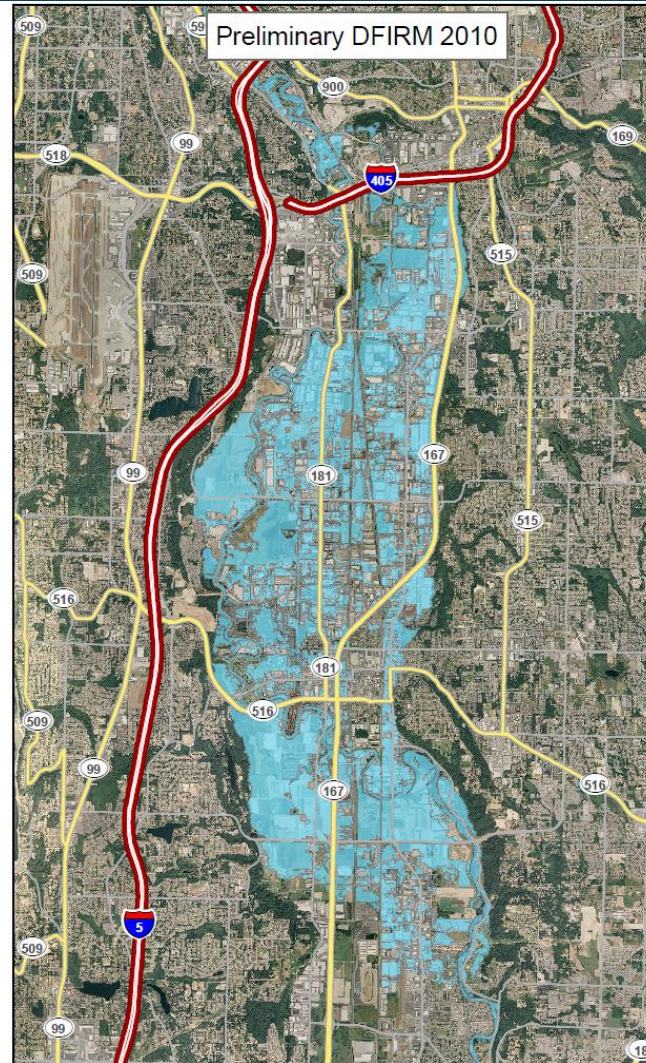
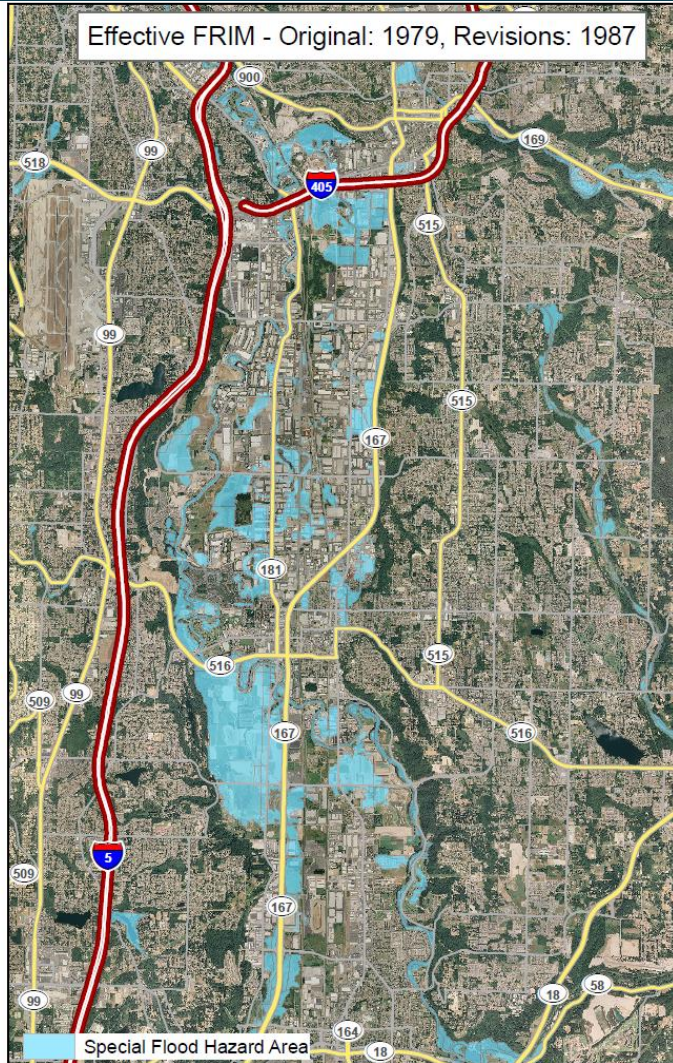


