

"Making a difference through excellence of service"



CITY OF WARRENTON

AGENDA

CITY COMMISSION OF THE CITY OF WARRENTON
REGULAR MEETING
April 11, 2017 – 6:00 P.M.
Warrenton City Commission Chambers – 225 South Main Avenue
Warrenton, OR 97146

1. **CALL TO ORDER**
2. **PLEDGE OF ALLEGIANCE**
3. **ROLL CALL**
4. **COMMISSIONER COMMENTS/COMMUNICATIONS/AGENDA ADDITIONS**
5. **CONSENT CALENDAR**
 - A. City Commission Work Session Minutes – 3.14.17
 - B. City Commission Meeting Minutes – 3.28.17
 - C. Community Library Board Meeting Minutes – Dec 2016
 - D. Planning Commission Meeting Minutes – Dec 2016
 - E. Planning Commission Meeting Minutes – Feb 2017
 - F. Building/Planning Dept. Update – First Quarter 2017
6. **BUSINESS ITEMS**
 - A. Declaration of Vacancy – Mayor
 - B. Sidney Van Dusen – Way to Wellville Presentation
 - C. Consideration of “No Public Purpose” for Tax Lot 1500
81021CB01500 – SW Juniper
 - D. Discussion of Oregon Prevailing Wage Law
 - E. Consideration of Request for Participation in Coalition Challenging the Oregon
Biological Opinion

- F. Consideration of Code Amendment to Allow Multifamily Development as a Conditional Use in the C-1 General Commercial Zoning District
- G. Consideration of Resolution No. 2485, Declaring the City of Warrenton a City of Inclusivity

7. **PUBLIC COMMENT**

At this time, anyone wishing to address the City Commission concerning items of interest not already on the Agenda may do so. The person addressing the Commission will, when recognized, give his or her name and address for the record. All remarks will be addressed to the whole City Commission and limited to 3 minutes per person. The Commission reserves the right to delay any action, if required, until such time as they are fully informed on a matter.

8. **EXECUTIVE SESSION**

Under the authority of ORS 192.660(2)(h); *to consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.*

9. **ADJOURNMENT**

Warrenton City Hall is accessible to the disabled. If special accommodation is needed, please notify the City Recorder at 503-861-233, at least 48 hours in advance of the meeting so appropriate assistance can be provided. TDD Users: Please call Oregon Telecommunications relay service at 1-800-735-2900.

MINUTES
Warrenton City Commission
WORK SESSION – March 14, 2017
5:15 p.m.
Warrenton City Hall - Commission Chambers
225 S. Main
Warrenton, Or 97146

Mayor Kujala called the meeting to order at 5:20 p.m.

Commissioners Present: Mayor Mark Kujala, Tom Dyer, Henry Balensifer, Pam Ackley and Rick Newton

Staff Present: City Manager Linda Engbretson, Police Chief Mathew Workman, Fire Chief Tim Demers, Wastewater Treatment Plant Superintendent Kyle Sharpsteen, Public Works Director Jim Dunn and Deputy City Recorder Dawne Shaw

City Manager Engbretson stated the purpose of the work session is to discuss the City's Emergency Operations Plan (EOP) and what needs to be done going forward. She noted the Fire Chief and Police Chief are involved in the process and attend monthly meetings.

Chief Workman stated the City's current EOP is an “all hazards/all emergency” plan, and noted it is a good plan, with good bones but it came out in 2010; the EOP should be revisited more often than every 7 years. He noted things have changed since 2010, such as the community, technology and communications; and the plan needs to be updated. Chief Workman noted the current plan has all emergency communications coming through the Police Department and talked about the Hamm radio in his office. The discussion continued on communications and the best location for the secondary Emergency Operation Center (EOC), with the new Sheriff's office noted as a possible option. Chief Workman gave a brief review of a Continuity of Operations Plan (COOP) template, noting it will take time to go through and complete. He noted the population center of the city is changing, so there is a need to update outreach efforts; and stated it is the City's responsibility to force people to be knowledgeable and prepared. Chief Workman noted CERT volunteers are continuing outreach in Hammond and has asked them to go out to the Alder Creek area and Kampers West. He stated CERT needs volunteers. Commissioner Balensifer noted it is important as elected officials to know their role so they are able to jump in and help; and how to continue governing. He stated the biggest concern is continuity of services to the citizens.

Chief Workman discussed the necessary emergency training; National Incident Management System, (NIMS) and Incident Command System, (ICS) and the stated the city is behind. He noted a lot of the training is now online, and the city needs to invest the time and money to get training

up to date. He noted if there is an "event" and training is not current, it could jeopardize federal funding. Also discussed was the need for exercises/practice so the city is prepared.

Chief Demers stated he looked at ways to alert the community in the event of an emergency and noted the "push" from the community for sirens. He stated the cost of sirens is prohibitive, at approximately \$40,000 per unit, but noted that when Umatilla closed, they gave some sirens to the county and there are 19 left. He noted they are an older analog system but can be useful and at no cost. Chief Demers discussed the logistics of siren placement and the topography of the city. He noted there is one siren on the City Hall building that can be updated. The discussion continued on the cost of installing the sirens and the possibility of partnering with Fort Stevens to reduce the costs. Also discussed was the effectiveness of the sirens and the ability to function long enough after power loss to alert everyone.

Mr. Scott Widdicombe stated his biggest fear is traffic bottle necks and the city's ability to manage traffic. Brief discussion continued on the road conditions after a major event and Chief Workman noted the city does need an evacuation plan for other events that include traffic control to avoid gridlock. Chief Workman stated the next steps are to get city staff trained; to revisit the EOP and to have a Continuation of Operations Plan (COOP). Commissioner Dyer suggested getting satellite phones since cell service may be out. Other steps include continued community outreach and letting citizens know to be prepared and to not wait for the city to rescue you.

There being no further business Mayor Kujala adjourned the work session 5:48 p.m.

APPROVED:

Mark Kujala, Mayor

ATTEST:

Dawne Shaw, Deputy City Recorder

5-B

MINUTES
Warrenton City Commission
Regular Meeting – March 28, 2017
6:00 p.m.
Warrenton City Hall - Commission Chambers
225 S. Main
Warrenton, OR 97146

Mayor Kujala called the meeting to order at 6:02 p.m. and led the public in the Pledge of Allegiance.

Commissioners Present: Mayor Mark Kujala, Tom Dyer, Henry Balensifer, Pam Ackley and Rick Newton

Staff Present: City Manager Linda Engbretson, Police Chief Mathew Workman, Police Officer Robert Wirt, Fire Chief Tim Demers, Public Works Director Jim Dunn, Public Works Operations Manager Kyle Sharpsteen, Community Development Director Skip Urling, Finance Director April Clark and Deputy City Recorder Dawne Shaw

COMMISSIONER COMMENTS

Mayor Kujala welcomed everyone and noted his family in attendance. He said he appreciates the good turnout at what is his last meeting.

Commissioner Ackley welcomed everyone and noted the large turnout. She stated it has been a joy working with Mayor Kujala and the next mayor will have big shoes to fill. She stated Way to Wellville is hosting the other four counties from across the United States, April 19th – 21st and there will be a crab feed at the Community Center. Mayor Kujala thanked her for all her work on the Way to Wellville committee.

Commissioner Balensifer presented an award to Mayor Kujala, on behalf of the City of Warrenton and the City Commission to thank him for his 12 years of service to the City. He noted it was Mayor Kujala that encouraged him when he first became interested in politics. Commissioner Balensifer noted some of Mayor Kujala's accomplishments as Mayor.

Commissioner Dyer stated Mayor Kujala's actions speak for themselves. He noted Mayor Kujala has been a dutiful servant for the people of Warrenton and expressed his gratitude.

Commissioner Newton noted that Mayor Kujala is leaving enormous shoes to fill. He stated he will attend the April 4th Port Commission meeting. He also noted for transparency, that he intends to run against Commissioner Balensifer for the Mayor position. He noted he offers 40 years of experience running a business and he has unlimited time. Mayor Kujala noted the Commission will decide how to proceed on the Mayor position at the next meeting.

Commissioner Balensifer stated with the recent high winds, he would like to remind citizens they can call Public Works to get a strap put on their recycling bins to keep the lids closed and keep the streets clean.

City Manager Engbretson thanked Mayor Kujala for his support, leadership and friendship; and stated he has represented the City well.

Deputy City Recorder Shaw thanked Mayor Kujala for his service to the City and then gave a brief update on the progress of the City's social media policy and Facebook page.

City Manager Engbretson announced Deputy City Recorder Dawne Shaw was awarded a scholarship that will pay for 3 years of schooling, to attend the certification program through the International Institute of Municipal Clerks. She also noted an addition to the agenda, Consideration of Res. No. 2484, for the Warrenton Meter Replacement Project.

Commissioner Balensifer made the motion to approve the consent calendar and add to the agenda item 6F, Consideration of Res. No. 2484, for Project No. S17016, Warrenton Meter Replacement Project. Motion was seconded and passed unanimously.

Kujala – aye; Balensifer – aye; Ackley – aye; Dyer – aye; Newton – aye

Mayor Kujala stated he would like to take a few minutes and respond to all the nice comments. He noted he has enjoyed working with the Commission, they are a good team and the city is in good hands. He also noted the great job Linda Engbretson has done as the new City Manager. Mayor Kujala proceeded to share his favorite memories as Mayor.

Mayor Kujala introduced Julia Mabry from CASA (Court Appointed Special Advocates). Ms. Mabry explained the blue "pinwheels for prevention," and noted there will be a traveling pinwheel garden. She also presented fliers that highlight activities happening throughout the county for Child Abuse Prevention Month.

After reading two Proclamations Mayor Kujala declared the month of April 2017 as *Child Abuse Prevention Month* and *Sexual Assault Awareness Month*, in the City of Warrenton.

Commissioner Dyer stated these issues should not be just for a month; they should be all year long. He encouraged everyone to take a look at how many kids need foster care and adoption; and noted his personal experiences as a foster/adopt parent.

CONSENT CALENDAR

- A. City Commission Regular Meeting Minutes – 2.28.17
- B. City Commission Work Session Minutes – 3.07.17
- C. City Commission Regular Meeting Minutes – 3.14.17
- D. Police Dept. Monthly Statistics – Feb 2017
- E. Monthly Finance Report – Feb 2017

MINUTES

Warrenton City Commission
Regular Meeting – 03.28.17

F. Fire Dept. Activity Report – Jan 2017

G. Fire Dept. Activity Report – Feb 2017

BUSINESS

WBA member Christine Bridgens noted her personal appreciation and the WBA's appreciation for Mayor Kujala. Ms. Bridgens and WBA President, Mike Moha stated the Community Pride Award is awarded to a local business in recognition of their dedication to make the communities of Warrenton and Hammond a better place to live and work. Mayor Kujala presented this year's award to Doctor and Mrs. Jon Bletscher of North Coast Dental Clinic.

