AGENDA

PLANNING COMMISSION
REGULAR SESSION

91136 N Willamette St, Coburg, OR

541-682-7852 | coburgoregon.org

Wednesday, December 18, 2024 at 6:00 PM

CALL MEETING TO ORDER

ROLL CALL

AGENDA REVIEW

PUBLIC COMMENT
(Five minute limit unless extended time approved prior to meeting. Comments on Public Hearing items are done during the Hearing)

COMMISSION BUSINESS

1. FEMA PICM Floodplain Regulations
2. 2025 Planning Commission Goals

UPDATES & FUTURE AGENDA ITEMS

3. November City Administration Report

ADJOURNMENT

The City of Coburg will make reasonable accommodations for people with disabilities. Please notify City Recorder 72 hours in advance at 541-682-7852 or sammy.egbert@ci.coburg.or.us

All Council meetings are recorded and retained as required by ORS 166-200-0235.

COUNCIL MEMO

MEETING DATE: November 12th, 2024
STAFF: Megan Winner, Planning Director

Federal Emergency Management Agency (FEMA)

Pre-Implementation Compliance Measure (PICM) Update and Next Steps

---

BACKGROUND

After multiple lawsuits from environmental advocacy groups dating back to 2009, in July 2024 FEMA announced that all National Flood Insurance Program (NFIP) participating communities must select a pre-implementation compliance measure (PICM) by December 1, 2024 to address floodplain development to protect habitats for a variety of species or lose eligibility to participate in NFIP. There are three PICM pathway options that communities can choose from:

1. Adopt the FEMA model floodplain ordinance or
2. Review each application for development in the floodplain on a permit-by-permit basis.
3. Prohibit all development in the floodplain

If no option is selected, communities will default to the permit-by-permit review basis which requires a habitat assessment and mitigation plan documenting that the proposed development in the Special Flood Hazard Area will achieve “no net loss" of habitat. FEMA is expected to provide final implementation measures in the future but is requiring PICM compliance in the interim.

Due to the time constraints imposed by the required deadline and the importance of upholding Oregon land use law, Governor Kotek has requested a delay in the PICM proceedings. However, as of yet, FEMA has not provided an extension or pause. Therefore, NFIP participating communities in Oregon (approximately 89% of Oregon, 239 communities) must inform FEMA of which PICM pathway it will pursue by the December 1 deadline. If pursuing the model ordinance, communities have until July 2025 to adopt the ordinance to provide time for the adoption process. Staff recommend reporting the model ordinance pathway to compliance (pathway #1) to FEMA now to provide time to allow for information and discussion on amending the existing floodplain regulations in the Coburg Zoning Code Ordinance A-200-L. Council will then be in a position to determine whether moving forward with the model ordinance is in the best interest of the community or if remaining with the permit by permit basis (pathway #2) is preferred as the final, long term compliance pathway.

BUDGET / FINANCIAL IMPACT

Planning Director and City Administrator time has been the only costs incurred to date on this matter. Additional staff time by both positions will be required to prepare materials for a future meeting, likely a joint session with Council and Planning Commission to review the model ordinance, compare it with existing floodplain related regulations in the City’s current development code and move forward a

recommendation for final Council review and decision at a future Council meeting. Additionally, staff time will be required to gather materials as part of the new FEMA annual reporting requirements being imposed as part of the PICM regulations.

PUBLIC COMMUNICATION/ENGAGEMENT

Future discussions, recommendations and final decisions on this matter will all occur within public meetings and follow all required state and local land use requirements as well as Council rules and Oregon Revised Statutes regarding consideration of land use ordinance adoption.

NEXT STEPS

Planning and Administration staff will continue to monitor how jurisdictions are moving forward on this matter and will assemble materials in preparation for a joint Council and Planning Commission meeting in February or March of 2025 unless alterations to the regulatory framework or process are identified prior to that time. In any event, Council will continue to receive updates as the process moves forward.

ATTACHMENTS

1. DLCD – PICM FAQ

OREGON
Department of Land Conservation & Development

Frequently Asked Questions about Pre-Implementation Compliance Measures

October 4, 2024

Disclaimer: This FAQ is general guidance based on the information available to DLCD staff at this time. It is not a DLCD decision. It is not legal advice for any specific situation. Cities and counties should consult their legal counsel for advice on specific decisions.

Table of Contents

What are “Pre-Implementation Compliance Measures”?

In July 2024, the Federal Emergency Management Agency (FEMA) sent a letter to cities and counties in Oregon instructing them to make short term changes to how the city or county regulates development

in flood hazard areas. FEMA describes these short-term actions as "pre-implementation" because they are occurring before FEMA fully implements long-term changes to the National Flood Insurance Program (NFIP) to comply with the Endangered Species Act.

What led up to PICM?

In 2009, environmental advocacy organizations sued the Federal Emergency Management Agency (FEMA) alleging that FEMA violated the Endangered Species Act by not consulting with National Marine Fisheries Services (NMFS) about how the National Flood Insurance Program (NFIP) could jeopardize threatened species. FEMA resolved the lawsuit by formally consulting with NMFS to review the impact of the NFIP. In April 2016, NMFS issued its Biological Opinion (BiOp) that concludes that the NFIP in Oregon jeopardizes the survival of several threatened species, including salmon, sturgeon, eulachon, and orcas. The BiOp contained a reasonable and prudent alternative (RPA) with recommendations from NMFS to FEMA on how to avoid jeopardizing the threatened species. In October 2021, FEMA issued a draft implementation plan on how to reduce the negative impacts of the NFIP on threatened species.

In 2023, FEMA started reviewing the draft implementation plan using a National Environmental Policy Act (NEPA) process, which is still underway. Under the NEPA process FEMA will analyze whether there are additional alternatives or changes to the 2021 draft implementation plan to consider.

In September 2023, environmental advocacy organizations filed a lawsuit alleging that FEMA has been too slow to implement the BiOp. Plaintiffs included the Center for Biological Diversity, the Northwest Environmental Defense Center, Willamette Riverkeeper, and The Conservation Angler. See also coverage in the Oregonian.

In July 2024, FEMA announced a new program of pre-implementation compliance measures (PICM or short-term measures) for the BiOp, separate from the NEPA full implementation (long-term measures) process. FEMA hosted four PICM webinars in July and August, and is planning additional outreach to assist NFIP communities in the fall of 2024. Some of the PICM pathways are included in the 2016 BiOp under RPA, element 2.

FEMA now has two separate, but similar processes: NEPA evaluation of the full implementation plan, and interim action through PICM. FEMA's webpage "Endangered Species Act Integration in Oregon" contains information about both processes, but does not clearly distinguish between the two processes.

What is the role of the Oregon Department of Land Conservation and Development in PICM?

FEMA and the state provide funds to the Oregon Department of Land Conservation and Development (DLCD) for staff to help cities and counties participate in the NFIP. DLCD floodplain staff do not set program policies and cannot make decisions on behalf of FEMA. As FEMA provides more information about what they are requiring through PICM, DLCD floodplain staff will try to explain the program to cities and counties.

While the floodplain staff at DLCD have a coordinating role communicating with FEMA, cities and counties are always free to communicate directly with FEMA staff. In this role, DLCD staff provided feedback on the full implementation plan (long-term measures) through the NEPA process. DLCD staff provided information about how the land use planning system in Oregon would affect the full implementation plan. DLCD did not have an opportunity to play a similar role while FEMA developed PICM.

On September 26, 2024, Governor Tina Kotek sent a letter to FEMA expressing concerns about PICM, similar to concerns raised in a letter from members of congress in August. DLCD will work with FEMA to address the governor's concerns.

What does a city or county need to do now?

FEMA is requiring cities and counties to select one of three PICM short-term paths by December 1, 2024:

- Pathway 1: Adopt the PICM model floodplain management ordinance that considers impacts to fish habitat and requires mitigation to a no net loss standard.
- Pathway 2: Review individual development proposals and require permit-by-permit habitat mitigation to achieve no net loss using "Floodplain Habitat Assessment and Mitigation" guidance from FEMA.
- Pathway 3: Prohibit all new development in the floodplain.

FEMA is also requiring cities and counties to gather additional data on local floodplain permitting starting January 31, 2025, and submit an annual report to FEMA starting January 2026.

If a city or county does not choose a PICM path by December 1, 2024, then FEMA expects the city or county to use Pathway 2 for permit-by-permit habitat assessment and mitigation.

Once local planning staff review the FEMA documents (PICM model ordinance and habitat assessment guidance), planning staff may want to discuss the PICM paths with other internal local staff, and their local legal counsel. A starting point could be to determine how much developable land is within the Special Floodplain Hazard Area (SFHA). With that data to inform local decision making, staff might want to report to decision makers and the public explaining the situation and may find this FAQ useful as background. An informational work-session could be helpful to explore options for what may or may not work at the local level. DLCD staff (regional representatives and flood hazards staff) are available for technical assistance; however, many questions will need to go to FEMA. Use the dedicated email address: FEMA-R10-MIT-PICM@fema.dhs.gov.

Does Pathway 3 "Prohibit floodplain development" require a moratorium?

No. A city or county has at least two options for prohibiting development in the special flood hazard area: temporary moratorium or permanent rezoning.