# Floodplain Mapping – Who's in and Who's Out?





# Floodplain Mapping – the Levee Effect

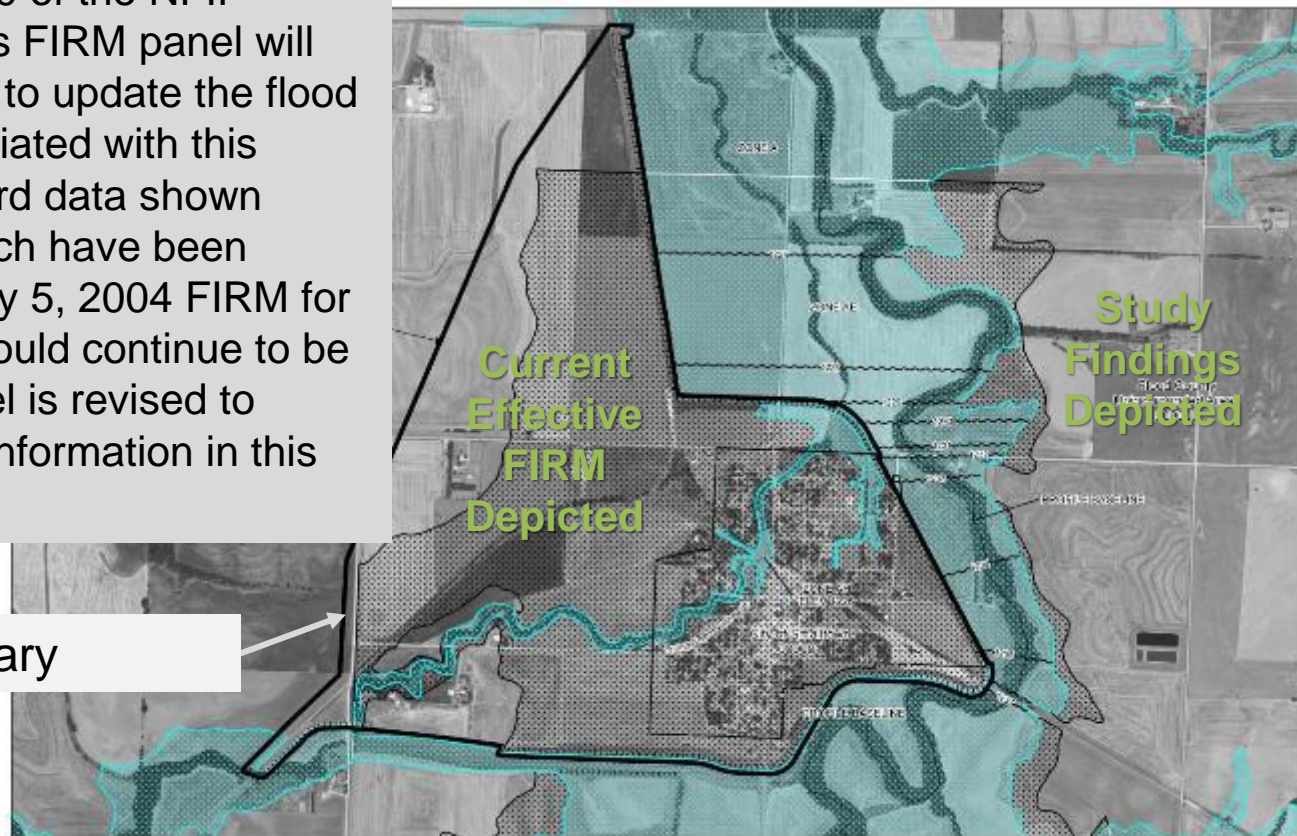




# Seclusion Mapping Process

1. **ATTENTION:** The levee, dike, or other structure inside this boundary does not comply with Section 65.10 of the NFIP Regulations. As such, this FIRM panel will be revised at a later date to update the flood hazard information associated with this structure. The flood hazard data shown inside this boundary (which have been re-published from the May 5, 2004 FIRM for the City of Floodville), should continue to be used until this FIRM panel is revised to update the flood hazard information in this area.

