



**JEFFERSON COUNTY**

**DEPARTMENT OF COMMUNITY DEVELOPMENT (DCD)**

621 Sheridan Street, Port Townsend, WA 98368

*Al Scalf, Director*

Mark Carey, Director  
FEMA Region X Mitigation Division  
130 – 228<sup>th</sup> St, SW  
Bothell, WA 98021-8627

September 22, 2011

Dear Mr. Carey,

This letter serves to provide you notice that Jefferson County intends to use the FEMA provided Biological Opinion checklist (Door 2) to comply with the performance standards of the Reasonable and Prudent Alternative (RPA) outlined in the September 22, 2008 Biological Opinion. We understand that our community will need to implement the permit by permit approach (Door 3) until such time that all aspects of the compliance package are approved by FEMA.

As you are aware, Jefferson County dedicated a significant amount of time working on the model ordinance as part of the special advisory committee that provided advice and assistance for preparation of the model ordinance. Further, we participated with Jim Kramer and ESA to detail obstacles and solutions of implementation and develop guidance documents for compliance submittals.

We understand your department is working on additional guidance for issues of significant importance to Jefferson County's unique local conditions and our approach to protecting Puget Sound Salmon and Orca Whales as well as their habitat. We are eager to receive the results of your work and look forward to further clarification.

Attached is a formal code interpretation allowing our jurisdiction to implement Door 3 effective September 22, 2011. Our staff is working diligently to finalize our compliance package submittal and anticipate it will be provided to you by the end of October, 2011.

Please contact us with any questions.

Sincerely,

Stacie L. Hoskins  
Planning Manager  
[shoskins@co.jefferson.wa.us](mailto:shoskins@co.jefferson.wa.us)

Attached: Unified Development Code Interpretation dated September 22, 2011

CC: John Graves, Senior NFIP Specialist, Mitigation Division, FEMA Region X  
Philip Morley, County Administrator, Jefferson County  
Al, Scalf, Director of Community Development, Jefferson County



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*Al Scalf, Director*

## **Unified Development Code Interpretation**

Date: September 22, 2011

Issued by: Jefferson County DCD Planning Manager/UDC Administrator and Floodplain Administrator

Affected: All properties located within the NFIP Floodplain within Eastern Jefferson County, Washington

Subject: FEMA/NMFS Biological Opinion compliance

### **Summary of Issue**

Jefferson County participates in the National Flood Insurance Program (NFIP) provided by the Department of Homeland Security's Federal Emergency Management Agency (FEMA). In order to participate in the program and allow the opportunity for Jefferson County residents to obtain flood insurance, Jefferson County shall comply with the requirements of the NFIP through FEMA. Further, all communities are required to comply with the Endangered Species Act.

Excerpted from the FEMA Region X webpage:

*In September of 2008, the National Marine Fisheries Service (NMFS) issued a Biological Opinion that determined that implementing the National Flood Insurance Program (NFIP) causes jeopardy to several species of Puget Sound Salmon and Orca Whales as well as adverse modification to their habitat. In the Biological Opinion NMFS provided a Reasonable and Prudent Alternative to modify the implementation of the NFIP in a manner that would remove the jeopardy situation.*

Until such time that FEMA approves all aspects of the compliance package, Jefferson County will need to implement a permit by permit review. FEMA issued guidance on the permit by permit review approach (attached).

### **Background & Analysis:**

In accordance with Article VI, Chapter 18.40 of the Unified Development Code (UDC), Jefferson County Code (JCC 18.40.350) this interpretation of the Unified Development Code is intended to clarify conflicting or ambiguous wording, interpret proper classifications of a use, or interpret scope or intent. This is an administrator-initiated interpretation as allowed by JCC 18.40.360(1). The "Factors for

Consideration”, as identified in JCC 18.40.360(4) and listed below, were considered in making this UDC interpretation, including applicable goals and policies of the Jefferson County Comprehensive Plan:

- (a) The applicable provisions of this code, including its purpose and context;
- (b) The implications of the interpretation for development within the county as a whole, including the precedent the interpretation will set for other applicants; and
- (c) Consistency with the Jefferson County Comprehensive Plan and other relevant ordinances and policies.