Option A: Temporary Moratorium

ORS 197.520 to 197.540 defines a process for a city or county to declare a moratorium to temporarily prevent all development in a specific area. Typically, a city or county would declare a moratorium where there are insufficient public facilities, which would not apply in this case. ORS 197.520(3) allows a different type of moratorium if a city or county demonstrates there is a compelling need based on the findings below:

For urban or urbanizable land:

- That application of existing development ordinances or regulations and other applicable law is inadequate to prevent irrevocable public harm from development in affected geographical areas;
- That the moratorium is sufficiently limited to ensure that a needed supply of affected housing types and the supply of commercial and industrial facilities within or in proximity to the city or county are not unreasonably restricted by the adoption of the moratorium;
- Stating the reasons alternative methods of achieving the objectives of the moratorium are unsatisfactory;
- That the city or county has determined that the public harm which would be caused by failure to impose a moratorium outweighs the adverse effects on other affected local governments, including shifts in demand for housing or economic development, public facilities and services and buildable lands, and the overall impact of the moratorium on population distribution; and
- That the city or county proposing the moratorium has determined that sufficient resources are available to complete the development of needed interim or permanent changes in plans, regulations or procedures within the period of effectiveness of the moratorium.

For rural land:

- That application of existing development ordinances or regulations and other applicable law is inadequate to prevent irrevocable public harm from development in affected geographical areas;
- Stating the reasons alternative methods of achieving the objectives of the moratorium are unsatisfactory;
- That the moratorium is sufficiently limited to ensure that lots or parcels outside the affected geographical areas are not unreasonably restricted by the adoption of the moratorium; and
- That the city or county proposing the moratorium has developed a work plan and time schedule for achieving the objectives of the moratorium.

Moratoriums are legally complicated. This description is only a summary of the law. A city or county should consult carefully with their legal counsel to determine whether and how a moratorium would work in their specific situation, and to review the applicable timelines for which a moratorium may be in place and circumstances for extending a moratorium.

Option B: Permanent Rezoning

A city or county could permanently rezone the land within the special flood hazard area to a zone that would not permit development. This would not be appropriate for all cities and counties, but could be appropriate if the area in the SFHA is relatively small, unlikely to develop, or publicly owned.

Is a "Measure 56 Notice" required for PICM short-term options?

Most likely yes, but cities and counties should consult with their legal counsel on how the notification requirements apply in the specific local circumstances.

Background on Measure 56 Notices

Cities and counties in Oregon are required to send a notice to landowners before "rezoning" property. This requirement was originally enacted through Ballot Measure 56 in 1998, and is codified in Oregon Revised Statutes (ORS) 227.186 for cities and ORS 215.503 for counties. The requirement uses a broad definition of rezoning that includes any change that "limits or prohibits land uses previously allowed." DLCD maintains a webpage on the landowner notification requirement.

Pathway 1 – Model ordinance

Cities and counties staff should carefully review current zoning and development regulations for property within the SFHA. If properties are zoned for open space or conservation, then the PICM model ordinance might not further limit uses.

If properties are zoned for residential, commercial or industrial use, the PICM model ordinance would likely limit those uses, and the Measure 56 notification requirement could apply. Most local floodplain codes require owners to obtain a permit for development in the floodplain. Permit processing varies for each city or county. Oregon's model floodplain Ordinance (version 2020) meets minimum NFIP standards. However, the updated PICM model ordinance contains new standards in section 6.0 (highlighted in yellow) which could limit currently allowed uses, in which case the Measure 56 notification requirement would apply.

Pathway 2 – Permit-by-permit habitat assessment and mitigation

Cities and counties should carefully review any existing requirements for habitat mitigation. Most cities and counties do not require mitigation for habitat impacts, so the city or county would be adopting a new ordinance to require assessment and mitigation for development in flood hazard areas. These new development regulations would most likely limit currently allowed uses, and thus the Measure 56 notification requirement would apply.

Pathway 3 – Prohibit floodplain development

If a city or county declares a temporary moratorium under ORS 197.520 to 197.540, then the Measure 56 notification requirements would likely apply because a moratorium would limit or prohibit uses that would otherwise be allowed.

If a city or county rezones land or amends development regulations to permanently prohibit development within the SFHA, then the city or county should carefully review the previous zoning and allowed uses for each parcel. If some properties were previously zoned for open space or conservation, then the prohibition on development is not likely to be a limitation on future use. If some properties are zoned for residential, commercial or industrial use, then the prohibition on development would limit those uses, and thus the Measure 56 notification requirement would apply.

A city or county may not want to completely prohibit all development in the floodplain and may want to think about explicitly adding in activities exempt from the no net loss standards as listed in section 6.3 of the PICM Model Ordinance. Some of the exempt activities include normal maintenance of structures, street repairs, habitat restoration activities, routine agricultural practices, and normal maintenance of above ground utilities and would still require a local floodplain development permit. However, if a city or county wishes to include activities beyond those listed in section 6.3, then the city or county will likely need to adopt the model ordinance or require permit-by-permit habitat mitigation for the uses that are still allowed. It may be simpler to choose pathway 1 (model ordinance) or pathway 2 (permit-by-permit) instead. Cities and counties should communicate with FEMA about any exemptions.

Will the state waive legislative adoption requirements?

Each city or county has its own requirements for adopting an ordinance. The state has no authority to waive those requirements.

ORS 197.610 through 197.625 requires cities and counties to submit notice to DLCD 35 days before the first hearing to adopt a change to a comprehensive plan or a land use regulation. The statute does not authorize DLCD to waive this requirement. If it is not possible to send the notice 35 days prior to the hearing, cities and counties should send the notice as soon as possible. The notice can include a draft ordinance that will be revised before adoption. If a city or county does not provide notice 35 days prior to the hearing, this does not invalidate the ordinance. A party that did not appear before the local government in the proceedings would be allowed to appeal the ordinance.

DLCD has no authority to waive the required Measure 56 notification to landowners that is described above.

What if a city or county cannot complete the ordinance process by December 1, 2024?

Start the process of evaluating the PICM pathways as soon as possible. Keep FEMA informed via their PICM inbox FEMA-R10-MIT-PICM@fema.dhs.gov regarding your PICM path and progress.

Send questions to FEMA early in the process to give them time to respond, and document when replies are received.

Communicate often to FEMA to update them on your status and expected adoption date.

Is the model ordinance clear & objective?

Background on Clear and Objective Standards

Oregon Revised Statutes 197A.400 requires cities and counties to:

> "adopt and apply only clear and objective standards, conditions and procedures *regulating the development of housing*, including needed housing, on land within an urban growth boundary." [emphasis added.]

The legislature amended this statute to include areas within unincorporated communities and rural residential zones. The amendment takes effect on July 1, 2025.

Reviewing Model Ordinances

DLCD plans to review the existing Oregon Model Flood Hazard Ordinance to identify standards for residential development that may not be clear and objective. Over the past year, DLCD also reviewed an early draft of the model ordinance in the NEPA process for the full implementation of the BiOp. DLCD identified several aspects of that early draft model ordinance that may not be clear and objective and suggested that FEMA revise those aspects. DLCD has not yet determined whether the PICM Model Ordinance has only clear and objective standards.

What is changing for cities and counties for letters of map revision based on fill?

FEMA has temporarily suspended processing of applications for letters of map revision based on fill (LOMR-F) and conditional letters of map revision based on fill (CLOMR-F) as of **August 1, 2024**. FEMA is doing this to remove any perceived incentive to using fill and to avoid potentially negative effects on habitat for threatened species.

FEMA is not prohibiting fill in the SFHA, rather they are suspending the opportunity for owners or developers to revise floodplain maps to be released from mandatory flood insurance. Therefore, if fill is used for structure elevation and there is a federally backed mortgage on the property, flood insurance will still be required. Cities and counties should continue to enforce their existing floodplain ordinance on regulations regarding placement of fill in flood hazard areas.

If an applicant asks for a community acknowledgement form (CAF) for a CLOMR-F or LOMR-F for a project not covered in the exceptions below, it would be wise to contact FEMA before signing.

Exceptions for L/CLOMR-F processing:

- Projects that are undergoing Section 7 consultation via an alternative federal nexus
- LOMR-Fs for already processed CLOMR-Fs
- CLOMRs required for habitat restoration projects

What are the Measure 49 implications to the PICM pathways?

Measure 49 could apply in some situations, but it is unlikely that a city or county would have to pay compensation to a landowner. Cities and counties should consult with their legal counsel to analyze their specific situation.

Background:

Ballot Measure 49 was approved by Oregon voters in 2007. Its initial impact was on property owners who acquired their property before land use regulations were established in the 1970's and 1980's. In many cases, those owners were permitted to build up to three houses, even though the current zoning would not allow new houses.

Measure 49 also applies to future changes in land use regulations. Those provisions are codified in ORS 195.300 to 195.336. If a state or local government enacts a land use regulation that restricts a residential use and reduces the fair market value of a property, then the owner can apply for just compensation. The compensation can be monetary, or a waiver to allow the owner to use the property without applying the new land use regulation. This requirement does not apply if the new regulation is for the protection of public health and safety.

Pathway 1 – Model ordinance

If a property owner applied for just compensation as a result of a city or county adopting the PICM model ordinance, the city or county would process the claim as provided in ORS 195.300 through 314. This includes evaluating the claim to determine whether it is valid, and then deciding whether to waive the regulation or pay monetary compensation.