Seclusion Boundary



# Floodplain Development Standards

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- Baseline requirements at 44 CFR 60.3
  - Main focus: human safety = elevation and floodproofing
- Key components:
  - Additional permit (flood hazard) required
  - Required to elevate or flood proof all structures to above the Base Flood Elevation
  - Required to anchor improvements that could move in flood
  - Required to use specific construction materials and methods to reduce flood damage
- Zero-rise standards for floodways

# NFIP Evolution due to ESA Challenges

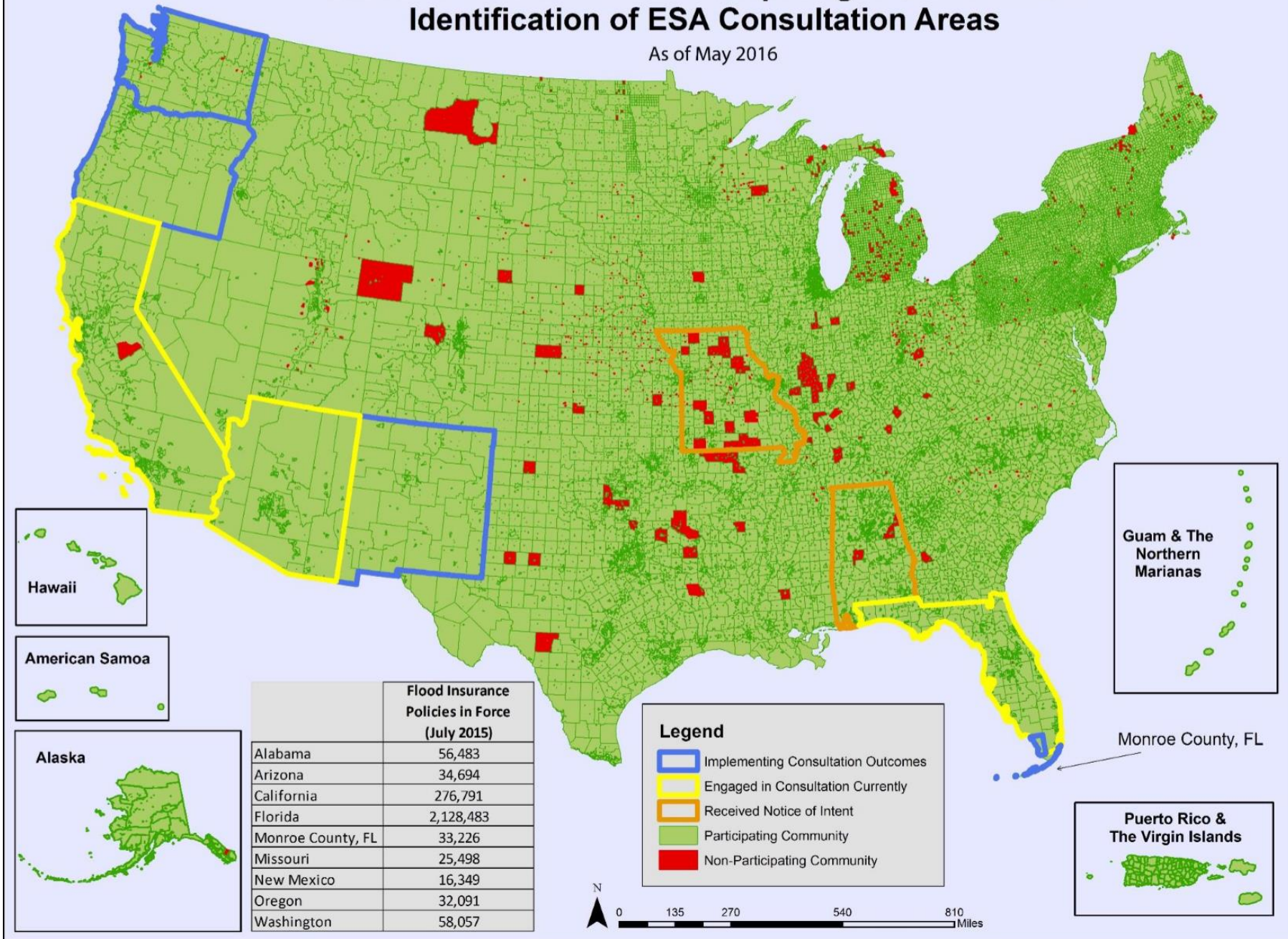
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- Series of suits around the country challenging FEMA's ESA compliance
- Monroe County, Florida (1990s-2008) re: Key Deer
- Washington State (2004) and Oregon (2009) re: T&E salmon/steelhead & Orca whales
- Ordered to consult under Section 7(a)(2) regarding the effect of the NFIP on T&E species and designated critical habitat
- Settlements in other jurisdictions – including Oregon, Arizona, New Mexico, and others