#### *Applicable Provisions*

Applicable provisions of the Jefferson County UDC include:

- JCC 18.22 Critical Areas Ordinance (CAO) – Adopted March 17, 2008 and further amended May 11, 2009 as per the Washington State Growth Management Act (GMA; RCW 36.70A) to protect environmentally sensitive features such as critical aquifer recharge areas, frequently flooded areas, geologically hazardous areas, fish & wildlife habitat conservation areas, and wetlands; and
- JCC 18.25 Shoreline Master Program (SMP) – Adopted March 7, 1989 (including subsequent amendments through February 6, 1998) as per the Washington State Shoreline Management Act (SMA; RCW 90.58) to encourage water-dependent uses and promote public access while protecting shoreline natural resources and ecological functions.
- JCC 15.15 Flood Damage Prevention Ordinance – Adopted May 15, 2006 as required by the Federal Emergency Management Agency in accordance with the Code of Federal Regulations (CFR) Title 44 Parts 59 and 60 to promote the public health, safety, and general welfare; reduce the annual cost of flood insurance; and minimize public and private losses due to flood conditions in specific areas.

#### *Implications*

The implications of this interpretation include:

- Jefferson County will comply with federal and state laws including the Endangered Species Act.
- Vesting rights will be preserved in order to comply with RCW 19.27.095, RCW 58.17.033 and published case law. Permits issued more than 24 days prior to the date of this Code Interpretation that have not already been challenged in Superior Court pursuant to the Land Use Petition Act cannot now be challenged, and those applicants vest to the development regulations applicable when their application became either “substantially complete” or were deemed complete by default. Permit applications that are “substantially complete” (or complete by default) but have not yet had a permit issued also vest to the development regulations in place when the application became either “substantially complete” or complete by default.

#### *Consistency*

This interpretation is consistent with the Jefferson County Comprehensive Plan as it continues to allow for use, development and protection of endangered species and environmentally sensitive areas and shoreline resources through implementation of the UDC consistent with state and federal law.

**Code Interpretation:**

Effective September 22, 2011, in compliance with the FEMA NFIP requirements, Jefferson County will review applications for development within floodplains located in eastern Jefferson County for consistency with the Endangered Species Act.

- Applications vested prior to September 22, 2011 shall be reviewed per the codes and code interpretations in effect on the date of vesting; and
- Applications with a vesting date on or after September 22, 2011 shall be reviewed per the codes and code interpretations in effect on the date of vesting including this code interpretation; and development proposed within the floodplain in eastern Jefferson County shall demonstrate through a habitat assessment that the development project will not have an adverse effect on listed species or designated critical habitat or provide concurrence from National Marine Fisheries Services (NMFS) that the project is compliant with the Endangered Species Act.

**Applicability:**

In accordance with JCC 18.40.380, this code interpretation will remain in effect unless and until the administrator issues a written rescindment or the code is formally amended (as per JCC 18.45.090) to supersede this interpretation. This interpretation may be enforced in the same manner that any provision of the code is enforced.

**Appeal:**

As outlined in JCC 18.40.390, a code interpretation may be appealed to the Hearing Examiner within fourteen (14) calendar days of the decision using the process for appeals of Type II permit decisions as set forth in JCC 18.40.330.

Dated this 22<sup>nd</sup> day of September, 2011.



Stacie Hoskins, Planning Manager/UDC Administrator and Floodplain Administrator

Attached: Door 3 Guidance provided by FEMA Region X September 22, 2011

**Frequently Asked Question:****What does it mean to be in “Door 3”?**

Federal regulations and local community ordinances mandate that communities that participate in the National Flood Insurance Program (NFIP) must require project proponents to obtain a floodplain development permit from the local community for any ground disturbing project proposed to occur within the Special Flood Hazard Area (SFHA). Communities must also ensure that all other federal, state, and local permits have been received prior to issuing a floodplain development permit. Communities may choose to provide a programmatic guarantee that floodplain development is compliant with the Endangered Species Act (ESA) by either adopting the Model Ordinance issued by FEMA Region X (“Door 1”), or by providing a copy of their ordinances, policies, and regulations that meet the performance standards of the Biological Opinion. Region X has developed a checklist communities can use for this option (“Door 2”) to demonstrate that resources will be protected. There may be instances when a habitat assessment may be required for projects that are proposed in the SFHA that do not meet the performance standards of the Biological Opinion. These projects may still be permitted provided a habitat assessment is completed and the project is determined that it does not have an adverse effect. Section 7 of the FEMA Region X ESA Compliant Model Ordinance provides clarification on when a habitat assessment is required.