First, determine whether the claimant owned the property before the city or county adopted the new regulations in the model ordinance.

Next determine whether the new regulations restrict the use of the property for single-family dwellings. The statute does not include a specific definition of "restrict" in this context. If the new ordinance has the effect of completely prohibiting residential use, then it clearly restricts the use. If the new ordinance allows single-family dwellings, but places design standards or conditions of development, these likely do not restrict the use.

Next, determine whether the regulations "restrict or prohibit activities for the protection of public health and safety" as provided in ORS 195.305(3)(b). Many aspects of regulating floodplains are based on safety; however, some of the regulations in the PICM model ordinance are based on improving fish habitat. This could result in complicated analysis to determine whether the habitat requirements restrict development beyond the restriction already created by regulations based on safety.

Next, review the property appraisals submitted by the claimant to determine whether the property value was actually reduced. Property in a flood hazard area may already have a low value. The property may still have value for agricultural use which would offset the loss due to the regulation.

If a property owner has a valid claim, then the city or county would decide to pay monetary compensation or to waive some regulations. The city or county is not required to waive all regulations, only "to the extent necessary to offset the reduction in the fair market value of the property" ORS 195.310(6)(b). The city or county could still apply regulations based on safety, and could still apply regulations that existed prior to adopting the PICM model ordinance.

Pathway 2 – Permit-by-permit habitat assessment and mitigation

The results would be similar to pathway 1. In most cases the habitat mitigation requirement would not prevent development, and the owner would likely not be entitled to just compensation. If the habitat mitigation requirements did prevent development, then the owner could apply for just compensation. The city or county would use the steps described above to determine whether it is a valid claim, and decide to waive some of the requirements, or pay monetary compensation.

Pathway 3 – Prohibit floodplain development

A temporary moratorium would likely not lead to a claim for just compensation because it is not a new land use regulation. Also, a temporary moratorium is unlikely to significantly affect fair market value because potential buyers know that the moratorium will end.

Rezoning to prohibit all development within the SFHA would likely be a basis for a claim for just compensation, especially for a property entirely within the SFHA. If a property includes area inside and outside the SFHA, and the owner could still develop the same number of dwellings in a different location, then the owner would likely not be able to make a claim for just compensation.

The city or county would use the steps described above to determine whether it is a valid claim, and decide to waive some of the requirements, or pay monetary compensation.

Where can I find additional information or ask questions about PICM?

FEMA has a webpage for Endangered Species Act Integration in Oregon. Email questions to the PICM email address: FEMA-R10-MIT-PICM@fema.dhs.gov.

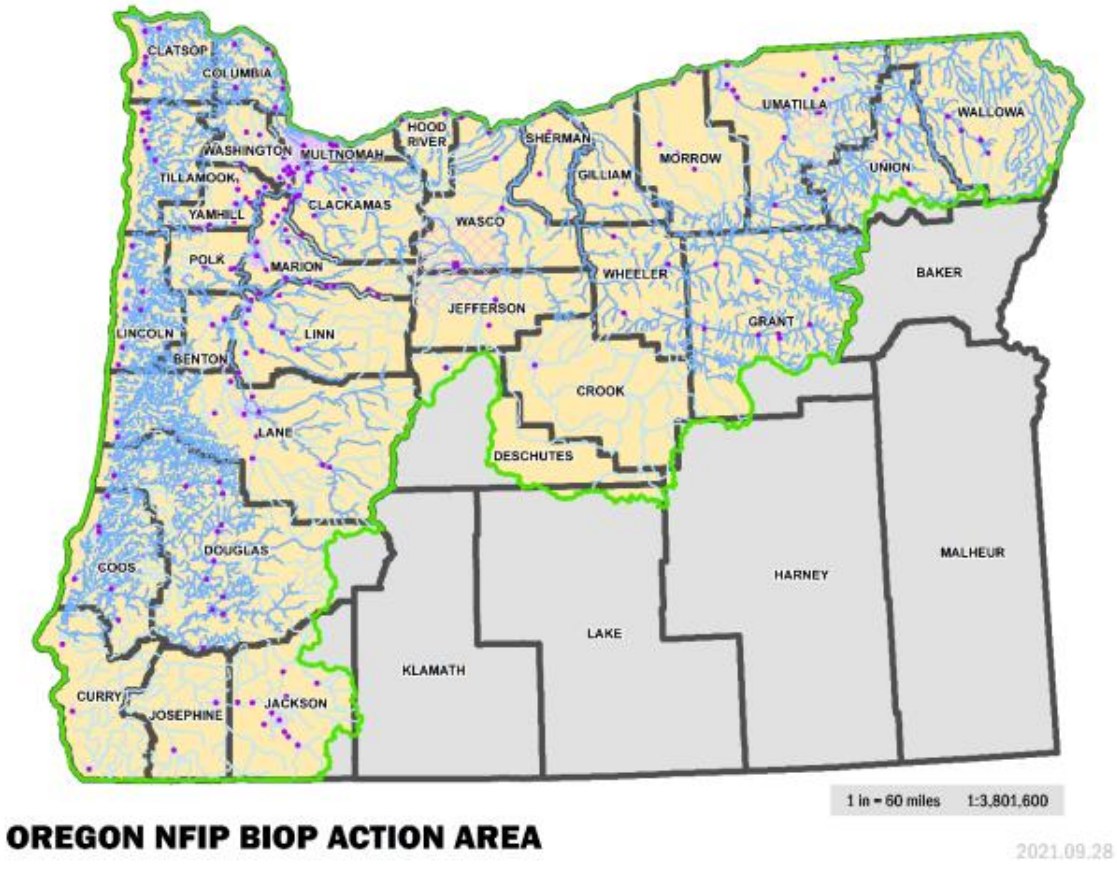
While DLCD staff are not responsible for PICM implementation, we are available to offer technical assistance. Email or call Oregon's NFIP Coordinator at DLCD, Deanna Wright, deanna.wright@dlcd.oregon.gov, 971-718-7473.

What if a city or county received a PICM letter in error, or did not receive a PICM letter?

Staff may contact FEMA's PICM inbox at: FEMA-R10-MIT-PICM@fema.dhs.gov to receive the letter, or you may contact DLCD staff. FEMA staff sent the email announcements to the city or county floodplain staff and the letter was mailed to each individual city or county chief elected officer. If you believe your community is outside of the BiOp action area (map instructions below), but you received a PICM letter, please contact FEMA PICM inbox for verification.

What area does the BiOp cover?

Below is a snapshot image of the Oregon NFIP BiOp Action Area:



The BiOp is applicable in Special Flood Hazard Areas (SFHA) within the mapped salmon recovery domains for Oregon communities that participate in the NFIP. The BiOp covers approximately 90 percent of participating Oregon NFIP communities but does not apply to five counties.

NOAA Fisheries GIS mapping application tool

FEMA has published directions on how to determine if a proposed development or project area is within the BiOp area.

PROTECTING PRIVATE PROPERTY RIGHTS SINCE 1989

OPOA Legal Center

(503) 620-0258
www.oregonpropertyowners.org

MEMORANDUM

To: Oregon Municipal Governments
From: OPOA Legal Center
Date: November 18, 2024
Re: Revised Memorandum on FEMA BiOp Implementation

This memorandum should not be considered legal advice. Local governments should review this memorandum with county counsel and city counsel prior to taking any action.

The purpose of this memorandum is to explain why local governments should not adopt any of FEMA's Pre-Implementation Compliance Measures (PICMs) and/or seek injunctive or declaratory relief regarding the legal validity of the PICMs prior to adopting any of the PICMs. This memorandum concludes that adopting any of the PICMs could violate state law and FEMA likely does not have authority to enforce the PICMs under federal law. Additionally, this memorandum outlines the process that FEMA would have to take prior to suspending a jurisdiction from the National Flood Insurance Program.

I. FACTUAL BACKGROUND:

In 2009, several non-profit environmental groups filed a lawsuit against the Federal Emergency Management Agency (FEMA) arguing that the implementation of the National Flood Insurance Program (NFIP) jeopardized multiple threatened and endangered species in Oregon. In response, FEMA negotiated a settlement that required initiation of a consultation with the National Marine Fisheries Service (NMFS) under the Endangered Species Act (ESA). In 2016, NMFS issued a Biological Opinion (BiOp) evaluating the implementation of the NFIP and its effect on threatened or endangered species and their habitat in Oregon. The BiOp concluded that the implementation of the NFIP likely jeopardized the continued existence of 16 ESA-listed anadromous fish species (fish that migrate up rivers from the sea to spawn such as salmon) and Southern Resident killer whales.

Accordingly, NMFS issued a reasonable and prudent alternative (RPA) that if implemented, would avoid jeopardy to the listed species and destruction or adverse modification of designated or proposed critical habitat for the anadromous fish. In 2021, FEMA, in cooperation with the Oregon

Department of Land Conservation and Development (DLCD), issued a draft implementation plan to integrate the ESA into the NFIP (Implementation Plan). In 2023, the Implementation Plan began the review process under the National Environmental Policy Act (NEPA), focusing on long-term measures to ensure compliance with the BiOp.