City Manager Engbretson stated the City has received an application for the WBA from Mr. Scott Lindahl. She noted the WBA has reviewed the application and approve of this appointment. Ms. Engbretson stated after this position is filled, there will be two remaining vacancies on the WBA.

Commissioner Balensifer made the motion to appoint Mr. Scott Lindahl to Position No. 4 on the Warrenton Business Association. Motion was seconded and passed unanimously.

Commissioner Balensifer proceeded to note the large number of people in attendance and stated there are vacancies on the boards and the WBA could use some board members.

Kujala – aye; Balensifer – aye; Ackley – aye; Dyer – aye; Newton – aye

Police Chief Workman noted his appreciation for Mayor Kujala. Chief Workman stated back in May of 2014, he came before the Commission to ask the decommissioned 2003 Chevrolet Impala be declared as surplus. He noted, per City policy the vehicle is to be offered to other departments and it was transferred to the Marina. The Marina has no further need for the vehicle and no other department needs it. Chief Workman stated he would like to donate the vehicle to Clatsop Behavioral Healthcare (CBH), as they are in desperate need of a vehicle. Commissioner Balensifer thanked Chief Workman for “connecting the dots” with CBH and the Respite Center.

Commissioner Balensifer made the motion to approve donation of the 2003 Chevrolet Impala, 2G1WF55K239271726, as-is from the City of Warrenton to Clatsop Behavioral Healthcare. Motion was seconded and passed unanimously.

Kujala – aye; Balensifer – aye; Ackley – aye; Dyer – aye; Newton – aye

Public Works Director Jim Dunn stated his appreciation for Mayor Kujala, noting he is the most knowledgeable Mayor he has worked for in regards to Public Works, and thanked him for his service. Mr. Dunn presented the proposal from Kennedy/Jenks Consultants for engineering services. He noted previously in August the Commission approved entering into a contract with IFA to partially fund an Inflow and Infiltration (I/I) study. This proposal is for professional engineering services to develop an I/I study for the City of Warrenton. Brief discussion continued on the details.

MINUTES

Warrenton City Commission

Regular Meeting – 03.28.17

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Commissioner Balensifer made the motion to approve the Kennedy Jenks Consultants proposal for engineering services to conduct an I/I study. Motion was seconded and passed unanimously.

Kujala – aye; Balensifer – aye; Ackley – aye; Dyer – aye; Newton – aye

City Manager Engbretson stated the Commission had requested staff develop a Request for Proposal (RFP) for City Attorney Services, and presented a draft RFP for Commission review. Ms. Engbretson asked the Commission for input and permission to distribute the RFP to local attorneys who have expressed interest, and also advertise for one month. After brief discussion the Commission came to a consensus to move forward with the RFP.

Public Works Director Jim Dunn presented Resolution No. 2484 for Project #S17016; the Warrenton Meter Replacement Project. Mr. Dunn stated this project is to replace old, obsolete meters. Commissioner Balensifer asked how long it will take to replace all the meters; and Mr. Dunn noted at the old pace, it would have taken 20 years; with IFA funding they will be able to get it done in 1 – 2 years. City Manager Engbretson noted this project has \$640,000 loan forgiveness and thanked Mr. Dunn and Finance Director April Clark for their work on obtaining the funding.

Commissioner Balensifer made the motion to adopt Resolution No. 2484; “*Authorizing the Mayor to execute the financing contract and all other documents necessary to obtain financial assistance from IFA for the Meter Replacement Project.*” Motion was seconded and passed unanimously.

Kujala – aye; Balensifer – aye; Ackley – aye; Dyer – aye; Newton – aye

PUBLIC COMMENT

Jean Sleutel, manager of Alder Manor Mobile Home Park stated she would like to address water costs. She noted there is a \$3500 cost/fee to hook up a new mobile home in an existing section of the park and requested it to be grandfathered in. Discussion continued and Mayor Kujala explained the SDC charges, which were implemented in 2012. Ms. Sleutel stated these are existing pads for mobile homes in an existing part of the park, and the water/sewer is already there. She noted in the past they would just pay for a new meter. City Manager Engbretson noted she will look at the SDC Ordinance.

Scott Widdicombe noted the number of executive sessions since December and asked if this was “normal”. Staff noted the executive sessions are to give updates on an ongoing issue. Mr. Widdicombe also noted legal documents he believes to be in the City’s possession, regarding CREST and SWCD. Mr. Widdicombe stated he would like know if the Commission will release the documents and if they are willing to comment on the issue at this time. The Commission stated they are not willing to comment at this time and noted Mr. Widdicombe is free to release the documents if he wishes.

MINUTES

Pat O'Grady thanked Mayor Kujala for his time, service and hard work. Mr. O'Grady noted the free time Mayor Kujala will have now and said he will be calling him to help put up the spring banners and holiday decorations.

Steve Fulton stated he was at a recent Chamber meeting and solicited for members to participate in the WBA. He also noted Mr. Widdicombe was at his office regarding the 8th street dam. Mr. Fulton noted when looking at the flood plain map and levee protection for the city, the 8th street dam is the center. He noted his disagreement with the proposal to do work on the dam and stated he thinks it was misrepresented. He stated it should go on to a higher authority to find out what actually took place.

There being no further business Mayor Kujala adjourned the regular meeting at 7: 15 p.m., and announced an executive session, under the authority of ORS 192.660(2)(f); *to consider information or records that are exempt from public disclosure*. He stated the Commission is not expected to return to regular session to take action on any item considered in the executive session.

APPROVED:

Henry Balensifer, Mayor Pro Tem

ATTEST:

Dawne Shaw, Deputy City Recorder

MINUTES FOR THE WARRENTON COMMUNITY LIBRARY ADVISORY BOARD FOR 9 DEC 2016

The meeting of the Warrenton Community Library (WCL) Advisory Board met in the City Hall Chambers and was called to order by our Board President, Kelsey Balensifer, at 10:01 a.m.

In attendance from the Board were Kelsey Balensifer, Rochelle Coulombe, Baret Becker-Murphy and Doug Rich. Judy Sivley and Jill Benish were unable to attend. The meeting was also attended by our Site Manager, Nettie-Lee Calog, and Frank Becker was also in attendance.

The minutes for the WCL Advisory Board's previous emergency meeting on 16 Nov 2016 were unanimously approved.

The site manager handed out a sheet of statistics on the use of WCL and answered questions and offered comments. Nettie-Lee also reported on the Little Free Library Auction fund raiser and on Gifts That Make a Difference fund raiser. She assured Board members that during the present hiatus on moving the library the contents of our old building remain safe and secure and usage of the facility continues (although it has diminished some recently). She has been negotiating with the Coast Guard as to when movers may be needed and is confident they will do all they can to cooperate.

The matter of moving WCL to the Serendipity Building, located at 160 South Main, brought forth a lively discussion which Nettie-Lee handled in a knowledgeable and friendly manner. These facts emerged in the process:

- The present occupant of the Serendipity, Cheryl Koon, has moved out of our area and is handling matters of the business from her distant location. She was not pleased with our last counter-offer and claims that she is working with another interested party for the take-over of her business.
- Nettie-Lee handed out a memo from Mark Jeffery to Linda Engbretson which stated that he met with the Warrenton School Board (owner of the Serendipity property) and informed them that the City of Warrenton was interested in leasing the space for WCL. The School Board agreed not to renew their lease with Cheryl Koon (which ends on 30 June 2017) because they felt WCL was the higher priority for using the property.
- Kelsey called for a motion from the WCL Advisory Board indicating the Serendipity as our choice for relocating the library; it was moved, seconded and passed unanimously. Our motion will be forwarded to the City Council for their action.
- Nettie said she would draw up plans on how the WCL would occupy and use the Serendipity, including making arrangements for the shelving needed.

There was a discussion regarding locating grants to fund WCL. Rochelle reported on the Clatsop County Cultural Coalition and Nettie reported on a grant from the Oregon State Library System.

For the good of the order, Doug reminded the WCL Advisory Board that four of its present seven members will complete their terms of service at the end of December 2016. Nettie reported that of the four retiring members,

- Jill Benish does not wish to serve again.
- Baret Becker- Murphy has applied to remain a member for another term.
- Douglas Rich does not wish to serve again, which will require the WCL Board find a new secretary.
- Judy Sivley is not able to serve again for reasons of ill health.

There was no further discussion on the matter. President Kelsey Balensifer declared the meeting closed at 10:46 a.m. and reminded us of our next year's meeting dates and time:

- Friday, 10 March 2017, at 10:00 a.m. in the City Chambers.
- Friday, 9 June 2017, at 10:00 a.m. in the City Chambers.
- Friday, 8 September 2017, at 10:00 a.m. in the City Chambers.
- Friday, 8 December 2017, at 10:00 a.m. in the City Chambers.

Respectfully submitted,

Doug Rich, Secretary

Recycle?
Dumpster?

Serendipity Caffe & Bakery

Room dividers
on wheels?

Concept

Eclectic "Central Perk" meets Barnes and Noble.

- Smart Reading Program
- Literacy Programs
- Kiddie Korner Storybook reading
- Santa Visits
- Study tables (finals, tutoring)

Logistics:

- Employee pay while transitioning/closed for renovation
- Hours of operation - 8-10 daily
- Lease Agreement
- Accounts (i.e., internet, phone, gas, electric, water, garbage,)

Bills to share:

- P.O. S.BPA - \$40/month
- Internet/phone/fax - \$204/month
- Gas - \$350 +/-
- Electricity - \$600 +/-
- Water/Garbage - \$370 +/-
- Merchant Services - \$450 +/- Credit cards
- ? - Music - \$15/month
- Office Supplies - \$100 +/-
- Interior Maintenance (i.e., floors, windows, plumbing, etc) - \$180 +/- /month - Carpet/ Shampooing
- Staffing - dependent on hours of operation
- Also - linens/towels, etc. - \$50 +/-
- Pest Control - \$115/ month - School Dist.
- Paper products - (i.e., restrooms) - \$75/month
- Marketing - \$550/month (just radio, not including print)
- Insurance - \$110/month
- Oregonian - \$37/month
- Storage unit - \$84/month
- Chamber Commerce - \$100/YR
- WBA ?
- Loyalty Program - 5 Stars - \$229/month

Single Platform - signs w/ google automatically 2902

Taxes - OR
Feds
Payroll

Security System? How much?

