

Guidance for Compliance with the Endangered Species Act for Letters of Map Change

This document provides guidance for complying with the Endangered Species Act aspects of FEMA Standard, 215, which states:

Conditional LOMCs are subject to the same standards of a LOMA, LOMR-F, or LOMR except:

- *Because Conditional LOMCs are based on proposed construction, as-built information is not required.*
- *The Conditional Comment Documents that are issued by FEMA do not amend or revise the effective FHBM or FIRM.*
- *Conditional LOMRs and CLOMR-Fs must demonstrate compliance with the Endangered Species Act.*

Highlighted below are additional resources and frequently asked questions to help guide Conditional Letter of Map Revision (CLOMR) and Conditional Letter of Map Revision based on Fill (CLOMR-F) applicants in the Endangered Species Act (ESA) compliance process. The following sections identify helpful web resources, while the final section includes responses to frequently asked questions.

NATIONAL FLOOD INSURANCE PROGRAM AND LETTERS OF MAP CHANGE

Additional information about the National Flood Insurance Program (NFIP) and Letters of Map Change (LOMC) is available from FEMA.

NFIP: <http://www.fema.gov/national-flood-insurance-program>

LOMCs: <http://www.fema.gov/national-flood-insurance-program-flood-hazard-mapping/letter-map-change>

ESA OF 1973

Additional information about the ESA and Endangered Species Programs is available from the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS). These two agencies, collectively known as “the Services,” share responsibility for implementing the ESA and assisting all individuals (public and private) in the ESA compliance process.

NMFS: <http://www.nmfs.noaa.gov/pr/laws/esa/>

USFWS: <http://www.fws.gov/endangered/what-we-do/consultations-overview.html>

GETTING STARTED WITH ESA COMPLIANCE AND WHO TO CONTACT

CLOMR and CLOMR-F applicants are responsible for demonstrating to FEMA that ESA compliance has been achieved prior to FEMA’s review of a CLOMR or CLOMR-F application. The applicant may begin by consulting the U.S. Fish and Wildlife website to check for federally listed endangered species located in the county or by contacting a local Service office, State wildlife agency office, or independent biologist to identify whether threatened or endangered species exist on the subject property and whether the project associated with the CLOMR or CLOMR-F request would adversely

affect the species. These entities are also available to discuss questions pertaining to listed species and ESA compliance.

NMFS Regional Offices:

Alaska: <http://www.alaskafisheries.noaa.gov/>

Northeast: <http://www.alaskafisheries.noaa.gov/>

Northwest: <http://www.nwr.noaa.gov/>

Pacific Islands: <http://www.fpir.noaa.gov/>

Southeast: <http://sero.nmfs.noaa.gov/>

Southwest: <http://swr.nmfs.noaa.gov/>

USFWS Office Directory: <http://www.fws.gov/offices/>

DEMONSTRATING COMPLIANCE WITH the ESA

To demonstrate to FEMA that ESA compliance has been achieved, the requestor must provide an Incidental Take Permit (ITP), an Incidental Take Statement, a “not likely to adversely affect” determination from the Services, or a statement that there is “No Effect” on proposed or listed species or designated critical habitat. If the applicant believes there is no effect, but is unable to obtain a no effect statement from the Services, the following website may be consulted and documentation showing no listed species in the county where the project is taking place may be submitted.

<http://ecos.fws.gov/ecos/indexPublic.do>

For all other situations in which comment from the services is unavailable, responses to the six questions listed below may be provided along with written documentation showing that an attempt to contact the Services had been made.

- 1) A description of the action to be considered.*
- 2) A description of the specific area that may be affected by the action.*
- 3) A description of all federally listed (threatened or endangered) species and critical habitat that may be affected by the action.*
- 4) A description of the manner in which the action may affect each of the listed species or critical habitat and an analysis of any cumulative effects.*
- 5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and*
- 6) Any other relevant available information on the action, the affected listed species, and critical habitat.*

If the project is likely to cause jeopardy of a species’ continued existence or adverse modification to designated critical habitat, then FEMA may refuse to review the CLOMR or CLOMR-F request without prior project approval from the Services. If a Federal entity is involved in a proposal or project for which a CLOMR or CLOMR-F has been requested, then the applicant may coordinate

with that agency to demonstrate to FEMA that Section 7 ESA compliance has been achieved through that other Federal agency.