Unhappy with the delays in implementation, several environmental advocacy groups sued FEMA again. In response, in July 2024 FEMA notified Oregon NFIP communities of the need to adopt mandatory Pre-Implementation Compliance Measures (PICMs). FEMA established a December 1, 2024, deadline for communities to notify FEMA of which of the following PICM options they will adopt:

1. Prohibit all development in the Special Flood Hazard Area.

2. Adopt the 2024 Model Ordinance that requires mitigation of any floodplain development to a no net loss standard.

3. Require a special habitat assessment and mitigation plan for development on a permit-by permit basis in the Special Flood Hazard Area to achieve a no net loss standard.

While participation in the NFIP is voluntary, nonparticipating flood-prone communities and communities who have withdrawn or are suspended from the program face the following sanctions:

1. No resident will be able to purchase a flood insurance policy.

2. Existing flood insurance policies will not be renewed.

3. No Federal grants or loans for development may be made in identified flood hazard areas under programs administered by Federal agencies such as HUD, EPA, and SBA;

4. No Federal disaster assistance may be provided to repair insurable buildings located in identified flood hazard areas for damage caused by a flood.

5. No Federal mortgage insurance or loan guarantees may be provided in identified flood hazard areas. This includes policies written by FHA, VA, and others.

6. Federally insured or regulated lending institutions such as banks and credit unions must notify applicants seeking loans for insurable buildings in flood hazard areas that there is a flood hazard and that the property is not eligible for Federal disaster relief.

If a local government does not meet the December 1 deadline they are subject to possible enforcement actions and suspension pursuant to a process set forth in the NFIA and its associated regulations.

II. ANALYSIS:

A. Adopting any of the PICMs could subject a local government to legal liability under state land use law:

While we understand the difficult situation FEMA has placed upon local governments, it must be acknowledged that adopting any of the PICMs likely subjects the county to significant legal liability. Oregon's statewide land use planning system governs development in and out of the floodplain, irrespective of FEMA's criteria for participation in the NFIP. While local governments have the authority to tailor their floodplain ordinances to qualify for federal programs, they cannot ignore state land use law. If they do so, they are subject to legal action by property owners or other entities affected by the local government's decision.

In short, local governments are not absolved of their responsibility to follow state law because of their desire to remain enrolled in the NFIP. The following analysis provides a high-level overview of just some areas of conflict between adopting one of the PICMs and state law:

i. Adopting any of the PICMs requires local governments to mail statutorily required Measure 56 notices, which will likely be infeasible given the December 1, 2024, deadline:

Certain notices must be sent out to landowners and the Department of Land Conservation and Development (DLCD) prior to the first public hearing on adopting any of the PICMs. The two most essential notices are Measure 56 notices under ORS 215.503 and the 35-day notice to DLCD under OAR 660-018-0020(1). If a local government makes a land use decision not in conformance with these requirements, its decision is potentially subject to reversal by LUBA under ORS 197.835(9)(a)(B) or (D), or other provisions of state law.

OAR 660-018-0020(1) requires:

> *Before a local government adopts a change to an acknowledged comprehensive plan or a land use regulation, unless circumstances described in OAR 660-018-0022 (Exemptions to Notice Requirements Under OAR 660-018-0020) apply, the local government shall submit the proposed change to the department, including the information described in section (2) of this rule. The local government must submit the proposed change to the director at the department's Salem office at least 35 days before holding the first evidentiary hearing on adoption of the proposed change.*

If a local government does not send the required 35-day notice and does not qualify for an emergency exemption (which local governments likely will not qualify for in this circumstance), adoption of the ordinance is appealable by the Director of DLCD to LUBA,

Under Measure 56 (codified at ORS 215.503(4)):

> *[A]t least 20 days but not more than 40 days before the date of the first hearing on an ordinance that proposes to rezone property, the governing body of a county shall cause a written individual notice of land use change to be mailed to the owner of each lot or parcel of property that the ordinance proposes to rezone.*

A property is considered "rezoned" if the county either "(a) Changes the base zoning classification of the property" or "(b) Adopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone." See ORS 215.503(9). Measure 56 notices are intended to allow property owners time to submit land use applications before new ordinances are adopted that prohibit or limit previously allowed uses. As recognized by DLCD in their FAQ to local governments on implementing the PICMs, adopting any of the options likely triggers Measure 56 notice because they likely limit and prohibit land uses previously allowed.

To be clear, this is true even upon the adoption of a temporary moratorium prior to other PICMs. Again, Measure 56 notices are intended to allow property owners time to submit land use applications before new ordinances are adopted that prohibit or limit previously allowed uses. It is highly unlikely that local governments will be able to send out proper Measure 56 notices and meet the December 1 deadline at this time.

A local government cannot avoid this issue by adopting a temporary moratorium before taking action to adopt the Model Code or the permit-by-permit Special Habitat Assessment (SHA). If a temporary moratorium is in place prior to the adoption of the Model Code or the SHA, landowners will be unable to submit permits prior to those PICMs coming into effect. As such, a temporary moratorium is nothing more than a de facto extension of either the Model Code or the Special Habitat Assessment. Allowing a local government to bypass the purpose of Measure 56 through the enactment of a moratorium defeats the reason for the measure, and is thus inconsistent with the law's objectives.

Thus, a local government must mail out proper Measure 56 notices at least 20 days prior to the first public hearing on implementing any of the PICMs (including a temporary moratorium), so that landowners have enough time to submit permits before the PICMs come into effect. If they do not, their decision to adopt the ordinance is subject to reversal by LUBA. Again, it is unlikely that most local governments will be able to mail out proper Measure 56 notices and comply with the December 1, 2024, deadline at this juncture.

ii. Incorporating the "no net loss" standard outlined by FEMA and DLCD likely violates the clear and objective requirements of ORS 197A.400:

Oregon law has special considerations and protections for the development of needed housing. One of these protections is known as the "clear and objective" standard, which prevents local

governments from adopting or applying standards that can cause unreasonable costs and delays to housing projects. Because of Oregon's unprecedented housing crisis, the Legislature recently strengthened the clear and objective standard. Under ORS 197A.400, cities and counties:

> *[…] may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing, on land within an urban growth boundary."*

See ORS 197A.400(1) (emphasis added). By July 1, 2025, this standard must apply to unincorporated communities designated in a county's acknowledged comprehensive plan, nonresource lands, and areas zoned for rural residential use as defined in ORS 215.501.

The "clear and objective" standard includes two fundamental parts. In *Roberts v. City of Cannon Beach,* 316 Or App 305, 504 P3d 1249 (2021), the Oregon Court of Appeals summarized the recent case law on this two-part standard:

> *We agree with petitioners that, fundamentally, the standard has two parts: First, a standard, condition, or procedure must be objective. As LUBA has explained, "objective" means "existing independent of mind." […] Standards are not objective "if they impose 'subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community.'" […]*
>
> *Second, as LUBA observed in this case, standards must also be clear. "[T]he term 'clear' means 'easily understood' and 'without obscurity or ambiguity.'" […] This second prong of the analysis is better developed in LUBA's case law than in our own. […] Ultimately, in the context of ORS 197.307(4), the degree of clarity required for standards, conditions, and procedures for housing development represents a balance between the need of applicants for an understandable route to approval of the applied-for development and the need of local governments for code-drafting requirements that are realistically achievable. See, e.g., Video Recording, House Committee on Human Services and Housing, HB 2007, Apr 13, 2017, at 29:55 (statement of Rep. Tina Kotek), available at https://olis.oregonlegislature.gov (accessed Dec 7, 2021) (indicating that it would be achievable for cities to apply only clear and objective standards to all housing).*

See *Roberts v. City of Cannon Beach*, 334 Ore. App. 762, 770; See also *Legacy Dev. Grp., Inc. v. City of The Dalles*,____Or LUBA___, , 2021 Ore. Land Use Bd. App. LEXIS 17, *5 (LUBA No. 2020-099, Feb. 24, 2020); *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998); *Rudell v. City of Bandon*, 249 Ore. App. 309, 319, 275 P.3d 1010 (2012); *Roberts*, Or LUBA at____, 2021 Ore. Land Use Bd. App. LEXIS 75, *20; *Group B, LLC v. City of Corvallis*,___Or LUBA,___, 2015 Ore. Land Use Bd. App. LEXIS 58 (LUBA No. 2015-019, Aug 25, 2015).

In short, a local government may not adopt or apply a standard that regulates housing that is unclear, subjective, value laden, vague, or would otherwise make it unreasonably difficult or expensive for applicants to develop housing. Unfortunately, several aspects of the proposed 2024 Model Ordinance and the SHA are neither clear nor objective, particularly the "no net loss" standard articulated by FEMA. This is acknowledged by DLCD in its FAQ to local governments.[1]

While we take issue with numerous parts of the 2024 Model Code, we are most concerned about the definition of "no net loss" in the Code and its application is Section 6 of the Code which state respectively:

> *No Net Loss: A standard where adverse impacts must be avoided or offset through adherence to certain requirements so that there is no net change in the function from the existing condition when a development application is submitted to the state, tribal, or local jurisdiction. The floodplain functions of the floodplain storage, water quality, and vegetation must be maintained.*
>
> *No net loss can be achieved by first avoiding negative effects on floodplain functions to the degree possible/ then minimizing remaining effects/ then replacing and/or otherwise compensating for/ offsetting/ or rectifying the residual adverse effects to the three floodplain functions.*

According to FEMA's directive, local governments must ensure, through adopting the PICMs, that any development in the SFHA (including housing) only occurs if it achieves this no net loss of standard. This language is inherently unclear, subjective, and a prime example of a value laden analysis designed to balance or mitigate impacts of housing development on other properties including the floodplain itself. It is unclear what several of these terms mean, and is unclear how an applicant would truly meet this standard.