5-D

"Making a difference through excellence of service"



CITY OF WARRENTON

MINUTES

Warrenton Planning Commission
Regular Meeting, December 8th, 2017 *2016*

**Ben Doney Conditional Use Permit CUP-16-1
Gil Gramson Sub-division SUB-16-1 & Variance VAR-16-5
Paul Leitch Fisherman's Storage continued**

Commissioners Present: Chair Chris Hayward, Vice Chair Paul Mitchell, Commissioners Mike Moha, Christine Bridgens, Ken Yuill.
Commissioners Ryan Lampi and Vince Williams had excused absences.

Staff present: Community Planning Director Skip Urling; Building Clerk Janice Weese

Pledge of Allegiance

Approval of Minutes: Vice-chair Paul Mitchell motioned to approve the November 10, 2016 minutes. Commissioner Christine Bridgens seconded. The motion passed unanimously.

Subject of Review: Ben Doney Technologies, LLC conditional use permit to convert a second floor office/storage space into an apartment at 1520 Discovery Lane.

Public Hearing Open

Disclosure by the Commissioners: Commissioners answered no to all questions or conflicts.

Staff Report: Apartments are permitted as conditional uses in the C1 General Commercial District. The application meets the six criteria for granting a conditional use permit. Building plans will have to be submitted for review and approval.

Applicant or Representative Testimony:

Randy Stemper, General Contractor
Submitted application on behalf of Ben Doney

Commissioner Ken Yuill asked if there were any plans to build more apartments there. Randy's reply was no.

Testimony in opposition: No one spoke.

Public Testimony Closed

Discussion Among Commissioners: Ken Yuill stated that this is not an unreasonable request.

Motion by Commissioners: Commissioner Ken Yuill motioned to approve the Conditional Use Permit CUP-16-1 to allow the conversion of the second floor office/storage area into an apartment. Commissioner Christine Bridgens seconded. The motion passed unanimously.

Public Hearing Open

Subject of Review: Gil Gramson Preliminary Plat Application SUB-16-1 for an 11-lot subdivision ; and Variance VAR 16-5 to exceed the 200 foot standard for a dead end street.

Disclosure by Commissioners: Commissioners answered no to all questions or conflicts. Commissioner Christine Bridgens spoke up and commented that she might have ex parte to declare. There was conversation among the commissioners and was determined that it wasn't pertinent and was withdrawn.

Staff Report: Planning Director Skip Urling summarized the staff report. Lots will range from 7,069 to 10,574 square feet. They meet the dimensional and aerial requirements of the zoning district. Wetlands to the west will remain undisturbed. The wetlands delineation is still current with the department of state lands. Prior to any work done, a geotechnical report needs to be reviewed and approved by the city engineer to stabilize the slope on the east side of the property. A final storm water plan needs to be submitted. There needs to be a sign reviewed by the city engineer to prohibit any parking at the hammerhead turnaround on the northern portion of the property. Signs will be posted along the wetland boundary on each lot, "Wetland Boundary – No Disturbance". The application for the variance to exceed the dead end road length standard has been satisfied.

Commissioner Yuill asked if there will be a continuing sidewalk. Skip replied that there will be one on the west side of the road.

Chair Chris Hayward asked if the drainage plan would impact Smith Lake. Skip answered that Smith Lake drains to the north. The impact of the additional runoff of this project will not impede the ability of the existing Smith Lake drainage to continue to flow.

Commissioner Mike Moha asked if this is approved can only single family homes be built, or can duplexes be built and other things that fall under the code. Skip replied that if the lots are large enough, there could be duplexes. They have specific development requirements. The application is only for single family homes.

Applicant or Representative Testimony:

Erik Hoovestol, Firwood Design Group LLC representing applicant

Wanted to put together a project that would work well for the city and surrounding neighborhood with single family homes. Skip addressed most of the key issues of the project. Not doing any fill of the wetlands or removing any trees.

Gil Gramson

Have picked out the single family homes that they will be building. Very similar to the previous project. There will be no duplexes. They are affordable homes that are much needed in the community. Increasing the size of the right of way in and out to 50 feet and the road surface itself will be 28 feet.

The question was brought why the word temporary was written by the turn around on the plans where lots 10 and 11 are.

Gil replied that Forte Pointe owns the property next door to his on Ridge Road next to KOA. He has some ideas to build and will extend the road on his property and he will have to provide the turnaround.

Gil will be the builder of all the new single family homes. All of the homes will have double car garages. The homes will range from 1650 to 2100 feet.

Commissioner Yuill asked if Gil was purposing the same stability for the westside on the sand hill or will there be anything else. Gil stated that the west slope on that property already has vegetation growing and grass up around a foot. There is no bare sand on the westside. On the eastside there is still some bare sand that will be sprayed with hay and seed to get grass growing. The slopes are two and a half to one, and they are not eroding in this weather and the rain. The drainage has to meet DEQ standards.

Testimony in Favor

Johnny Pepper

Property is connected and adjacent to Mr. Gramsons property. Early in the year, was not for the development at all in building duplexes in the neighborhood. The new project has changed totally. It makes sense that Mr. Gramson is building single family homes. There is a housing shortage in Warrenton and all of Clatsop County. We need homes desperately. Box stores and businesses are coming to Warrenton. The people in the businesses will have no place to live. Building these homes will help the economy with construction jobs which is always welcome in our area. Have seen the plans of the houses and Mr. Gramson builds a fine home. They will not devalue our homes, they will increase our values. The parcel of land is sitting idle with nothing happening with this huge building site. Sand is blowing all over the neighborhood onto our houses and cars. This will stop when the houses are built.

Jason Palmberg

Does not know the project or the property real well. Listening to what Mr. Gramson had to say about his project. There are a lot of challenges that developers face when trying to develop property. Mr. Gramson is not asking anything out of the ordinary. Is sharing his support for him.

Testimony in Opposition

Lynne Kelton

Made a comment that Mr. Pepper will be moving out of the area and that may be the reason for his testimony in favor. Is a home owner five houses south of the project. They were informed that there would be no further construction at the north end of Kalmia. Parking, traffic and congestion will continue to be a big issue. They were told that a play park would be installed across from her home. It has not been started. Is an eyesore to the surrounding neighbors with overflow parking and trash dumping.

Susan Dickerson

Lives in the cul de sac. Area is tight already. There was a fire at Mr. Peppers home and the fire truck had a hard time getting through and it was midday.

Tom Dickerson

The lots extend into the wetlands. The people who buy these lots will impact the wetlands somehow. The streets being 28 feet wide is still not enough. If the road goes through then we will be getting Ridge Road traffic all the way through from other tracks. There is a choke hold on Second and Gardenia, and Juniper and Ninth. Would prefer to see this as a non through traffic area or traffic control where it is not a straight line through for other people to drive into our neighborhood. Is concerned about the hammerhead because it is right up against the neighboring property Forte Pointe.

David and Cheryl Murphy

With the extra people, there will be a lot more traffic jams. Would like Mr. Gramson to propose a development that maintains or improves the existing family environment. Is cramming many dwellings into small spaces and it doesn't fit with the rest of the community. Would like to see if a resolution can be drafted and passed to halt all future building at the end of Kalmia Avenue unless the proposal meets all current city codes, restrictions and ordinances.

Jay Bandeen

Has property that is east of the big sand hill. Has never seen any seed on the south or east side.

Commissioner Yuill asked if it was purposed and approved by an engineer for complete cover and protection of the sand, would that take care of his concerns. Jay replied yes and if someone oversees it.

Heather Penrod

Cramming a lot homes into a really small area. Would like to see an overflow parking area for those homes so they are not parking in front of the homes that are already there. Was assured that no other development of houses would be built by the end of the street.

Dennis McCleary

Feels that the safety of the community will be in jeopardy with the houses built in such a small area.

Christopher Peck

Member of the Warrenton Fire Department and the Fire Fighters Association. Expressed concerns about the new ladder truck that the fire department will be getting and if the hammerhead will provide adequate room to turn the truck around. Skip pointed out that the fire chief has reviewed and accepted the proposal as specified. His comments were included in the package that went to the planning commission. Also had concerns on ingress and egress on second street. It is not a normal route for the fire department to take to get to the housing on Kalmia. The ninety degree corner at Gardenia and second will be difficult with a larger truck.

Applicant rebuttal

Gil Gramson spoke and said that he wanted a park for the community and showed the plans to the city, but the city parks board did not want to take on the liability to maintain any more parks. Does not want to build a private park and was never required to build one, he offered to. Did not tell anyone personally that would be the last phase where the last home was built. We are putting in stand up curbs and not roll up curbs. The lot sizes are the same as the ones that are already built on. They are over 7,000 up to 10,0500 sq. feet. For the new property owners, there will be a sign posted to not disturb the wetlands, they can only maintain their yards. Will meet what the engineer asks for to stabilize the sand. Is fine with the homeowners getting together to put in the park. Whatever the fire chief requirements are he will do, including no parking on the east side.

Erik Hoovestol spoke up to address the traffic issue. In traffic terms, eleven homes is a very low number. City code requires that a traffic impact analysis study be done if there are 350 trips per day. The standard per home is 10 trips per day. One of the conditions of approval is that they have a geotechnical engineer to provide guidance on what should be done to stabilize the slope.

Commissioner Christine Bridgens asked if there were any report from an engineer that addresses any suggestions of a wall for the stabilization of the slope. A reply was given that there will be an engineered designed wall, three to five feet tall, cut into the slope to build the road.

Public Hearing Closed

Discussion Among Commissioners

Commissioner Mitchell asked the fire chief if the cause of the delay of ten to fifteen minutes to get to Mr. Peppers fire was due to the cars. Chief replied there was no impact due to the cars; his arrival was in 5 minutes with a water extinguisher. Feels safe that the vehicles can get in.

Commissioner Yuill spoke up and noted that in the fire chief's memo that the street was going to be a private drive but it has been changed to fifty feet. Chief replied that it is under a variance request to make the access public with a fifty foot right of way. It is actually wider with one side being parked on then the existing rest of the street.

Commissioner Yuill addressed Collin, Warrenton's city engineer, regarding the stabilization of the sand hill. The report will be presented with their recommendation and Collin will approve it prior to the approval of the application. It was suggested that some sort of a financial security for approximately three years; paid by the applicant, to take care of things that might be need repair or the vegetation didn't grow as desired.

Commissioner Mitchell commented that he understands the impact of the traffic but we need affordable houses to be built because of the growth of Warrenton. We need to change because a lot of box stores and businesses are coming in and people need a place to live.

Commissioner Yuill commented that Mr. Gramson recognized the need to put in a fifty foot wide right of way. With the possible development of other property to Ridge Road, that gives the neighborhood another way to get out. Feels he has addressed the issue.

Commissioner Moha spoke up and commented that the traffic is a major issue. From second street to Gardenia is a problem and is not a safe area.

