

**Center for Biological Diversity \* Defenders of Wildlife \* Natural Resources Defense Council**

**RE: Please Oppose Language Exempting FEMA from the Requirements of the ESA**

October 11, 2017

Dear Senator/Representative,

On behalf of our millions of members and supporters nationwide, we strongly urge you to oppose legislative language that would absolve the Federal Emergency Management Agency (FEMA) of its responsibilities under the Endangered Species Act with respect to the implementation of its flood programs, including the National Flood Insurance Program (NFIP). Such language appears in section 6007 of H.R. 2825, the “Department of Homeland Security Authorization Act,” which passed the House on July 20, 2017. Similar damaging language appears in section 6 of H.R. 2548, the “FEMA Reauthorization Act.” Additionally, in an October 4, 2017 letter addressed to Vice President Mike Pence, Office of Management and Budget Director Mick Mulvaney recommended several reforms to the NFIP, including ensuring that “with respect to compliance with the Endangered Species Act (ESA), the NFIP is not responsible for privately-funded actions taken by private parties on private land” (“OMB NFIP recommendation 14”). These proposals would remove FEMA’s legal obligations regarding floodplain management and severely undercut the agency’s ability to safeguard our nation’s endangered and threatened wildlife. Moreover, they would undercut our nation’s ability to prepare for the impacts of climate change, waste taxpayer dollars, put public safety at risk, and set a dangerous precedent for other federal agencies seeking to absolve themselves of their environmental responsibilities under bedrock federal statutes.

**The proposed legislation undermines FEMA’s obligations under sections 7 & 9 of the ESA**

**Exemption from section 7 obligations**

FEMA has an existing obligation under section 7 of the ESA and its implementing regulations to address the indirect effects of its NFIP on listed species. Like all federal agencies, FEMA must consult with either the U.S. Fish and Wildlife Service or NMFS whenever it authorizes, funds, or carries out an action that “may affect” threatened or endangered species or designated critical habitat. Consultation is intended to ensure that federal actions do not jeopardize imperiled species or adversely modify critical habitat. Section 6007 of H.R. 2825, Section 6 of H.R. 2548, and OMB recommendation 14 would remove that obligation and allow FEMA to authorize detrimental development projects in floodplains without examining the impacts of those projects on threatened and endangered wildlife. This provision severely undercuts the ability of the ESA to safeguard our nation’s endangered and threatened wildlife and establishes a dangerous precedent that puts numerous species at risk.

**Exemption from section 9 obligations**

Section 9 of the ESA prohibits anyone from “taking” an endangered or threatened species. This means that a person cannot kill, harm, harass, wound or capture a listed species. If an action taken by private parties – such as building a new house – may result in incidental take of a listed species, then the project must receive an incidental take permit either through a habitat conservation plan (HCP) that minimizes and mitigates for that take or by being included in a federal agency’s consultation under Section 7 of the ESA. Section 6007 of H.R. 2825 does two things with respect to

section 9 of the ESA: (1) it exempts FEMA from being liable for any violations of section 9 that result from non-federal actions covered by a FEMA flood program, and (2) by exempting FEMA's management of its flood programs from section 7 of the ESA, it deprives private parties of any coverage under a federal consultation, leaving individuals and businesses that engage in development activities occurring in areas covered by the flood insurance program potentially exposed to liability for incidental take under section 9 of the ESA. This legislation, as well as possible additional legislation deriving from OMB recommendation 14, absolves FEMA of its legal responsibility for the effects of its flood insurance program in promoting development in covered floodplains that affects endangered species.

**The proposed legislation wastes taxpayer dollars and reduces public safety.**

The NFIP is a taxpayer funded program that affects more than 5 million properties and land uses in high-risk flood areas across the entire country. In exchange for federally backed insurance, communities agree to regulate development in the floodplain. A primary purpose of the program is to encourage state and local governments to make appropriate land use adjustments to constrict development of land which is vulnerable to flooding, minimize flood damage and guide future development away from areas threatened by flood hazards. FEMA establishes minimum requirements for flood-prone and flood-related erosion-prone communities, but encourages communities to adopt stronger requirements based on knowledge of local information or conditions (44 CFR 60.1(d)) in order to protect public safety. In the past, ESA consultation on FEMA's implementation of the NFIP has highlighted significant flood risks associated with erosion and channel migration – providing strong incentives for communities to strengthen their efforts to implement cost-saving and risk-reducing floodplain management actions. The proposed legislation would constrain FEMA's ability to incentivize communities to address these increased flood risks and update federal flood insurance rate maps to reflect increased risk to the public.

**The proposed legislation weakens our nation's ability to prepare for climate change impacts.**

While the NFIP has a laudable goal, the program also has an unfortunate track record of enabling and failing to discourage development of hazardous, flood prone and environmentally-sensitive areas, with adverse socio-economic consequences. Structures damaged due to flooding have been repeatedly rebuilt in the same location. Continued development in floodplains, wetlands and vulnerable coastal areas degrades the landscape's ability to act as a natural buffer to the impacts of storms and sea level rise, both of which are being exacerbated by climate change. The legislation being considered restricts essential FEMA authorities necessary to remedy this problem and guide future development out of high-risk areas. It could block desperately needed modernization of the NFIP such as updating federal floodplain maps with climate risk data and could limit the agency's capacity to improve the NFIP to address climate change impacts on floodplain management, effectively undermining the previous Administration's climate preparedness strategy and resilience priorities for the program under the Climate Action Plan.

Legislation exempting FEMA from its obligations under the ESA would be an enormous step backward for the NFIP, imperiled wildlife, local communities and the American taxpayer. In May 2016, a number of our groups wrote to Congress urging opposition to a similar damaging provision – Section 311 of H.R. 1471 (114<sup>th</sup>). At that time, we wrote “[p]rograms like the NFIP are becoming increasingly important considering the predicted effects of climate change on rising sea levels and the future frequency and magnitude of flood events, and the degradation of our natural defenses to

flood events.” Since that time, we witnessed the devastating effects of three category 4 or 5 hurricanes on the U.S. mainland and U.S. tropical territories within the span of six weeks. We continue to witness the devastation from Hurricanes Harvey, Irma, and Maria and urge Congress to act quickly to provide a clean disaster relief package to help the victims of these catastrophic storms – especially those in Puerto Rico and the U.S. Virgin Islands, who continue to suffer the most. As flood events become even more frequent and damaging, Congress should consider ways to strengthen the NFIP in accordance with our bedrock environmental laws, rather than restricting FEMA’s ability to safeguard our nation’s endangered and threatened wildlife and develop more resilient flood management plans.

We strongly urge you to reject Section 6007 of H.R. 2825, Section 6 of H.R. 2548, and any similar language that would erode FEMA’s responsibilities under the ESA.

Thank you for your consideration.

Sincerely,

Center for Biological Diversity  
Defenders of Wildlife  
Natural Resources Defense Council