We share similar concerns with the exceptions to the "no net loss" standard. According to the Model Code and FEMA's guidance on the SHA, the following activities, among other things, are exempted from having to comply with the "no net loss" standard:

> *Normal maintenance of structures, such as re-roofing and replacing siding, provided there is no change in the footprint or expansion of the roof of the structure.*

The term "normal" is unclear and subjective. What is considered "normal" maintenance or modifications in the context of a structure like a house? What would "abnormal" modifications be? This language is neither clear nor objective, and makes it extremely confusing for homebuilders and property owners to understand what housing-related permits would be exempted from the no net loss standard.

[1] DLCD_PICM_FAQ.pdf

These are just two examples of where the proposed Model Code and the SHA impose neither clear nor objective standards. Despite being the architect of the Code, DLCD has already acknowledged that several aspects of the Model Code are neither clear nor objective. As such, local governments should not move forward with its adoption, and should not move forward with adopting the "no net loss" standard as outlined by FEMA, as it in itself would not pass the clear and objective test.

iii. The PICMs restrict farm activities and farm structures in violation of ORS 215.253:

ORS 215.253 is a simple statute first enacted in 1973 as part of Senate Bill 101, the companion bill to Senate Bill 100. Under the statute:

> *(1) No state agency, city, county or political subdivision of this state may exercise any of its powers to enact local laws or ordinances or impose restrictions or regulations affecting any farm use land situated within an exclusive farm use zone established under ORS 215.203 or within an area designated as marginal land under ORS 197.247 (1991 Edition) in a manner that would restrict or regulate farm structures or that would restrict or regulate farming practices if conditions from such practices do not extend into an adopted urban growth boundary in such manner as to interfere with the lands within the urban growth boundary. "Farming practice" as used in this subsection shall have the meaning set out in ORS 30.930.*
>
> *(2) Nothing in this section is intended to limit or restrict the lawful exercise by any state agency, city, county or political subdivision of its power to protect the health, safety and welfare of the citizens of this state.*

The purpose of the statute is obvious – on land zoned for exclusive farm use, a local government may not restrict or regulate farm structures or farm uses except for situations in which the structure or farm uses extend into urban growth boundaries and interfere with uses on property within the boundary or the local regulation is necessary for the protection of public health, safety and welfare.

As acknowledged by FEMA in the Implementation Plan, the intent of the Plan and the accompanying PICMs is habitat and species protection, not the protection of public health, safety or welfare. This would normally not create a conflict with ORS 215.253, but the definition of "development" in FEMA rule (44 CFR 59.1) and the PICMs Model Ordinance is so broad that it would include certain accepted farm practices. FEMA defines development as:

> *Any man-made change to improved or unimproved real estate, including but not limited to building or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials.*

This definition will undoubtedly include the construction or maintenance of any type of farm structures. Additionally, it could include the storage of farm products. Both actions are considered

"farm use" under ORS 215.203 and/or "farm practices" under ORS 30.930. Thus, enacting a no net loss provision that limits or prohibits these uses violates ORS 215.253. A county choosing to adopt the model ordinance PICM and applying that ordinance to its Goal 3 zoned land would thus be creating an automatic conflict with ORS 215.253. FEMA does not have Congressional authority to require a County to violate Oregon state law as a condition of obtaining coverage under the NFIP.

B. Local governments should take immediate legal action against FEMA as enforcing the PICMs like violates several provisions of state and federal law, and its outside of the scope of FEMA's authority to enforce:

Before acquiescing to any of the PICMs, local governments should seek legal clarification as to whether the PICMs are legally sound and within FEMA's authority to impose. If not, local governments should seek either injunctive or declaratory relief instead of adopting any of the PICMs. For the following reasons, we believe FEMA may not have the legal authority to enforce the PICMs as criteria for eligibility in the NFIP:

i. Enforcing the PICMs prior to completing NEPA review likely violates federal regulation:

It is unclear whether FEMA has the authority to impose the "no net loss" standard while the Implementation Plan is being reviewed under the National Environmental Policy Act (NEPA) and before completing an Environmental Impact Statement (EIS) of the PICMs themselves.

Generally, NEPA establishes a national environmental policy and provides a framework for environmental planning and decision making by Federal agencies. NEPA directs Federal agencies, when planning projects or issuing permits, to conduct environmental reviews to consider the potential impacts on the environment by their proposed actions. As such, through NEPA review federal agencies are required to take a "hard look" as to whether any major federal action might significantly affect the quality of the human environment. As a United States District Court held in a similar case in Northern California (quoting the United States Ninth Circuit Court of Appeals):

> *NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.*

See *Delta Smelt Consol. Cases v. Salazar*, 686 F Supp 2d (E.D. Calif. 2009).

As noted in *Delta Smelt*, because the risk of taking incorrect action is so high, the CEQ has imposed limitations on federal action taken during the NEPA process. Specifically, 40 CFR § 1506.1(c) states:

(c) While work on a required environmental review for a program is in progress and an action is not covered by an existing environmental document, agencies shall not undertake in the interim any major Federal action covered by the program that may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental review; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

Here, FEMA is currently in the process of completing its Environmental Impact Statement (EIS) under NEPA for the 2021 Implementation Plan, which includes the promulgation of the "no net loss" standard. This process was set to be completed by 2025, when a final Record of Decision (ROD) would be issued. Until FEMA completes its EIS, it is premature to attempt to enforce Plan requirements like the "no net loss" standard that may or may not satisfy federal law. The whole point of NEPA is to ensure that an agency evaluates its proposed actions for compliance with federal environmental law. *Cf. Wetlands Water Dist. v. United States DOI, 376 F3d 85*3 (9th Cir. 2004).

Implementing the "no net loss" standard prior to the NEPA process being complete raises several questions. First, FEMA's attempt to implement the BiOp RPA's through PICM's likely constitutes "major federal action" as the PICMs are different than the actions contemplated in the Implementation Plan. This may trigger an independent NEPA review itself. If not, then the PICMs are at least considered interim measures, those making them subject to the criteria outlined in 40 CFR § 1506.1(c) (Limitations on actions during NEPA process).

As it stands, it is unclear if the PICMs could pass § 1506.1(c) muster as it is: (1) unclear whether FEMA has the authority to impose a "no net loss" standard under the NFIP irrespective of how the Implementation Plan moves forward; (2) unclear whether the PICMs have undergone any environmental review themselves; and (3) enforcing a "no net loss" standard as contemplated by the PICMs likely prejudices programmatic development of the NFIP and future decisions by jurisdictions and FEMA in implementing the program, as they require local governments to violate state law. For these reasons, FEMA's ability to implement the PICMs during the NEPA review process is legally suspect.

ii. FEMA may not have the authority to utilize the PICMs to determine community eligibility because they are not legally enforceable land management criteria required by 44 CFR Part 60:

FEMA's jurisdictional and regulatory authority stems from the National Flood Insurance Act, 42 USC § 4000-4131 (NFIA). Under the NFIA, the FEMA Administrator must make available to flood insurance in only those States or areas (or subdivisions thereof) which have:

> *(1) evidenced a positive interest in securing flood insurance coverage under the flood insurance program, and*
>
> *(2) given satisfactory assurance that by December 31, 1971, adequate land use and control measures will have been adopted for the State or area (or subdivision) which are consistent with the comprehensive criteria for land management and use developed under section 1361 [42 USCS § 4102], and that the application and enforcement of such measures will commence as soon as technical information on floodways and on controlling flood elevations is available.*

See 42 USC § 4012(c). These are the two statutorily outlined criteria for eligibility in the NFIP.

Congress gave the Administrator the authority to create "comprehensive criteria for land management" deigned to:

> *[…] encourage, where necessary, the adoption of adequate State and local measures which, to the maximum extent feasible, will—*
>
> *(1) constrict the development of land, which is exposed to flood damage where appropriate,*
>
> *(2) guide the development of proposed construction away from locations which are threatened by flood hazards,*
>
> *(3) assist in reducing damage caused by floods, and*
>
> *(4) otherwise improve the long-range land management and use of flood-prone areas,*

See 42 USC § 4102(c). These are the four (and only four) purposes contemplated by Congress for the criteria for land management that local governments are expected to adopt to be eligible for the NFIP. Note, there is no mention of the endangered species act, habitat preservation, or species conservation in these criteria. This is because Congress did not draft the NFIA with the intention of requiring the Administrator to consider these types of issues when creating the management criteria.