Commissioner Yuill motioned to approve Preliminary Plat Application SUB-16-1 and Variance Application VAR 16-5 subject to the five conditions plus a bond for stability of the hillside not to exceed twenty-five percent of the cost for stability. Commissioner Mitchell seconded. The motion passed. Commissioner Moha voted nay for the applications.

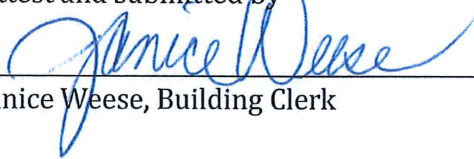
Subject of review: Paul Letich Fisherman's storage continued from September and November 2016, and December 8, 2016 Planning Commission meeting. Vice-chair Mitchell motioned to continue to January 2, 2017. Commissioner Yuill seconded. The motion passed unanimously.

Other Business: Planning Director Skip Urling brought up that Heather Hanson from Clatsop County is still interested in workshops on parliamentary procedures.

Jason Palmburg spoke up and expressed his thought that in the development code, for commercial zoning, there is no mention for conditional uses or anything to build multi-family housing. There are lots in the commercial zoning that are not really set up for commercial use, but could be well set up for multi-family apartments. Would like this to be revisited by the planning commission since there is a housing shortage.

Meeting Adjourned

Attest and submitted by



Janice Weese, Building Clerk

Approved:



Chris Hayward, Planning Commission Chair

5-E

“Making a difference through excellence of service”



CITY OF WARRENTON

MINUTES

Warrenton Planning Commission
Regular Meeting, February 9, 2017

Waterfront Trails Landing Preliminary Plat SUB 16-2 Lang Marine Services Conditional Use Permit 17-1

Commissioners Present: Chair Chris Hayward, Commissioners Mike Moha, Ken Yuill, Ryan Lampi, Vince Williams. Vice-chair Paul Mitchell and Commissioner Christine Bridgens had excused absences.

Staff Present: Community Planning Director Skip Urling; Building Clerk Janice Weese

Pledge of Allegiance

Approval of Minutes: Commissioner Mike Moha motioned to approve the December 8th 2016 minutes. Commissioner Vince Williams seconded. The motion passed unanimously.

Subject of Review: Ben Johnson's application for a preliminary plat approval for a seven lot subdivision on 1.55 acres located on North Main Avenue.

Public Hearing Open

Disclosure by the Commissioners: Commissioners answered no to all questions or conflicts.

Staff Report: Lots will range from 7,105 to approximately 9,285 square feet with the goal to build duplexes which are permitted in the RM Medium Density Residential zoning district. The drawings indicate that they meet the various standards for public improvements. Recommends approval with two additional conditions added to the five already recommended. 6. Signs be posted along the wetland boundary along the perimeter of the property warning that this is a wetland and cannot be disturbed. 7. Should the developer prefer to go to a private road, that there be a private road maintenance agreement recorded.

Applicant or Representative Testimony:

Ben Johnson
89125 Stellar Lane
Warrenton, OR 97146

Property is outside of wetlands. Land had been filled approximately 40 years ago. Simple plan. Will be filling in less than one acre.

Commissioner Ken Yuill asked how high he would be bringing the property up. Ben replied that it is around 9 ½ feet now and will be bringing it up to around 11 ½ feet.

Erik Hoovestol, P.E. Project Engineer
359 E. Historic Hwy.
Troutdale, OR 97060

Spoke with Colin regarding drainage. Colin, the city of Warrenton's engineer, wants them to check downstream to see if there is blockage. Ben offered to clean it out for the city. They are planning a chip seal improvement for the road. Doesn't affect their engineering. There are plans to widen the frontage road by four feet on Main Street.

Commissioner Ryan Lampi brought up that the existing flood elevations are twelve feet but property is not mapped in a flood zone. Current maps suggest a flood elevation of eight. Future flood elevations could be near thirteen if levies are not certified. Erik replied that they designed the grading plan so the finished floor would be out of the flood zone.

Testimony in opposition:

Brian Walker
38447 Hwy 30
Astoria, OR 97103

Been dealing with the city for fourteen years trying to build a home there. Has been denied because of the sewer problem. Doesn't think it is fair that the Johnson's get to come in and build duplexes. Pays \$7,000.00 dollars in property taxes pays for sewer and garbage every year and still can't build a house. Gave several options to the city like putting in a sump grinder or holding tank. Offered to put in a 1,000 gallon tank, but the city said he was too close to the water table. The ditch behind his place, that the city said he was too close to, was dug just recently. The ditch was not there when he lived on the property.

Jerry Black
390 NW 7th Place
Warrenton, OR 97146

They are on septic also. Originally they were told by the city that when the city recoups a little money, they could possibly tie in the back leg to the new lines that Ben and the city will be putting in. That would solve the problem if the city would allow that to happen.

Dixie Black
370 NW 7th Place
Warrenton, OR 97146

Also had asked the city how she could hook up her two houses to the sewer line. The drain field has failed and cannot afford to put in a sand filter, they do not have enough property. The city said that Mr. Johnson will be building right behind her and that she could hook up to the sewer through his building. They can put a holding tank and pump it into where his sewer is. Has no objection to Ben's building and proposal. Just wants confirmation from the city that they can hook up to the sewer.

Rebuttal:

Nate Johnson
80856 Fort Clatsop Road
Astoria, OR 97103

This will be a nice project. The community needs what they are doing. Multi-family is a good thing for Warrenton. Rental property that is affordable is hard to come by.

Erik Hoovestol, P.E. Project Engineer

Demonstrated on the grease board where 7th and Main Street are and where Ben's project is. Pointed where the gravity sewer is down Main Street. Thinks that the sewer problem that the home owners are having in that area are unrelated to the sewer issues of Ben's project. Ben's project is at the end of the gravity sewer line. Suggest talking to the city engineer.

Public Hearing Closed

Discussion Among Commissioners

Commissioner Lampi acknowledged the applicants development, but also is concerned about the sewer issues of the residents not being able to hook up to the sewer system.

Commissioner Williams said the sewer issues need to go through the city engineer and then go through city commission to change things or get a budget for it. There is a housing crisis here and thinks that Ben's project will enhance and will be good for the city.

Commissioner Yuill stated that there are still a lot of conditions that the city engineer need to sign off on, but feels comfortable with it. When they do the chip sealing on the road, that might be a good time to do improvements to the sewer system.

Motion by Commissioners:

Commissioner Ryan Lampi motioned to approve the Preliminary Plat SUB 16-2 for a seven lot subdivision on 1.55 acres located on North Main Avenue with the seven conditions of approval stated in the staff report. Commissioner Vince Williams seconded. The motion passed unanimously.

Subject of Review: Conditional Use Permit 17-1 Lang - Marine Services Business

Disclosure by Commissioners: Commissioners answered no to all questions or conflicts.

Staff Report: This application is to convert an existing warehouse on the corner of Fifth and Jetty in Hammond, into an indoor boat storage and rinse – wash facility. This is a building that has been neglected for awhile a few blocks from the Hammond Marina. There will be no expansion of the footprint. Will be some internal remodeling improvement due to the change of occupancy. Zoning is commercial mixed use. Activity will occur mostly during fishing season. It is consistent with the comprehensive plan and will blend in with the neighborhood and not generate excess traffic. Recommends approval with two conditions.

Applicant or Representative Testimony:

Dick Lang
P.O. Box 909
Astoria, OR 97103

The building is forty feet by ninety four feet. Fourteen feet by forty feet of the building that faces Jetty Street is almost completed for office and storage space. Will have two services to offer; a long term boat storage and a paid per use drive through boat rinse station. Will be installing a lock box for the fire department to have access to the building. Have completed the hydrant flow test. The fence will be replaced with a similar chain link fence. Will be adding a second gate for easy access in and out and also a second door to the warehouse. Has a man gate on the west side, but will be adding one to the east side for fire department and emergency access. Inside the warehouse he will be adding two layers of sheetrock to the south and east wall to achieve a one hour fire rating. Miscellaneous plumbing will also be done. Upstairs will be a conference room and storage area. Stairs will be removed and new ones put in. Installing an alarm system with remote monitoring. Will be substantial repairs to the roof, gutters and siding. The roof will be painted red and the siding green. There will be approximately ten boats per year that will go through the rinse and storage process into the warehouse.

Wants to assure his neighbor that his business will not affect their property. The rinse station will be around the corner with a stationary hoop with the sound of spraying water and will not be noisy. The busy times will be around noon to four p.m. but that could vary with the tides and time of the year. The busiest will be the last three weeks ending Labor Day. His business is a water rinse; not a wash with detergents or solvents.

Testimony in opposition:

Matt Vineyard
P.O. Box 98
Hammond, OR 97121

Does not necessarily oppose the project. Was concerned about his wastewater plan until Mr. Lang explained it. Is concerned with the boat traffic since Fifth Street is a very narrow street also the noise the business might generate. He is looking forward to the warehouse being fixed up because it is dilapidated. Appreciates the way it is laid out.

Applicant Rebuttal: Wants to have a smooth operation with minimal obstruction to the traffic. There will be some during fishing season but will do his best to minimize it. Mr. Lang demonstrated on the grease board how the traffic will enter and exit. They will leave the jetty and turn right on Fifth for a block. If they stay to the side, there will be room for traffic to go through. Is willing to spend the first few times that they are open to make sure the traffic flow is smooth. Will be putting signs up to direct and also what is not allowed on the property.

Public Hearing Closed

Discussion Among Commissioners

Commissioner Williams thinks the project will be an enhancement for the area and complimented Mr. Lang on his presentation.

Commissioner Yuill spoke up and said Mr. Lang is a man of his word and his work is always good.


Motion by Commissioners: Commissioner Ken Yuill motioned to approve the Conditional Use Permit CUP17-1 subject to the conditions of the approval in the staff report. Commissioner Ryan Lampi seconded. The motion passed unanimously.

Other Business: Skip brought up the mini home that was being built on the owners property that was brought to the planning commission awhile back. Will monitor the situation and report back in a few months.

New Business: Skip mentioned that he had a preconference meeting with Dick Krueger who wants to build sixty apartments behind the Senior Center and Food Bank.