# Status of Communities Participating in the NFIP and Identification of ESA Consultation Areas

As of May 2016





## Limit Development to "No Adverse Effect" in Protected Area



# Oregon NFIP ESA Consultation

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- FEMA sued by several environmental groups in Oregon in 2009
- FEMA settled; agreed to consult regarding the effect of the NFIP in Oregon on T&E species and designated critical habitat
- July 2011: FEMA submitted Programmatic Biological Assessment to NMFS
  - FEMA offered “Proposed Action” that would have required implementation of Washington RPA in Oregon

# NMFS Issued Biological Opinion in April 2016

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- NMFS rejected FEMA's Proposed Action
- Concluded FEMA's implementation of NFIP in Oregon – even with significant modifications – jeopardizes the continued existence of T&E species and adversely modifies designated critical habitat
- NMFS offered a Six Element RPA:
  - Element 1: Notice to all NFIP Participating Jurisdictions
  - Element 2: “Interim Measures”
  - Element 3: Update mapping protocols; map future conditions flood-hazard areas, and flood-related erosion hazard areas

# NMFS Issues Biological Opinion in April 2016

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- Six Element RPA:
  - Element 4: Update NFIP minimum eligibility criteria to require “ESA performance standard”
  - Element 5: Data collection and reporting
  - Element 6: Compliance and enforcement
- “Deadlines” for Implementation:
  - September 15, 2016, for Element 1
  - March 15, 2018, for Element 2, parts of 3, and 5
  - 2019 for other components that FEMA determines can be implemented without regulatory revisions
  - January 1, 2021, for any components that FEMA determines require regulatory revisions



# Numerous Defects in Oregon Final RPA

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- Fails to take into consideration existing state and local programs
- Fails to consider existing landscape/floodplain conditions – *analysis in a vacuum*
- Proposes to significantly expand the SFHA and apply ESA restrictions to the entire 100 year floodplain – not just designated critical habitat
- **APPLIES ACROSS THE COUNTRY – NOT JUST OREGON**

# Numerous Defects in Oregon Final BiOp

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Interim Measures apply same standards to:

Pristine



Moderately altered



Highly altered



# FEMA Response to NMFS

“Although our teams worked collaboratively together over many years in support of this consultation, there are still key areas of disagreement that could not be resolved” –

- Impact of NFIP as compared to impact of private development
- Authority of FEMA to implement RPA

“*Nevertheless*, under the ESA, federal agencies must utilize the legal authorities they do have for the benefit of endangered species. As such, despite these disagreements . . ., FEMA will, as a good steward of the environment, take steps, consistent with the requirements of the RPA, to use its legal authorities under the NFIA for the benefit of ESA-listed species and their habitat. . . .”

# FEMA 60-Day Notice Letter to Local Jurisdictions

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



# Key Considerations from Washington and Oregon BiOps

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- Consultation between FEMA and NMFS – but resulting requirements imposed on state and local governments
- Entirely new and undefined regulatory metrics – not defined by NFIP or ESA:
  - “No adverse effect” standard in Washington
  - “Beneficial gain” standard in Oregon
- *FEMA is ambivalent regarding implementation – but jurisdictions are worried.*

# Programmatic EIS re the NFIP

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- Started as settlement of several ESA suits
- Initial Notice of Intent published on May 16, 2012
- Pursuant to settlement, 78 months to complete DEIS, and 96 months to complete FEIS
- Scoping in 2012
- Notice to continue development of the PEIS published on March 25, 2014
- Nationwide BE issued November 2016
- Draft Nationwide Programmatic EIS issued April 7, 2017. *Comments due June 6, 2017.*

# FEMA's Proposed Action

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“The Proposed Action is the current implementation of the NFIP, as modified by recent legislation and proposed program changes. These program changes are as follows:

(a) Changes to Floodplain Management:

(i) Clarify that pursuant to 44 C.F.R. § 60.3(a)(2), a **community must obtain and maintain documentation of compliance with the appropriate Federal or state laws, including the ESA**, as a condition of issuing floodplain development permits.