If species may be affected adversely by the project, the applicant (as a non-Federal entity) would be required to obtain compliance through the Section 10 process. This process includes applying for an ITP and preparing a habitat conservation plan (HCP). Additional information about Section 10 requirements and the permit application process is available from NMFS and USFWS.

ITPs and NMFS: http://www.nmfs.noaa.gov/pr/permits/faq_esapermits.htm

ITPs and USFWS: <http://www.fws.gov/endangered/what-we-do/hcp-overview.html>

NMFS Permit applications: http://www.nmfs.noaa.gov/pr/permits/esa_permits.htm

USFWS Permit application: <http://www.fws.gov/forms/3-200-56.pdf>

Frequently Asked Questions

For which map change applications does FEMA require demonstrated ESA compliance?

FEMA requires applicants to demonstrate compliance for CLOMRs and CLOMR-Fs only, except in Washington and Oregon which also includes select LOMRs .

Why is ESA compliance required before FEMA can review my CLOMR or CLOMR-F application?

All individuals in the country (private and public) have a legal responsibility to comply with the ESA. FEMA recognizes that potential projects for which a CLOMR or CLOMR-F has been requested may affect threatened and endangered species. As a result, FEMA requires documentation to show that potential projects comply with the ESA before a CLOMR or CLOMR-F application can be reviewed.

Why does FEMA not require demonstration of ESA compliance for other LOMC applications?

Other LOMC requests involve floodplain activities that have occurred already. As a result, FEMA does not have the opportunity to comment on these projects in terms of ESA compliance. Private individuals and local and state jurisdictions are required to comply with the ESA independently of FEMA's process.

What will FEMA require from CLOMR and CLOMR-F applicants to demonstrate ESA compliance?

As part of the CLOMR or CLOMR-F application, the requestor must provide an ITP, an Incidental Take Statement, a "not likely to adversely affect" determination from the Services, or concurring determination that the project has "No Effect" on proposed or listed species or designated critical habitat. See the above section *Demonstrating Compliance with the ESA* for additional information.

How much time will be required to achieve ESA Compliance?

The timeframe needed to achieve ESA compliance will depend entirely on the complexity of the project, the extent to which species may be affected by the project, the quality of biological analyses conducted by the applicant, and the review process as determined by the Services.

Who is available to answer my questions about ESA compliance?

NMFS and the USFWS both have staff available around the country to answer questions about threatened and endangered species and ESA compliance. Refer to the *NMFS Regional Offices* and *USFWS Office Directory* links on Page 2 of this guidance document to identify the nearest available Service office. FEMA does not have staff available to assist with this process.

How do I determine if there are threatened or endangered species or critical habitat in my project area?

The applicant may begin by consulting the U.S. Fish and Wildlife website to check for federally listed endangered species located in the county or by contacting a local Service office, State wildlife agency office, or independent biologist to identify whether threatened or endangered species exist on the subject property and whether the project associated with the CLOMR or CLOMR-F request would adversely affect the species.

Do I need to hire a biologist for this process?

While hiring a biologist may be unnecessary, doing so may help facilitate the process. Biologists familiar with subject species and the regulatory process can help adequately complete many of the studies required as part of the Section 10 process and fulfill other Section 10 requirements.

How are the following ESA-related terms defined?

“Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct and may include habitat modification or degradation.

“Harm” can arise from significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

“Section 7” requires all Federal agencies, in consultation with USFWS or NMFS, to use their authorities to further the purpose of the ESA and to ensure that their actions are not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat.

“Section 10” lays out the guidelines under which a permit may be issued to non-Federal parties to authorize prohibited activities, such as take of endangered or threatened species.

“ITP” or incidental take permit is a permit issued under section 10(a)(1)(B) of the ESA to a non-Federal party undertaking an otherwise lawful project that might result in the “take” of an endangered or threatened species. Application for an incidental take permit is subject to certain requirements, including preparation by the permit applicant of a HCP.

“HCP” or habitat conservation plan is a legally binding plan that outlines ways of maintaining, enhancing, and protecting a given habitat type needed to protect species. It usually includes measures to minimize impacts and may include provisions for permanently protecting land, restoring habitat, and relocating plants or animals to another area. An HCP is required before an incidental take permit may be issued to non-Federal parties.

Other ESA-related terms not described here may be defined on the following website:

<http://www.fws.gov/endangered/esa-library/index.html>