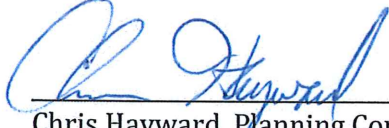
Meeting Adjourned

Attest and submitted by



Janice Weese, Building Clerk

Approved



Chris Hayward, Planning Commission Chair

5-F

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CITY OF WARRENTON

TO: Warrenton City Commission
FROM: Skip Urling, Community Development Director 
RE: Building permits & land use applications activity—First Quarter 2017
DATE: For Agenda of April 11, 2017

Building Permits

- 4 four – plexes in the Forest Rim Subdivision
- 2 single family dwellings
- 2 commercial—Palmer ministorage buildings

Land Use

- SUB-16-2 Water Front Landing preliminary plat--Johnson
- SDR 16-5 Marlin Larsen Harborview resort
- CUP-17-1 Richard Lang-boat wash, Hammond
- DCR-17-1 Multi-family Developments C1 CUP code amendment

- LUCS-17-1 Palmberg-hwy access
- LUCS-17-2 BioProtein renew air & water quality permits
- LUCS-17-3 Bar Pilots dock removal
- LUCS-17-4 Dick Hellberg-bank repair
- LUCS-17-5 Roy Gilga-marijuana extraction
- LUCS-17-6 Warrenton Fiber-dredging
- LUCS-17-7 Jason Palmberg-hwy access

- PRE-17-1 Pincetich, 6 - plex
- PRE-17-2 Yacht Club Apartments
- PRE-17-3 Warrenton School District expansion
- PRE-17-4 Fort George Brewery Distribution facility/tasting room
- PRE-17-5 Marlin Larsen -4plex CUP
- PRE-17-6 Cary Johnson—rezone 2 acres

We have implemented a temporary moratorium on building permits in the Forest Rim subdivision because the development has reached the limits on dwelling units with limited fire apparatus access. This action is pursuant to Oregon Fire Code Section D106.2, attached.

D105.2 Width. Aerial fire apparatus access roads shall have a minimum unobstructed width of 26 feet (7925 mm), exclusive of shoulders, in the immediate vicinity of the building or portion thereof.

D105.3 Proximity to building. At least one of the required access routes meeting this condition shall be located within a minimum of 15 feet (4572 mm) and a maximum of 30 feet (9144 mm) from the building, and shall be positioned parallel to one entire side of the building. The side of the building on which the aerial fire apparatus access road is positioned shall be approved by the *fire code official*.

D105.4 Obstructions. Overhead utility and power lines shall not be located over the aerial fire apparatus access road or between the aerial fire apparatus road and the building. Other obstructions shall be permitted to be placed with the approval of the *fire code official*.

2. The number of *dwelling units* on a single fire apparatus access road shall not be increased unless fire apparatus access roads will connect with future development, as determined by the *fire code official*.

**D108
REFERENCED STANDARDS**

ASTM	F 2200—05	Standard Specification for Automated Vehicular Gate Construction	D103.5
ICC	IFC—12	International Fire Code	D101.5, D107.1
UL	325—02	Door, Drapery, Gate, Louver, and Window Operators and Systems, with Revisions through February 2006	D103.5

SECTION D106

MULTIPLE-FAMILY RESIDENTIAL DEVELOPMENTS

D106.1 Projects having more than 100 dwelling units. Multiple-family residential projects having more than 100 *dwelling units* shall be equipped throughout with two separate and *approved* fire apparatus access roads.

Exception: Projects having up to 200 *dwelling units* may have a single *approved* fire apparatus access road when all buildings, including nonresidential occupancies, are equipped throughout with *approved automatic sprinkler systems* installed in accordance with Section 903.3.1.1 or 903.3.1.2.

* **D106.2 Projects having more than 200 dwelling units.** Multiple-family residential projects having more than 200 *dwelling units* shall be provided with two separate and *approved* fire apparatus access roads regardless of whether they are equipped with an *approved automatic sprinkler system*.

SECTION D107

**ONE- OR TWO-FAMILY
RESIDENTIAL DEVELOPMENTS**

D107.1 One- or two-family dwelling residential developments. Developments of one- or two-family *dwelling units* where the number of *dwelling units* exceeds 30 shall be provided with two separate and *approved* fire apparatus access roads, and shall meet the requirements of Section D104.3.

Exceptions:

1. Where there are more than 30 *dwelling units* on a single public or private fire apparatus access road and all *dwelling units* are equipped throughout with an *approved automatic sprinkler system* in accordance with Section 903.3.1.1, 903.3.1.2 or 903.3.1.3 of the *International Fire Code*, access from two directions shall not be required.

6-A

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CITY OF WARRENTON

AGENDA MEMORANDUM

TO: The Warrenton City Commission
FROM: Linda Engbretson, City Manager
DATE: April 11, 2017
SUBJ: Declaration of Vacancy – Mayor

SUMMARY

As former Mayor Mark Kujala resigned his position effective March 28, 2017, the office must be declared vacant, per Section 31 of the City Charter. The Commission may then fill the vacant position by appointment; a majority vote is required to validate the appointment. Until such permanent appointment is made, the office is filled pro tem by Commissioner Henry Balensifer, appointed Mayor Pro tem by unanimous vote on January 10, 2017. The Commission may choose the process to consider the appointment to fill the Mayor's office, term-ending December 31, 2018.

RECOMMENDATION/SUGGESTED MOTION

"I move to declare the office of Mayor officially vacant as of April 11, 2017."

ALTERNATIVE

None recommended

FISCAL IMPACT

N/A

Warrenton Charter

CHAPTER VII

Vacancies in Office

Section 31. What Creates Vacancy. An office shall be deemed vacant upon the incumbent's death; adjudicated incompetence; conviction of a felony; or other offense pertaining to his office; or unlawful destruction of public records; resignation; recall from office; or ceasing to possess the qualifications for the office; upon the failure of the person elected or appointed to the office to qualify therefor within 10 days after the time for his term of office to commence; or in the case of mayor or commissioner, upon his absence from meetings of the commission for 60 days without the consent of the commission; and upon a declaration by the commission of the vacancy.

Section 32. Filling of Vacancies. Vacant elective offices in the city shall be filled by appointment. A majority vote of the commission shall be required to validate the appointment. The appointee's term of office shall begin immediately upon his appointment and shall continue throughout the unexpired term of his predecessor. During the temporary disability of any officer or during his absence temporarily from the city for any cause, his office may be filled pro tem in the manner provided for filling vacancies in office permanently.

CHAPTER VIII

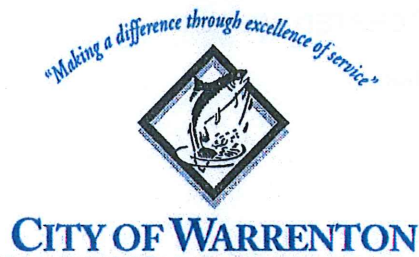
Ordinances

Section 33. Enacting Clause. The enacting clause of all ordinances hereafter enacted shall be, "The city of Warrenton ordains as follows:"

Section 34. Mode of Enactment.

- (1) Except as the second and third paragraphs of this section provide to the contrary, every ordinance of the commission shall, before being put upon its final passage, be read fully and distinctly in open commission meeting on two different days.
- (2) Except as the third paragraph of this section provides to the contrary, an ordinance may be enacted at a single meeting of the commission by unanimous vote of all commission members present, upon being read first in full and then by title.
- (3) Any of the readings may be by title only if no commission member present at the meeting requests to have the ordinance read in full or if a copy of the ordinance is provided for each commission member and three copies are provided for public

6-C



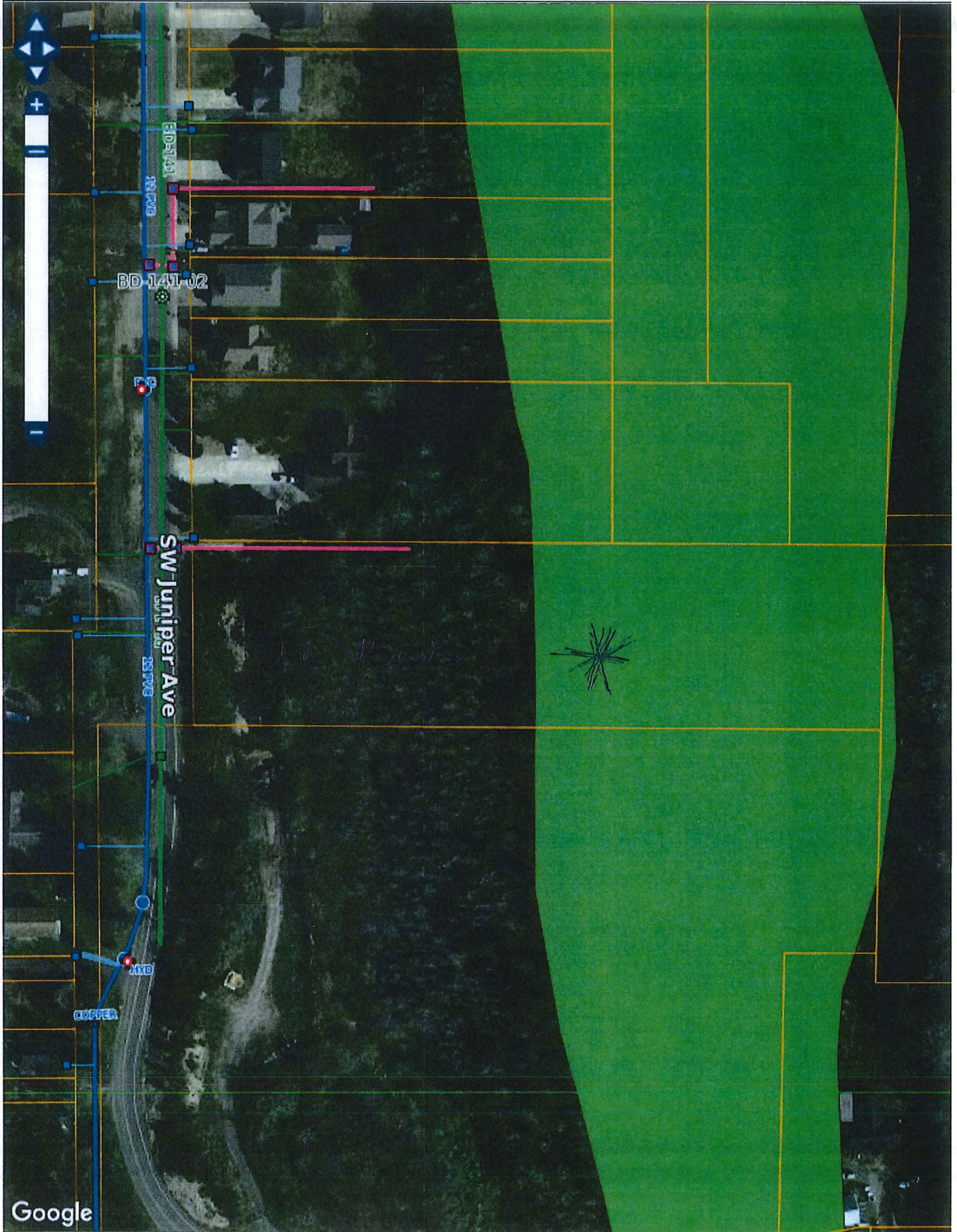
AGENDA MEMORANDUM

TO: The Warrenton City Commission
FROM: Linda Engbretson, City Manager *LE*
DATE: ~~March 7, 2017~~ *April 11, 2017*
SUBJ: Request to Determine "No Public Purpose" for Tax Lot 1500
81021CB01500 - SW Juniper Avenue

SUMMARY

We previously presented a request to consider whether Tax Lot 1500, Map 81021CB, serves a public purpose. This property was originally deeded to the City by Clatsop County for landfill purposes; however, the deed includes a reversionary clause wherein the property reverts back to the County should the City determine there is no longer a public need. John Sprecher, our consultant who monitors and provides our DEQ reports for both the "Warrenton Landfill" and the "stump dump" has reported Tax Lot 1500 is not included in the post-closure monitoring area. The attached shows the property in question. It appears approximately 50% of the property is listed as significant wetlands.