(b) Changes to Flood Hazard Mapping:

(i) Clarify that certain letter of map change requests **will not be issued until the community or project proponent has submitted documentation of compliance with the ESA.**”



# NFIP Reauthorization

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- NFIP must be reauthorized every five years
- Last reauthorized: Biggert-Waters Flood Insurance Reform Act, enacted July 2012
- Substantial backlash. Resulted in Homeowner Flood Insurance Affordability Act (HFIAA), enacted in November 2014
- Next reauthorization deadline: September 30, 2017



# NFIP Reauthorization – Current Efforts in Congress

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## Four Hearings since Sept 2016

- House Committee on Transportation and Infrastructure – *September 21, 2016*
- House Financial Services Committee, Subcommittee on Housing and Insurance – *March 9, 2017 and March 16, 2017*
- Senate Committee on Banking, Housing and Urban Affairs - *March 14, 2017*

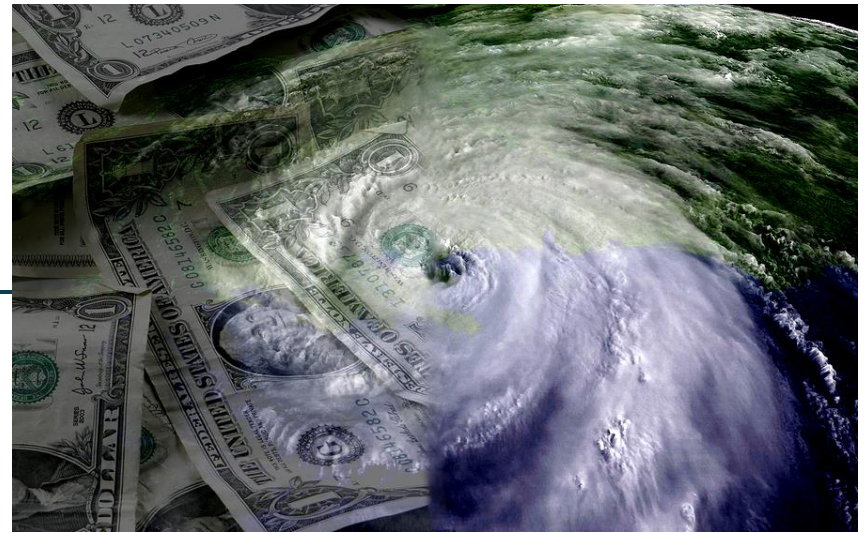
## NFIP Reauthorization - Bills in Play

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- Senators Cassidy (R-LA) and Gillibrand (D-NY)
  - Flood Insurance Affordability and Sustainability Act of 2017
- Representative Hensarling (R-TX)
  - Issued principles but no draft legislation yet
- Representatives Barletta (R-PA), Johnson (D-GA), Shuster (R-PA), DeFazio (D-OR)
  - FEMA Reauthorization Act
    - Attempt to address ESA consultation issue

# NFIP Reauthorization: KEY ISSUES

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- Financial Solvency v. Affordable Rates
- Move to Private Market
- Addressing Repetitive Loss Properties
- Inadequate Participation and Enforcement
- Outdated and Unsophisticated Mapping
- ESA Burden
- Restrict development in floodplain to reduce losses?

# Potential Rule Making: FEMA Disaster Deductible

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- FEMA **considering** implementing a Public Assistance deductible that would **condition States' receipt of FEMA reimbursement for the repair and replacement of public infrastructure damaged by a disaster event.**
- **The primary intent** of the deductible concept is to **incentivize greater State resilience to future disasters, thereby reducing future disaster costs nationally.**
- Notice of Advance Rulemaking: January 20, 2016
- Supplemental Notice of Advance Rulemaking: January 14, 2017
- *NACo submitted comment letter on April 12, 2017*



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