Nonetheless, FEMA has promulgated regulations outlining the management criteria at 44 CFR Part 60. Under these regulations, to be eligible for the program, local governments must adopt "adequate flood plain management criteria" consistent with these federal criteria. In adopting these regulations FEMA made clear:

> *(b) This subpart sets forth the criteria developed in accordance with the Act by which the Federal Insurance Administrator will determine the adequacy of a community's flood plain management regulations. These regulations must be legally-enforceable, applied uniformly throughout the community to all privately and publicly owned land within flood-prone, mudslide (i.e., mudflow) or flood-related erosion areas, and the community must provide that the regulations take precedence over any less restrictive conflicting local laws, ordinances or codes.*

44 CFR § 60.1 (emphasis added). As such, the FEMA Administrator is limited to using only legally enforceable regulations that are uniformly applied when determining the adequacy of a community's floodplain ordinances. Additionally, the minimum eligibility criteria for the NFIP exist in 44 CFR § 60.3. These regulations include no mention of the endangered species act, habitat loss, or any requirements that a local government adopt a "no net loss" standard of floodplain function to preserve endangered species. This is because Congress did not authorize or direct FEMA to do so under 42 USC 4102(c). See discussion in *Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d 1151, 59 Env't Rep. Cas. (BNA) 1973, 2004 U.S. Dist. LEXIS 23583 (W.D. Wash. 2004).[2]

The specific FEMA regulations for suspension of community NFIP eligibility are found in 44 CFR 59.24. Under this rule, FEMA must first determine that a community has violated the eligibility criteria set forth in 44 CFR 60.3. Those requirements include, among other things, a requirement that a community:

> *Review proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law, including Section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 USC 1334.*

See 44 CFR 60.3(a)(2).

The language cited above, which NMFS and FEMA rely upon to support the PICMs, does not obligate communities to change their existing floodplain ordinances or enact the PICMs. 44 CFR 60.3 obligates a community to ensure that an applicant for a development permit within a SHFA obtains all necessary permits, both state and federal. By its terms, that language can only be enforced on a permit-by-permit basis, as the required permits will change depending upon the facts

[2] Assuming for the sake of argument that the ESA (16 USC §1536(a)(2)) apply to FEMA's actions under the NFIP, and that NMFS has the authority to require FEMA to consider the RPA's suggested in the BiOp in the land management criteria, there is simply nothing in the NFIA authorizing FEMA to do so and FEMA's regulations are clear. In other words, FEMA cannot rely on its consultation obligations under the ESA to bootstrap extreme conservation standards into its land management criteria under the NFIP, without at least following the proper procedures to amend its regulations. The PICMs are a step too far.

of each individual development. If a community believes that a development application will result in an incidental take under the ESA, then the community can require the applicant to address that take as part of the land use permit process. But nothing in the above cited language requires a community to enact any of the PICMs. It simply requires an applicant to prove that they do not need an incidental take permit.

Here, it is unclear whether the PICMs can be considered legally enforceable "comprehensive criteria for land management" under 42 USC § 40012(c) and 4102(c), because the PICMs require a local jurisdiction to violate provisions of state land use law and they extend outside of the scope of the minimum eligibility criteria in 44 CFR § 60.3. Therefore, it is unclear and doubtful that FEMA has the authority to use the PICMs as criteria to assess whether local governments are eligible for the NFIP under 42 USC § 4012(c). To decide otherwise would be arbitrary, capricious, and outside of the scope of FEMA's lawfully delegated authority to administer the NFIP.

iii. The PICMs were not adopted following normal procedures under the Administrative Procedures Act:

If it is determined that FEMA must adopt habitat conservation measures into their criteria 44 CFR § 60.3, then it must do so following the procedures outlined in the Administrative Procedures Act (APA). Congress enacted the APA to outline the process by which federal agencies develop and issue regulations and other agency actions such as policy statements, licenses, and permits. As such, before adopting or amending a rule or regulation, the APA requires federal agencies to publish notice of the properties rule in the Federal Register and give interested persons an opportunity to participate in the rulemaking and provide comments on the rules. 5 USC § 553. If an agency adopts or amends a rule in violation of the APA, that rule can be appealed, and a court must hold unlawful and set aside such actions when they are deemed "arbitrary and capricious, and abuse of discretion, or otherwise not in accordance with law." 5 USC § 706(2)(C).

Here, FEMA did not go through the normal APA procedures before "adopting" and enforcing the PICMs. FEMA created the PICMs entirely out of whole cloth. There was no opportunity for local governments or the public to comment on them, and they were not published in the Federal Register in accordance with the APA. Therefore, any application or enforcement of them can be appealed under the APA and 5 USC § 706(2)(C).

Assuming (for the sake of argument only) that FEMA has the authority under the NFIA to require communities to comply with the PICMs as a condition of eligibility under the NFIP, nothing in 44 CFR 60.3 authorizes FEMA to ignore the requirements of the APA when amending its flood plain management regulations. In other words, even if FEMA has the authority to enact the PICMs or implement a no net loss standard, they still must follow the APA in doing so. There is nothing in statute or regulation that enables them to bypass their federal procedural requirement to short-circuit the rule adoption process to force communities to immediately implement the PICMs.

iv. Adopting the PICMs may trigger claims under both the 5th Amendment Takings Clause and ORS 195.305 (Measure 49):

Both Oregon statute and the United States Constitution contain provisions requiring the payment of compensation for new regulations which limit or prohibit the ability of property owners to use their property. The PICMs may subject local governments to significant takings liability. Specially, the moratorium under consideration is remarkably similar to the temporary moratorium on development in a floodplain that was enacted by the County of Los Angeles in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 US 304 (1987). As the Supreme Court noted in that case, a temporary moratorium on all development will create a total taking of the property, triggering the just compensation requirements of the Taking Clause.

C. Local government have time to review the legality of the PICMs prior to adoption, because they are entitled to due process under the law before being put on probation or suspended from the NFIP:

While FEMA may ultimately be able to take enforcement action against a local government for not adopting the PICMs, it cannot do so without significant due process, notice to the local jurisdiction, and opportunity by the local jurisdiction to correct any deficiency (including enactment of a PICM option). To be clear, the failure of a local jurisdiction to comply with the PICM's on or before FEMA's self-imposed December 1 deadline does not authorize FEMA to immediately suspend the local jurisdiction from coverage under the NFIP.

Should a community fail to enact the PICMs, FEMA may argue that the community has failed to "adequately enforce" FEMA's floodplain management regulations under 44 CFR 59.24(b). When FEMA believes a community has violated this rule, FEMA is authorized to place the community on probation. However, before placing a community on probation, FEMA is first obligated to provide 90 days written notice of the intent to place the community on probation and specify the alleged violations. At least 60 days before placing the community on probation, FEMA must issue a press release to the local media informing them of the possible probation. At the same time, FEMA is required to notify all policy holders in the community of the possible probation at the same time it initially notifies the community government. To date, FEMA has taken none of these steps.

Assuming a community does not comply with the items listed by FEMA in the notice of possible probation (i.e. it doesn't choose a PICM) within the 90-day notice period, the probation period (at least one-year in length) will go into effect. During that period, flood insurance may still be purchased or renewed, and the community can resolve its probation by acting in compliance with the FEMA regulations cited in the letter of possible probation.

If a community does not comply with FEMA requirements before the end of the probation period, FEMA may suspend NFIP coverage for that community. Before suspending coverage, however,

FEMA must notify the community and the public at least 30 days prior to the suspension, and a community can be reinstated for NFIP coverage by complying with the identified FEMA requirements and reaffirming the community's intent to comply in the future.

In short, a community that fails to enact the PICMs on or before FEMA's imaginary December 1 deadline is not going to lose NFIP coverage. At worst, failure to comply will trigger action by FEMA to place a community on probation, at which point the community can either enact a PICM or choose to assert that FEMA lacks the authority to enforce the PICMs for the myriad of reasons set forth above.

II. CONCLUSION:

For the aforementioned reasons, local governments should not move forward with adopting any of the PICMs before December 1, and should question FEMA's enforcement of the PICMs. https://www.dropbox.com/scl/fi/xtuswkgkqc2072zshni6w/OPOALC_WhoWeAre.pdf?rlkey=k2bzcenx6u8msip5xtbjbpph2&st=d4p8da47&dl=0

We understand that local governments have been placed in a difficult spot because of these lawsuits and FEMA's failure to complete their EIS in a timely manner. We also appreciate that that many of them have been active in informing property owners of the pending PICMs, and that many of the people who have contacted us have submitted development applications in advance of the deadline. However, the choice of adopting a PICM would simply pass the cost and burden suffered by the local governments directly onto their constituents. This isn't fair, especially when the PICMs are legally questionable.

We fully understand the concern that ignoring FEMA's self-imposed deadline could possibly jeopardize the ability to obtain coverage under the NFIP. No one wants that, least of all property owners. However, there is a long and substantial process that FEMA must follow, including a probation period, with multiple opportunities for the local government to course correct and come into compliance (see 44 CFR §59.24). Therefore, taking a slow, measured, and legally responsible response to FEMA's PICMs will not result in any immediate threat to a jurisdiction's enrollment in the NFIP. Local governments have the time to analyze and question FEMA's ability to enforce the PICMs as eligibility criteria under the NFIP.