If the City sees no public purpose for this property then the City can re-deed it to the County. Because of the reversionary clause, the City could not sell the property or use it for any purpose other than "public benefit." The County will likely sell it at auction to the highest bidder.



6-D



AGENDA MEMORANDUM

TO: The Warrenton City Commission
FROM: Linda Engbretson, City Manager
DATE: April 11, 2017
SUBJ: Oregon Prevailing Wage Law

SUMMARY

Commissioner Dyer requested that discussion on Prevailing Wage Rate Legislation be placed on the April 11, 2017, Agenda. I have attached a *History of Oregon's Prevailing Wage Rate Legislation*. There have been a lot of amendments since its enactment; Oregon voters rejected a bill to repeal the law in 1994. Prevailing Wage Law and its impacts, and "Quality v Cost" continues to be a debate across the country.

RECOMMENDATION/SUGGESTED MOTION

No staff recommendation

ALTERNATIVE

N/A

FISCAL IMPACT

Prevailing Wage

Department

History of Oregon's PWR Legislation

Libraries

Wage and Hour: Prevailing Wage

Lists

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[Formulario de Queja](#)

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[Occupational Wage Survey](#)

[PWR Advisory Committee](#)

[Oregon Revised Statutes](#)

[Administrative Rules](#)

1959	Oregon enacts a State prevailing wage rate law to cover public works that are not covered by Davis-Bacon regulations. Stated objectives are: 1. To assure quality workmanship on public works; 2. To discourage exploitation of workers; and 3. To encourage competition for contracts at the management skills level.
1969	Oregon's prevailing wage rate law is amended to include fringe benefits.
1977	Oregon's prevailing wage rate law undergoes a major revision, which, among other changes, expands subject workers to include those paid on a salary or per diem basis, and provides debarment for employers who willfully violate the prevailing wage rate statutes.
1981	Oregon's prevailing wage rate law is amended to require public agencies to notify the Bureau of Labor and Industries (BOLI) of awarded contracts, and to allow the commissioner to seek injunctions against employers without first receiving a wage claim.
1983	Oregon's prevailing wage rate law is amended to include a provision that the public agency may be held exclusively liable for unpaid prevailing wages in certain circumstances. In addition, the law now provides that contractors may be debarred for intentional failure to post the prevailing wage rates on the job site.
1991	Oregon's prevailing wage rate law is amended to allow the losing bidder to recover at least \$5,000 from the winning bidder if it can be established that the winner has willfully violated any one of several laws, including the prevailing wage rate law.
1994	Oregon voters reject Measure 12, which would have repealed Oregon's prevailing wage rate law.
1995	Oregon's prevailing wage rate law is substantially amended by the 1995 legislature. The statutes now include a declaration by the Legislative Assembly that the purposes of the prevailing wage rate law are: <ul style="list-style-type: none"> • To ensure that contractors compete on the ability to perform work competently and efficiently while maintaining community established compensation standards; • To recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards; • To encourage training and education of workers to industry skills standards; and • To encourage employers to use funds allocated for employee fringe benefits for the actual purchase of those benefits. <p>Changes to the law include an increase in the threshold for coverage from \$10,000 to \$25,000; a prohibition against dividing public works projects to avoid compliance with the PWR law; and the addition of a prevailing wage fee payable by contractors who contract directly with a public agency. Fees are to be used to pay the costs of:</p> <ul style="list-style-type: none"> • State-conducted prevailing wage rate surveys, • Educational programs, and • Investigation and enforcement of the prevailing wage rate law. <p>Other changes to the law include the requirement that contract specifications and contracts for public works include a provision stating the PWR fee shall be paid to BOLI; the addition of an advisory committee to assist in administration of the PWR law; civil penalty authority up to \$5,000 for each violation of the prevailing wage rate law; contractors are no longer required to submit copies of their certified payroll statements to BOLI (however, they are still required to submit these reports to the public agency); and debarment of subcontractors who fail to pay workers when workers' wages are paid by the prime contractor.</p>
1997	Oregon's prevailing wage rate law is amended making public agencies' liability joint and several with any contractor or subcontractor for unpaid prevailing wages when the agency fails to include required prevailing wage rate language in the advertisement for bids, request for bids, contractor specifications, accepted bids, or elsewhere in the contract documents. <p>Other changes to the law include the amendment to the daily overtime statute to allow employers to adopt work schedules of four ten-hour days on public works projects; liquidated damages may be for an additional amount of wages equal to twice the unpaid overtime wages if contractors have falsified the payroll records; and contractors must adopt a written work schedule on public projects prior to the beginning of work.</p> <p>The statute (ORS 279C.305) that requires public agencies to prepare and submit a list of their planned public improvement projects to BOLI is amended. The estimated project cost threshold for least cost comparison requirements when an agency considers using its own employees as workers on a public works is increased</p>

Prevailing Wage History of Oregon's PWR Legislation

from \$50,000 to \$125,000.

ORS 279C.815 (formerly 279.359) is amended to require that BOLI rely on the annual wage survey in determining prevailing wage rates. It allows the commissioner to consider additional information if it appears that the data derived from the wage survey alone is insufficient to establish the prevailing wage rates.

- 1999 Oregon's PWR law is amended to reapply portions of the PWR law to Oregon University System contracts.
- The notice of claim requirement against public works contractors' bond is modified to allow BOLI to include unidentified workers.
- School district contracts with community foundations or nonprofit corporations are exempt from prevailing wage rate law requirements under certain and specific conditions; sunsets January 1, 2006.
- Prevailing wage rate fees are allowed to be used for education programs on public contracting and purchasing laws in addition to the prevailing wage rate law.
- 2001 Oregon's prevailing wage rate law is amended to require contractors and subcontractors on public works projects to prepare weekly certified payroll statements and submit them to the public agency monthly, by the fifth business day of the month.
- Public agencies are required to include a copy of the contractor's disclosure of first-tier subcontractors with the Notice of Public Works form submitted to BOLI.
- ORS 279C.810 is amended by adding an exemption. Public work projects for which no funds of a public agency are directly or indirectly used are exempt from the PWR law. BOLI is required to adopt rules to carry out these provisions. The amendment specifies that "funds of a public agency" does not include funds provided in the form of a government grant to a nonprofit organization, unless the grant is issued for the purpose of construction; "nonprofit organization" is defined.
- 2003 Oregon's prevailing wage rate law is amended to exempt Oregon Youth Conservation Corps (OYCC) members.
- HB 2341 establishes a Public Contracting Code for public agencies within Oregon. The new Code establishes three separate chapters to modernize and clarify public contracting processes. The first chapter, ORS 279A, establishes an overarching policy for all contracting activities. The second chapter, ORS 279B, covers most types of procurements, except for public improvements, public works and architectural, engineering and related services, which are covered in the third chapter, ORS 279C. The entire prevailing wage rate law is contained within ORS 279C.
- 2005 Oregon's PWR law is substantially amended by the 2005 legislature. Changes to the law include an increase in the PWR threshold for coverage from \$25,000 to \$50,000; contractors must pay the higher of state or federal rates on projects subject to both the state PWR law and the federal Davis-Bacon Act; BOLI must compare state and federal prevailing wage rates, determine which is higher for workers in each trade or occupation in each locality, and make this information available twice each year; and public agencies must include in their project specifications information showing which prevailing rate of wage, either state or federal, is higher.
- Other changes to the law include the requirement that all contracts, including subcontracts, must contain a provision that workers shall be paid not less than the specified minimum hourly rate of wage on projects subject to the PWR law; and all contractors and subcontractors working on a public works project must file a \$30,000 "public works bond" with the Construction Contractors Board. This bond is to be used exclusively for unpaid wages determined due by BOLI. Some exemptions from the requirement are provided for certified disadvantaged, minority, women or emerging small business enterprises. In addition, general contractors must verify that subcontractors have filed a public works bond before permitting a subcontractor to start work on a project.
- Project price is now defined to include, but is not limited to, the value of work performed by persons paid by a contractor as part of the project. Project price does not include the value of donated materials or work performed on a project by individuals volunteering to a public agency. "Funds of a public agency" does not include building and development fees waived or paid by the public agency, staff resources used for project oversight or coordination, or staff resources used for the design or inspection of the project.
- Finally, public agencies and general contractors must withhold 25 percent of amounts earned by contractors if certified payroll reports are not submitted as required.
- 2007 The definition of "public works" in ORS 279C.800(6)(a) is amended to include in addition to roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest:
- A project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency; or
 - A project for construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.
- The definition of "funds of a public agency" is amended to exclude, among other things, tax credits or tax abatements, or money from the sale of bonds that are loaned by a state agency to a private entity, unless the money will be used for a public improvement.
- If a public works project is of the type described in ORS 279C.800(6)(a)(B) or (C) (a privately owned project with \$750,000 or more of funds of a public agency or in which 25 percent or more of the square footage will be occupied or used by a public

Prevailing Wage History of Oregon's PWR Legislation

agency), the Commissioner of the Bureau of Labor and Industries is required to divide the project if appropriate so that any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency will not be subject to the PWR law. If a project includes parts that are owned by a public agency and parts that are owned by a private entity, the commissioner is required to divide the parts of the project that are not public works from those that are subject to the PWR law if appropriate.

Projects for residential construction that are privately owned and that predominately provide affordable housing are exempted from the PWR law.

BOLI is required to make coverage determinations upon request about whether projects or proposed projects are or would be subject to the PWR law. The requestor or anyone adversely affected or aggrieved by the determination may request a hearing.

The applicable prevailing rates of wage for a public works project may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates, and by providing adequate information about how to access the rates.

When a public works project is subject to the Davis-Bacon Act, if the public agency fails to include the state and federal prevailing rates of wage in the specifications for the contract, or fails to include in the specifications information showing which prevailing rate of wage is higher, the public agency will be liable to each affected worker for any unpaid difference between the applicable higher rate of wage and the lower rate of wage. The public agency will also be liable for an additional amount equal to the amount of unpaid wages as liquidated damages.