Absent a programmatic approach through Door 1 or Door 2, communities must ensure that development in the SFHA will not cause harm to threatened or endangered species, or that any harm from floodplain development is exempt from the take prohibition contained in Section 9 of the ESA. Any project that may have an adverse impact on threatened and endangered species must receive an incidental take permit under Section 10 of the ESA. Applicants for development projects in the SFHA must assess the impact of the proposed development on salmon habitat on a permit by permit basis (“Door3”). In order to avoid allowing incremental, systemic loss of essential ecosystem features to occur, the compliance standard for Door 3 must be a high showing that individual projects seeking to develop in the floodplain will retain the full level of existing baseline function. The impact of a project on habitat may be difficult to evaluate because there is often little or no information on the baseline conditions of the site’s natural features and habitat functions. The scope, magnitude, and risks associated with possible impacts to populations or their habitats vary greatly by project. A habitat assessment is needed to identify those natural processes and habitat functions that currently exist (i.e. the environmental baseline) and determine how the proposed project will affect them. Communities should consult their legal counsel to determine if their current regulations include the authority to require the completion of habitat assessments for projects located within the SFHA. Communities may want to consider requiring a habitat assessment for projects that are required to undergo a Washington State Environmental Policy Act (SEPA) review. Although SEPA thresholds are often limited to larger projects, a community may choose to lower the thresholds for which a project is required to submit for a SEPA review. Additionally, many communities require critical areas reports for projects occurring within designated critical areas and may request additional data for projects that are in a frequently flooded area. Communities that implement this approach may need to require additional data in order ensure the standards for conducting habitat assessments are met.

The FEMA Region X Guidance for conducting Habitat Assessments is available at:  
<https://www.fema.gov/about/regions/regionx/nfipesa.shtm>.

If a permit applicant has prepared a Biological Evaluation or a Biological Assessment that includes an effects analysis of the proposed actions of the current project, and has received concurrence from United States Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) (the services), the project is deemed to comply with the ESA. As an example, projects requiring a federal permit under Section 404 of the Clean Water Act would likely follow a consultation process through the U.S. Army Corps of Engineers Regulatory Branch. The Section 404 permit process includes consultation with the U.S. Fish and Wildlife Service (USFWS), and/or the National Marine Fisheries Service (NMFS). Such consultations are required under Section 7 of the ESA. Applicants may also consult with NMFS through Section 10 of the ESA by providing a Habitat Conservation Plan (HCP) for their project; for example the [Storedahl Gravel](#) project, or by providing evidence that the project falls under an existing consultation conducted under Section 4(d) of the ESA. Many section 4(d) projects fall under the Regional Road Maintenance Program. A new habitat assessment will not be required for the project if it has already received concurrence from the services.

Once it is determined that a habitat assessment is needed in order to describe baseline habitat conditions and have a basis to estimate possible impacts from proposed project actions, a step by step assessment process is recommended in the FEMA Region X guidance for conducting Habitat Assessments. Communities should use or direct applicants to sources of information that are readily available in order to provide detailed information that may be necessary to include in the habitat assessment. Some potential sources of information are the Shoreline Characterization Reports use for a community's Shoreline Master Program, Watershed Resource Inventory Area (WIRA) reports, and critical areas inventories.

NMFS, USFWS, and the Corps use the following effects determination criteria and this language needs to be used for habitat assessments:

- No Effect (NE): the project has no effect whatsoever to the listed species or designated critical habitat.
- May Affect, Not Likely to Adversely Affect (NLAA): the effects to the listed species or designated critical habitat are insignificant and/or discountable. A determination of NLAA would be made for those activities that have only a beneficial effect with no short or long-term adverse effects.
- Likely to Adversely Affect (LAA): the effects of the project will result in short -or long-term adverse effects on the identified species or designated habitat area.

If the effects determination is NLAA, the report should indicate what minimization and conservation measures would help eliminate or minimize the impact. For example, the permit applicant could time certain construction work to occur when the species are not present in the project area. If the assessment finds a project is LAA, then the floodplain development permit cannot be issued unless the project is redesigned to a point where the assessment is NLAA. If a project cannot be redesigned to meet the standard of NLAA, the project may only be permitted if the project has received concurrence from NMFS through a consultation under Section 7, 4(d), or