Respectfully,

David Hunnicutt
OPOA Legal Center
OSB #923426
Dhunnicutt@oregonpropertyowners.org

Samantha Bayer
OPOA Legal Center
OSB #125220
sbayer@oregonpropertyowners.org

Outlook

City of Coburg, OR - PICM Response

From HANKS Adam <adam.hanks@ci.coburg.or.us>
Date Wed 11/27/2024 2:04 PM
To fema-r10-mit-picm@fema.dhs.gov <fema-r10-mit-picm@fema.dhs.gov>
Cc WINNER Megan <Megan.Winner@ci.coburg.or.us>; COBURG Mayor <mayor@ci.coburg.or.us>

FEMA PICM Team,
Consistent with our understanding of the decision mandate set forth by FEMA upon local jurisdictions, the City of Coburg is meeting the stated December 1, 2024 decision communication regarding the PICM option the City of Coburg will be pursuing.

It is the intention of the City of Coburg, based on formal, but preliminary, discussion at its November 12, 2024 City Council meeting, to pursue the review, potential modification and adoption of a model code. It is our understanding from multiple sources, including from the FEMA PICM team, that the permit by permit "option" is in effect starting Dec 1 regardless of which of the three pathways are submitted by the December 1, 2024 deadline.

Please provide any guidance and direction that may be helpful in our pursuit of the model ordinance pathway, as well as any additional information that comes forward as a result of the impending deadline.

Thank you,
Adam

Adam Hanks
City Administrator
City of Coburg
541-682-7871
www.coburgoregon.org

City Administration Monthly Report

December 10, 2024

This report is intended to provide Council with an overview of current activities, project status updates and previews of select upcoming issues and activities of Council and Staff.

Featured Items

1. **Public Works Staff Update #2** (See Oct 8 CA Report for Update #1)

   The City of Coburg's Public Works Department has for a number of years consisted of a total of six full time employees (6.0 FTE) in the following positions:

   - Public Works Director (1.0 FTE)
   - Public Works Supervisor (1.0 FTE) – Vacant Nov 1
   - Public Works Operator II (1.0 FTE) – Vacant Oct 25
   - Public Works Operator I (3.0 FTE)

   Both the Supervisor and Operator II positions became vacant in late October of this year. With change comes an opportunity to evaluate existing operations, organizational structure and resource allocation. The remaining members of the Public Works team, led by Director Brian Harmon, have been extremely busy with daily operations with the water system, wastewater collections and treatment plant, the new Operations Center building completion, leaf pick up, Christmas in Coburg and several low-level emergency infrastructure repairs.

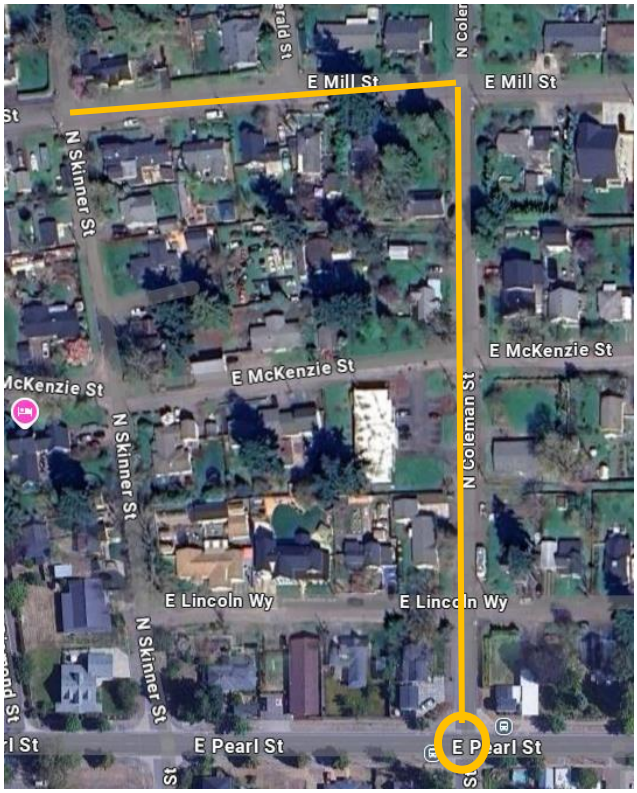
   Third party contracting opportunities were explored and evaluated, with a determination that no cost-effective partner agreements in our areas of need were available or viable at this time. Third party contracting for vegetation management in late spring/summer remains a potential that staff will explore.

   A Public Works Operator III job announcement is posted which will provide regulatory certification and technical assistance and support to the City's wastewater system that currently operates under the certification and authority of the Public Works Director. It is expected that the position will be filled and operating by early February, at which time we will have identified a path forward for the remaining open position and will provide Council with an update on options and plans.

2. **Collector Street Project Kicks Off**

   With funds received last year through federal grants managed through Lane County, City staff and Branch Engineering have begun design and engineering for Phase I of the

Coleman Street Collector Project. Phase I begins with pedestrian intersection improvements at Coleman and Pearl Street with the planned installation of flashing beacon crossing signals per the recommendation of the Transportation Safety Ad-Hoc Committee approved by Council this summer.



The project then extends north on N Coleman Street to Mill Street, turns west and extends to Skinner Street. Improvements include travel lane paving, a sidewalk on the west side of Coleman and south side of Mill and improved storm drain infrastructure throughout the project.

Because Mill Street is also the designated Loop path route, traffic markings and signage will be installed to enhance Mill Street as a priority walking and biking route extending from the Loop path connector at Norma Pheiffer Park.

The project is scheduled to go to bid in February/March of 2025, Council award and contract approval in April, and construction between May and September of 2025.

Total project cost of Phase I will determine the timing and extent of Phase II, which will extend similar improvements from Pearl Street south on S Coleman to Dixon and Dixon to N Willamette Street.

3. **2025 Council Retreat**

Mayor Bell and I are developing the agenda for the February 1, 2025 (Saturday) Council Retreat. This annual event provides an opportunity for Council to discuss long-range priorities, goals and objectives, as well as explore the financial and operational status and needs of the City and its ability to provide the services required and desired by Council and the community. The Council's adopted 2024 Framework Goals and Objectives document will be the starting point for discussions and will include multiple opportunities for Council to discuss and shape adjustments, additions, deletions to this guiding document.

The retreat is currently scheduled to begin at 9:00 AM in the Council Chambers, includes a working lunch and wraps up between 3:00 and 4:00. Calendar invitations, along with preparatory "homework" will be sent out in the coming weeks.

4. **Community Survey**

The City of Coburg was offered participation in a University of Oregon and Lane County sponsored program through the U of O Institute for Policy Research and Engagement for the upcoming winter term. The focus of the project will be a community survey to assist Council in learning the current values, experiences and needs of the Coburg community

that can be utilized to inform future strategic plan development. The project scope has recently been finalized and City staff will be meeting with the class in January to fully develop the survey goals and approach, survey delivery, engagement strategy, completed survey analysis and final deliverables. The project will be the focus of the student team for the duration of the winter term and will finish with a presentation to Council at its March 11, 2025 meeting. The final project scope is attached.

5. **US Postal Service Problem Solving Initiative update**

As reported at a prior Council meeting, former City Council President Mike Watson dedicated significant personal time recently to communicate with local and regional staff and management of the US Postal Service with an objective of improving several longstanding service level deficiencies and inconsistencies of mail and package delivery in Coburg. Mr. Watson's efforts are summarized in the attached report he developed and submitted to USPS at the conclusion of his efforts several weeks ago. While sweeping changes did not occur, Mr. Watson's efforts were much appreciated by both myself and Mayor Bell as he kept each of us updated and involved in the dialogue throughout.

6. **League of Oregon Cities (LOC) – 2025 Legislative Priorities**

In preparation for the upcoming 2025 State Legislative Session, the LOC requested all member jurisdictions submit their top five legislative issues for LOC to focus their lobby efforts on in the upcoming session. The Coburg City Council reviewed and selected their top five issues at the September 10, 2024 meeting.

The top five selected were:

- Infrastructure Funding
- 2025 Transportation Package
- Restoration of Recreational Immunity
- Community Safety and Neighborhood Livability
- Employment Lands Readiness and Availability.

The LOC utilized the priority submissions from all local jurisdictions to develop their final 2025 Legislative Priorities, which are attached for reference. It is notable that the majority of the City Council's priorities "made the list" on the LOC final priority list.

Current Projects & Contracts

The two tables below provide a summary of active infrastructure projects and signed contracts/agreements

Project Type	Description	Est Cost	Complete Date
Water	Well #3 – Wellhouse, treatment, SCADA	$850,000	May 2025
Water	Stallings Transmission Line	$1,500,000	Sept 2025
Parks	Pavilion Park – Phase II ($702,000 total)	$350,000	May 2025
Streets	N Willamette/Macy/Harrison Reconstruct	$800,000	Oct 2024
Streets	Collector St Project (Coleman Phase I)	$500,000	Sept 2025
Streets	Loop Path #4 + N Industrial Paving	$1,300,000	Sept 2025
Sewer	System Capacity Analysis – Kennedy/Jenks	$32,000	Dec 2024

PW	PW Operations Building	$1,350,000	Oct 2024
PW	Storm Water Master Plan	$60,000	Jan 2025
Water	Water Conservation & Management Plan	$50,000	Jan 2025

*Highlighted projects indicated recently completed

Citizen Inquiries	Submit Date	Status
Industrial noise – Shane Ct	6/21/24	Active
Street surface condition (potholes_- N Skinner)	9/3/24	Active
Dangerous Tree – N Skinner	9/4//24	Closed
Dangerous Tree – N Skinner	10/10/24	Closed
Pickleball Court – Slip hazard with surface	9/4/24	Closed
Dangerous Tree – E Locust	11/6/24	Closed
No Parking issue – N Willamette	11/18/24	Closed
Light/Glare – From Roberts Rd affecting Residential	11/25/24	Active

Department Activity & Statistics

Staff maintains various activity, work order and case log type records that are utilized for a variety of required reporting to other agencies and/or for day-to-day oversight and management of their operations. Some of the data comes from third party software systems and typically not always in a format that is easily summarized or customized.