When a public works project is subject to the Davis-Bacon Act, BOLI must:

- Use the federal definition and interpretation of "site of work;"
- Use the federal guidelines for whether workers transporting materials and supplies to and from the site of the project are due the prevailing rate of wage;
- Apply the federal standard to workers enrolled in skill training programs that are certified by the U.S. Secretary of Transportation under the Federal-Aid Highway Act.

The PWR fee, previously required to be paid by contractors, is now required to be paid by public agencies. The minimum fee is increased to \$250 and the maximum fee is increased to \$7,500. The increased minimum and maximum amounts sunset on January 1, 2011.

BOLI is required to develop and adopt a plan to increase diversity statewide among workers employed on public works projects.

Certified disadvantaged, minority, women or emerging small business enterprises may elect not to file a public works bond with Construction Contractors Board (CCB) for up to four years after certification.

Contractors and subcontractors may elect not to file a public works bond with CCB when working on a public works project for which the total project cost does not exceed \$100,000.

2009

Oregon's prevailing wage rate law is amended to include a provision that a contractor or subcontractor may be debarred (ineligible to receive public works contracts or subcontracts for three years) if BOLI determines the contractor intentionally falsified certified payroll statements.

The bond Notice of Claim deadline is extended from 120 days to 180 days after the person last performed labor or furnished materials. The bond Notice of Claim deadline for fringe benefit claims is extended to 200 days.

Employers are required to pay PWR wages on the employer's regularly established and maintained paydays.

Public agencies are prohibited from entering into an agreement with another state, or a political subdivision of another state, that allows a contractor or subcontractor to pay less than the prevailing rate of wage on a public works project.

The amount of the PWR fee is permanently adjusted to 0.1 percent (one-tenth of one percent) of the contract price, with a minimum fee of \$250 and a maximum fee of \$7,500. The PWR fee is due at the time the Notice of Public Works form is submitted to BOLI.

The requirement for certified payroll reports is amended to include the gross amount of wages *earned* per week, rather than the gross amount of wages *paid* per week, as not all employers pay wages on a weekly basis.

2010

The 2010 Special Legislative Session amends the definition of "public works" so that effective January 1, 2011, the construction or installation of solar radiation devices on publicly-owned property will be subject to the prevailing wage rate laws, regardless of the total project cost or whether funds of a public agency are used on the project.

2011

Oregon's prevailing wage rate law is amended to remove the requirement that BOLI compare state and federal prevailing wage rates and publish information showing which prevailing rate of wage is higher for use on projects subject to both the state PWR law and the federal Davis-Bacon Act.

The required language provisions are modified for projects subject to both Oregon's PWR law and the federal Davis-Bacon Act. For such projects, the specifications and every contract and subcontract must provide that the workers must be paid not less than the higher of the applicable state or federal prevailing rate of wage.

2013

Oregon's prevailing wage rate law is amended to allow a member or manager of a limited liability company that commits certain violations of the PWR regulations to be added to the list of those persons ineligible to receive a public works contract.

The definition of "public works" is amended to include the construction, reconstruction, major renovation or painting of a road, highway, building, structure or improvement of any type that occurs on Oregon University System property or on

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property an institution within the Oregon University System owns, regardless of whether the project uses funds of a public agency.

2015

The definition of "public works" in Oregon's prevailing wage rate law is amended so that a project that uses \$750,000 or more of funds of a public agency for constructing, reconstructing, painting or performing a major renovation on a road, highway, building, structure or improvement of any type will be subject to the prevailing wage rate law, regardless of whether the project is privately owned, or whether the project uses funds of a private entity.

The statutes regarding public universities with governing boards (ORS 352.138) are amended so that the prevailing wage rate law will apply to an agreement under the terms of which a private entity constructs, reconstructs, renovates or paints an improvement on real property owned by a public university with a governing board or by a not-for-profit organization or other entity that a public university with a governing board owns or controls exclusively.

2016

The 2016 Special Legislative Session amends the prevailing wage rate law so that, effective January 1, 2017, a contractor or subcontractor, or an agent of a contractor or subcontractor, may not intentionally:

- Fail to pay an employee the appropriate prevailing wage rate;
- Reduce an employee's regular wage rate to offset the prevailing wage rate;
- Unlawfully withhold, deduct, or divert any portion of an employee's wages;
- Enter into an agreement with an employee under the terms of which the employee performs work on a public works project at less than the prevailing rate of wage; or
- Otherwise deprive an employee, permanently or indefinitely, of prevailing wages due in an amount that equals or exceeds 25 percent of wages due or \$1000 in a single pay period, whichever is greater. single pay period, whichever is greater.

Any intentional violation of the above would constitute a Class C felony for which the Commissioner of the Bureau of Labor and Industries may pursue through a civil action or referral to a district attorney or the Attorney General for prosecution.

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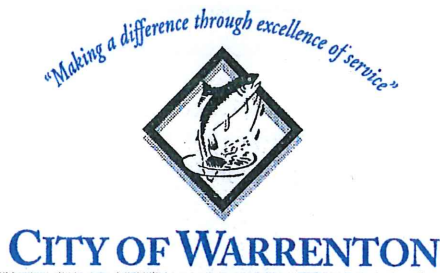
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6-E



AGENDA MEMORANDUM

TO: The Warrenton City Commission
FROM: Linda Engbretson, City Manager *LM E*
DATE: April 11, 2017
SUBJ: Consideration of Request to Join Coalition Challenging the Oregon Biological Opinion

IN SUMMARY

Staff met with Molly Lawrence, Attorney with VanNess Feldman, last week to discuss the challenge to FEMA's implementation of the National Marine Fisheries Services' Biological Opinion for the implementation of the National Flood Insurance Program in the State of Oregon. Ms. Lawrence presented information and a request to Warrenton, as a local jurisdiction highly impacted, that the City considers participation in the coalition challenging the Oregon Biological Opinion. The coalition includes a number of industry associations as well as local jurisdictions.

The coalition intends to file litigation in federal district court to challenge the analysis and conclusions contained in the Oregon NFIP Biological Opinion, and FEMA's proposed implementation of the recommended changes to floodplain development regulations that local jurisdictions must adopt to participate in the National Flood Insurance Program (NFIP). They are requesting a contribution of \$500 to join the

Coalition. I have attached information to provide more detail on the coalition and proposed action.

City Engineer Collin Stelzig will be present to answer any questions.

RECOMMENDATION/SUGGESTED MOTION

“ I move to authorize staff to take the necessary steps to participate in the Coalition Challenging the Oregon Biological Opinion.”

ALTERNATIVE

Other action as deemed appropriate by the City Commission

FISCAL IMPACT

\$500 from Storm Water

March 31, 2017

Linda Engbretson
City Manager
City of Warrenton
225 S Main Ave
Warrenton, OR 97146

Re: Request for Participation in Coalition Challenging the Oregon Biological Opinion

Dear Linda:

Thanks to you and Mayor Mark Kujala for taking the time to meet with me last week to discuss how the implementation of the development code changes recommended in the Oregon NFIP Biological Opinion¹ would affect the City of Warrenton and its residents. As you know, I am legal counsel to a coalition of industry groups, including the Oregon Home Builders Association, the Oregon Association of Realtors, BOMA Oregon, Associated Oregon Industries (AOI), the Oregon Farm Bureau, and the Oregon Concrete and Aggregate Producers Association (collectively, the "Coalition"), who intend to file litigation in federal district court challenging both the analysis and conclusions contained in the Oregon NFIP Biological Opinion, and FEMA's proposed implementation of the Biological Opinion's recommended changes to the floodplain development regulations that local jurisdictions must adopt to participate in the National Flood Insurance Program ("NFIP"). I am attaching the two letters that our Coalition sent to FEMA and NMFS in November 2016, which outline our anticipated legal claims. The Coalition would like the City of Warrenton to join us in this effort.

For the City of Warrenton to participate in the Coalition, we would need a few things. First, the City of Warrenton would need to become a member of the non-profit entity, Oregonians for Floodplain Protection, that the Coalition is currently forming to act as the named plaintiff in the litigation. Each of the organizations and individuals intending to participate in this litigation challenging the Biological Opinion and FEMA's implementation of its recommendations will become members of this new organization. The intention of this format is to enable all members to speak with one voice under one umbrella in the litigation, rather than having numerous, separately named plaintiffs.

¹ *Endangered Species Act ("ESA") Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) "Not Likely to Adversely Affect" Determination for the Implementation of the National Flood Insurance Program in the State of Oregon*, from the National Marine Fisheries Service ("NMFS") to the Federal Emergency Management Agency ("FEMA"), dated April 14, 2016 .

Second, we assume that soon after we file the complaint in federal district court, the Department of Justice (defending FEMA and NMFS) will file a motion to dismiss our complaint for lack of standing. (This is a common procedural maneuver in this type of litigation.) The City of Warrenton would need to provide a declaration that Oregonians for Floodplain Protection could submit as part of our response to that motion to dismiss. That declaration would outline how the City and its residents and businesses would be adversely affected by implementation of the Biological Opinion's recommendations, and identify some of the conservation efforts that the City has been a part of to protect or restore habitat areas for threatened salmon/fish species (e.g., levee setback projects, removal of tide gates, wetland or coastal restoration, etc.).

After that, the City would continue to participate as a member of Oregonians for Floodplain Protection through periodic discussions regarding the status and strategy for the litigation. We would expect the City to maintain its participation at a minimum through the disposition of the case in federal district court. Depending on the outcome in federal district court, members could re-evaluate their participation if the case proceeds to the appellate level (e.g., the Court of Appeals or the Supreme Court).

Other members of the Coalition have agreed to pay the legal fees associated with bringing this litigation. Consequently, we would be looking for only a nominal contribution (\$500) from the City of Warrenton to secure your participation. You would also be able to request a seat on the Board of Directors for Oregonians for Floodplain Protection if you would like.

As I mentioned last week, we would like to file the litigation in April. Please get back to me confirming that the City of Warrenton would like to become a member of Oregonians for Floodplain Protection and to participate in our litigation effort. If you or your Commissioners have any questions or comments as you consider this invitation, please let me know. I will do my best to respond to any questions. Otherwise, thank you in advance for your interest. We look forward to working with you.