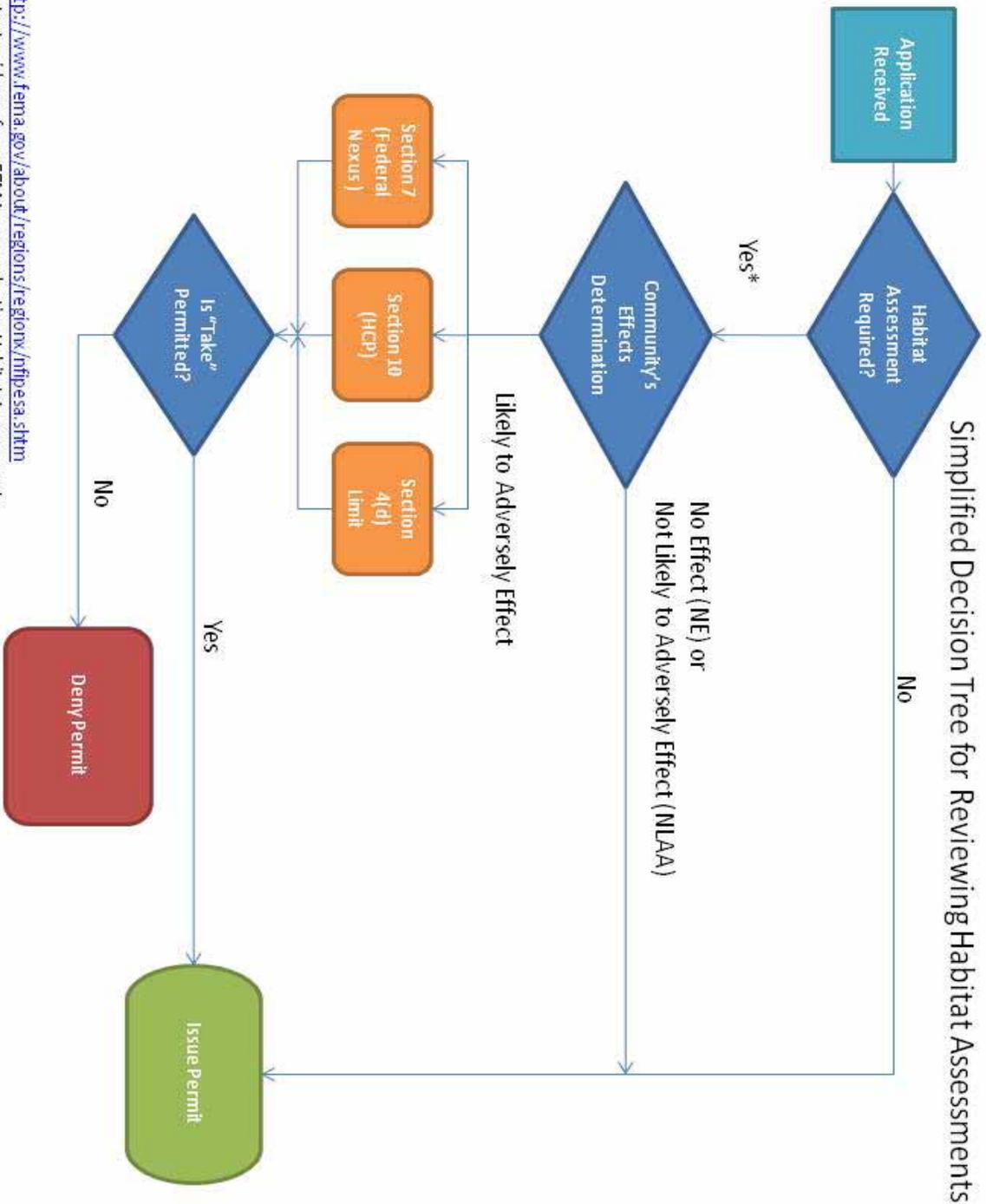
10 of the ESA. The attached simplified permitting process flowchart will help communities understand the steps required to permit a development project in the SFHA.

It is recommended that applicants start with conceptual development plans and conduct a preliminary impact assessment before they invest in detailed project plans and specifications. Continued communication with community staff will also help identify problems and solutions before too much time and/or money is spent on a project that may require additional mitigation measures, if allowed.

It may be necessary for some communities with limited staff to require assistance to evaluate the adequacy of habitat assessments. The FEMA Region X Habitat Assessment Guide does allow for flexibility in many aspects of the assessment. Review of assessments will require some familiarity with the information needed to adequately portray and interpret fisheries population and habitat survey data. FEMA Region X can provide assistance to communities preparing habitat assessments. Communities with low levels of floodplain development may receive one on one assistance for their occasional permit. Communities with moderate to high levels of development may receive training on how to conduct a habitat assessment.

A permit applicant should weigh the cost of preparing the assessment and the mitigation plan, should one be needed, against the cost of locating the project outside the SFHA. It may cost less in time and money to simply avoid the SFHA.

For additional information please view the FEMA website at:  
[www.fema.gov/about/regions/regionx/nfipesa.shtm](http://www.fema.gov/about/regions/regionx/nfipesa.shtm) or contact John Graves at [john.graves1@dhs.gov](mailto:john.graves1@dhs.gov) or 425-487-4737.



\* See <http://www.fema.gov/about/regions/regionx/nfpesa.shtm> for the latest guidance from FEMA on conducting Habitat Assessments