Public Works

Water

- Distribution system emergency repair at Pioneer Valley Estates
- Roof repair at well #2
- Completed wetland restoration (DEQ permit) for eastside waterline extension

Wastewater Treatment & Collections

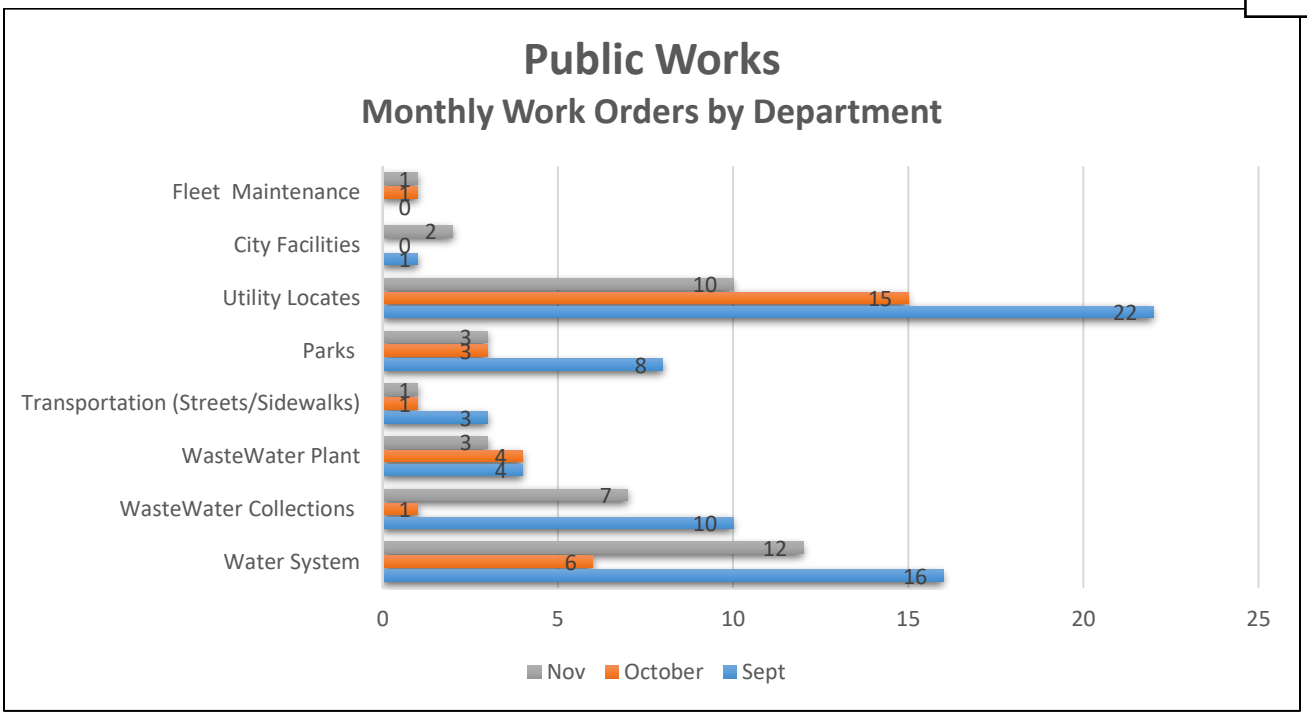
- Replacement of failed feed pump at Treatment Plant
- Restoration of communications/notification system for Treatment Plant

Streets

- Leaf pick up process started
- Christmas in Coburg event preparations
- Veterans banner installations completed

All Departments

- Equipping and building preparations for occupation and use of new PW Operations building at the Treatment Plant



Planning

- SUB 01-22: Coburg Creek Subdivision: Dwelling permits issued for each lot, final walkthrough scheduled for December.
- Issued seven Structural/Plumbing/Mechanical/Electrical permits in November.
- Issued Certificate of Occupancy for new Public Works Operations Building.
- Attended regional transportation meetings including Metropolitan Planning Committee and Technical Advisory Sub-Committee (of MPC), Transportation Planning Committee (TPC), Regional Transportation Plan (RTP) and Congestion Management Plan (CMP) update TAC meeting in addition to the CFEC Project management team meetings and ODOT multimodal inventory project's statewide technical advisory committee (STAC) meeting.
- Continued research of FEMA's new floodplain requirements for NIFP participating communities.
- RARE AmeriCorps member, Dabeat Nieto Wenzell, working on developing maps, riparian restoration project and creating a vegetation maintenance and management plan.
- Special guest, Jim Bell, gave a presentation on the Railroad & Coburg at the November Heritage Committee meeting.

Municipal Court

November 2024 Activity Measures:

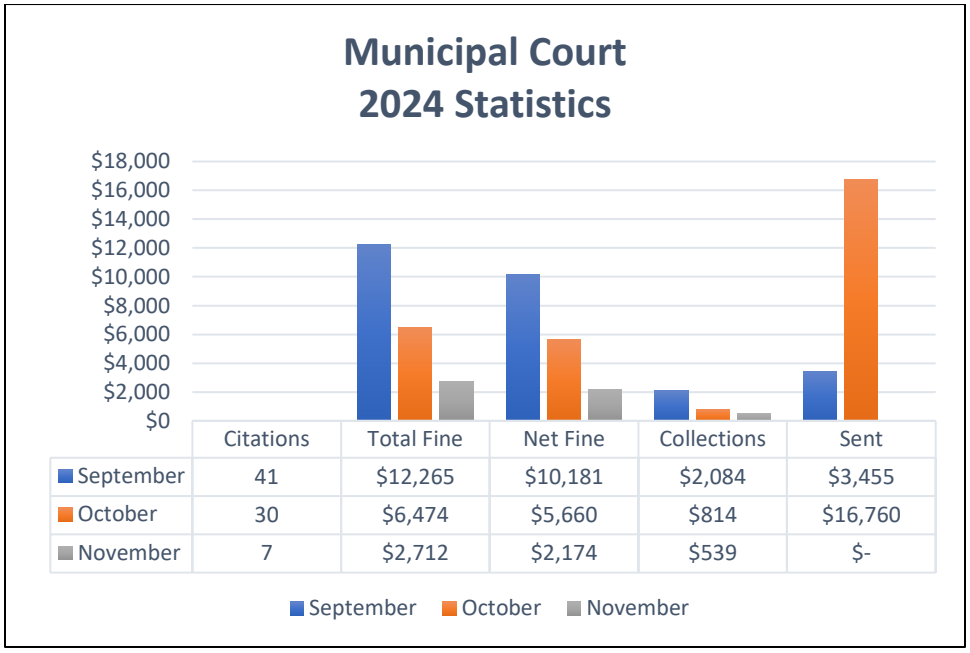
- New Citations for November 5, 2024 Court Date: 7
- Total Fines: $2,712.46 (total monies taken in for the month, nothing deducted), *compared to $12,213.14 in November of 2023*
- Net Fines: $2,173.71 (City share only, NOT including collections), *compared to $5,890.00 in November of 2023*

November 2024 Professional Credit Service Collections:

- Total Collection Revenue: $538.75
  compared to $6,323.14 in November of 2023
- Turned over to collection: $0
  compared to $12,525.00 in November of 2023

Comparisons should only be considered when viewing the year-to-date amounts as court dates are not consistently held on the same dates each month, nor is there consistent cases presented to the court.

Next Regular Court Session: December 3, 2024



	Citations	Total Fine	Net Fine	Collections	Sent
September	41	$12,265	$10,181	$2,084	$3,455
October	30	$6,474	$5,660	$814	$16,760
November	7	$2,712	$2,174	$539	$-

Police

- Contacted a suspicious subject.
- Transported custodies for their court appearances.
- Arrested a male for endangering the welfare of a minor.
- Arrested a female on a warrant.
- Took a report for theft.

- Investigated a stolen vehicle and a burglary.
- Responded to several complaints regarding trespassing at the Truck N' Travel.
- Conducted a DHS welfare check and determined it was unfounded.
- Arrested a male on a warrant.
- Used the CHETT fund for a citizen.
- Investigated a road rage incident that led to an assault and strangulation.
- Took a report of criminal mischief at the park.
- Investigated a violation of a restraining order.
- Responded to a house fire.
- Responded to a domestic dispute and determined a crime was not committed.
- Assisted the Lane County Sheriff's Office with a DUII crash investigation.
- Tagged vehicles for violating the City Ordinance.
- Assisted motorists with a motor vehicle accident.

Upcoming Events:

- Christmas in Coburg.
- Coburg Light Parade.
- Shop with a Cop.
- DUII enforcement concentration.