Very truly yours,

VAN NESS FELDMAN LLP



Molly A. Lawrence

cc: Mark Kujala, former Mayor of Warrenton



November 23, 2016

Kenneth Murphy
Regional Administrator
FEMA Region 10
130 228th Street SW
Bothell, WA 98021-8627

Re: Notice of Intent to Challenge FEMA's Implementation of the National Marine Fisheries Service's Biological Opinion for the Implementation of the National Flood Insurance Program in the State of Oregon

Dear Administrator Murphy:

We are a coalition of industry associations concerned about the unnecessary over-regulation of floodplain areas within the state of Oregon. The coalition currently includes the Oregon Home Builders Association, the Oregon Association of Realtors, BOMA Oregon, the Association of Oregon Industries, the Oregon Farm Bureau, and the Oregon Concrete and Aggregate Producers Associations (collectively, the "Coalition"). We have reviewed the *Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) 'Not Likely to Adversely Affect' Determination for the Implementation of the National Flood Insurance Program in the State of Oregon* ("Oregon NFIP BiOp" or "BiOp") issued by the National Marine Fisheries Service ("NMFS"), together with the Federal Emergency Management Association's ("FEMA") 60-day notice letter to National Flood Insurance Program ("NFIP") participating communities regarding FEMA's plans to implement the Reasonable and Prudent Alternative ("RPA") set forth in the BiOp. We are writing to inform you of the Coalition's intention to commence a lawsuit challenging both the Oregon NFIP BiOp, as well as any efforts by FEMA to implement the BiOp's RPA. As explained further below, NMFS's analysis and conclusions as set forth in the BiOp are arbitrary and capricious and should be withdrawn. Further, FEMA lacks the authority at this time to enforce any element of the RPA against any local communities in Oregon.

Despite these errors and deficiencies, FEMA has indicated that it intends to implement at least the Interim Measures (RPA Element 2) from the BiOp. Before FEMA may make any changes to its implementation of the NFIP—whether those proposed by NMFS in the BiOp or alternatives proposed by FEMA in response to the BiOp—FEMA *must complete a public review process* wherein the affected jurisdictions and landowners are provided notice and the opportunity to participate in developing any changes to the NFIP. Quite simply, *hundreds* of local jurisdictions and *thousands* of property owners in Oregon will be affected and have the

right to participate and be heard on these fundamental issues. FEMA may not continue to subvert the public processes in considering such dramatic changes to the NFIP.

1. The Oregon NFIP BiOp is Arbitrary and Capricious and, Therefore, Must Be Withdrawn and Consultation Reinitiated.

The Coalition has prepared a letter to NMFS outlining our concerns with the analysis, conclusions and the RPA in the BiOp. *See attached.* As detailed therein, the BiOp is fatally flawed. It begins within an incomplete environmental baseline; fails to analyze the effects of the NFIP against an accurate, current environmental baseline; attributes the effects of all floodplain development over the past century to the NFIP; grossly overestimates the impacts of the NFIP on certain threatened and endangered species and their designated critical habitat in Oregon; and proposes an RPA that does not comply with the regulatory definition and goes far beyond what is necessary or appropriate to address any impacts of the NFIP. As a result, the BiOp and its RPA must be withdrawn and consultation reinitiated.

2. FEMA Lacks the Authority to Implement the Oregon NFIP BiOp's RPA.

Despite the various flaws in the Oregon NFIP BiOp, FEMA Region X's notice letter to NFIP participating jurisdictions states FEMA's intent to implement the RPA set forth in the BiOp, beginning with the Interim Measures set forth in RPA Element 2.¹ FEMA does not have legal authority under the National Flood Insurance Act ("NFIA") to implement each of the elements of the RPA. Even if FEMA did have the authority under the NFIA, FEMA has not yet gone through the requisite processes to enable it to implement or enforce any components of the BiOp's Interim Measures, much less the permanent NFIP changes proposed in RPA Elements 3 and 4.

A. FEMA's Authority Under the NFIA is Limited to Protecting People and Property from Flood Hazards.

FEMA itself has asserted repeatedly throughout this consultation that it lacks the legal authority to implement certain elements of the RPA.² That is because FEMA's authority under the NFIA is limited to protecting people and property from flood hazards and does not include protecting listed species or their habitat.³ Most recently during a hearing before the Committee on Transportation and Infrastructure in the U.S. House of Representatives, Michael Grimm, Assistant Administrator for Mitigation for FEMA, was asked whether FEMA has "the authority

¹ Letter from Mark Carey, Mitigation Division, Fed. Emergency Mgmt. Agency, Region X, to Oregon NFIP Participating Communities (June 13, 2016).

² *E.g.*, Letter from Roy E. Wright, Deputy Assoc. Adm'r for Mitigation, Fed. Ins. and Admin. Ass'n, to William Stelle, Regional Adm'r, Nat'l Marine Fisheries Serv. (May 29, 2014); Letter from Mark Carey, Mitigation Division, Fed. Emergency Mgmt. Agency, Region X, to Kim Kratz, Assistant Reg'l Adm'r, West Coast Region, Nat'l Marine Fisheries Serv. (Jan. 14, 2013); Letter from Mark Carey, Mitigation Division, Nat'l Marine Fisheries Serv., Region X, to Kim Kratz, Assistant Reg'l Adm'r, West Coast Region, Nat'l Marine Fisheries Serv. (June 3, 2015); Letter from Michael Grimm, Assistant Adm'r for Mitigation, Fed. Emergency Mgmt. Agency, to Kim Kratz, Assistant Reg'l Adm'r, West Coast Region, Nat'l Marine Fisheries Serv. (May 4, 2016).

³ 42 U.S.C. §§ 4001-4002; § 4102.

to regulate privately funded development on private land under the NFIP?” Mr. Grimm responded simply, “No.” FEMA has no ability or obligation to implement those provisions of the RPA for which it lacks legal authority.

B. FEMA Cannot Implement the RPA Without First Completing Administrative Procedures Act Rulemaking and National Environmental Policy Act Review.

Despite its lack of authority, FEMA Region X has stated that it intends to implement at least the Interim Measures (RPA Element 2) from the BiOp.⁴ As explained in its “Proposed Action,” FEMA intends to rely on a provision in its existing “Floodplain management criteria for flood-prone areas”, 44 C.F.R. § 60.3(a)(2), as the regulatory hook for enforcing these changes to the NFIP against local communities.⁵ The provision does not, however, provide FEMA the necessary authority to implement the Interim Measures. Instead, the provision requires only that local communities “[r]eview 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 U.S.C. 1334.”⁶ As NMFS has explained to FEMA, there is no “necessary” ESA permit. Specifically, NMFS wrote in the BiOp:

A significant flaw in this aspect of FEMA’s proposed action is the reliance on local entities “complying with the ESA” prior to issuing a floodplain development permit.

While FEMA indicates that ESA section 10(a)(1)(B) permits are that vehicle, they misunderstand how that section of the ESA operates – ESA section 10 permits are not a required permit. The services’ regulations at 50 CFR 222.301 state “any person who desires to obtain permit privileges” for take incidental to an otherwise lawful activity must apply for that permit in accordance with applicable regulatory provisions. *In other words, section 10 permits are elective, not required, and therefore do not appear to fall within the purview of 44 CFR 60.3(a)(2).*⁷

⁴ See Letter from Mark Carey, Mitigation Division Director, Fed. Emergency Mgmt. Agency, Region X to Oregon NFIP Participating Communities (June 13, 2016).

⁵Fed. Emergency Mgmt. Agency, Program Level Biological Assessment for National Floodplain Insurance Program, Oregon State, at 2-40-41 (Feb. 2013).. It is unclear how FEMA reconciles its two inconsistent positions: one, that the NFIA grants FEMA only authority to protect people and property from flood hazards; and two, that FEMA’s existing NFIP implementing regulations can be used as a vehicle to require local governments to demonstrate ESA compliance. If FEMA lacks the authority to change its implementation of the NFIP to protect listed species beyond the bounds of its obligation to protect people and property from flooding, FEMA’s implementing regulations cannot create that authority.

⁶ 44 C.F.R. § 60.3(a)(2) (Emphasis added.)

⁷ Nat’l Oceanic and Atmospheric Admin., Nat’l Marine Fisheries Serv., Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) “Not Likely to Adversely Affect” Determination for the Implementation of the National Flood Insurance Program in the State of Oregon, at 40 (Apr. 14, 2016) [hereinafter “BiOp”].

Moreover, FEMA's reliance on 44 C.F.R. § 60.3(a)(2) to support imposing ESA-based requirements on local jurisdictions amounts to a re-writing of that regulation without first going through the required notice and comment process. FEMA established the existing "Floodplain management criteria for flood-prone areas", 44 C.F.R. § 60.3, in 1976.⁸ In the 30 years prior to NMFS's issuing a biological opinion in Washington regarding the effects of the NFIP on threatened and endangered species and critical habitat in the Puget Sound ("Puget Sound NFIP BiOp")⁹, FEMA never asserted that 44 C.F.R. § 60.3(a)(2) required local communities to demand that project applicants produce an "ESA permit" before issuing a floodplain development permit. The re-interpretation of the NFIP regulations proposed by FEMA to implement the Interim Measures is a legislative rule in interpretive clothing that FEMA may not implement before going through the Administrative Procedure Act's ("APA") notice-and-comment rulemaking.¹⁰ Because FEMA has not yet done so, it may not rely on its reinterpretation of 44 C.F.R. § 60.3(a)(2) as authority to implement the Interim Measures.¹¹

Furthermore, FEMA must also complete review under the National Environmental Policy Act ("NEPA") before it may either reinterpret 44 C.F.R. § 60.3(a)(2) or implement any change to the NFIP in response to the Oregon NFIP BiOp.¹² The programmatic changes triggered by FEMA's de facto revision to 44 C.F.R. § 60.3(a)(2) or any implementation of the Interim Measures *will* significantly change FEMA's implementation of the NFIP in Oregon and *will* significantly affect the human environment.¹³ As a result, NEPA review is required. To date, however, FEMA has made no indication that it intends to complete any NEPA review prior to enforcing the Interim Measures against local jurisdictions.¹⁴ FEMA must identify what changes,

⁸ 41 Fed. Reg. 46975 (Oct. 26, 1976).

⁹ Nat'l Oceanic and Atmospheric Admin., Nat'l Marine Fisheries Serv., Endangered Species Act Section 7 Consultation Final Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the Implementation of the National Flood Insurance Program in the State of Washington, Phase One Document – Puget Sound Region (Sept. 22, 2008) [hereinafter "WA BiOp"].

¹⁰ *Appalachian Power Company v. U.S. Envtl. Prot. Agency*, 208 F.3d 1015, 1024 (D.C.Cir. 2000)(holding that the EPA violated the APA by attempting to avoid notice and comment rulemaking by "labeling a major substantive legal addition to a rule a mere interpretation"); *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166-68 (2012) (where agency announces a new interpretation of an existing regulation after years of silence and/or alternative interpretation, the new interpretation is not entitled to deference); *Alabama Educ. Ass'n v. Chao*, 539 F. Supp. 2d 378, 381 (D.C. Cir. 2008), *clarified on denial of reconsideration*, 595 F. Supp. 2d 93 (D.C. Cir. 2009) (agencies have discretion to interpret their own regulations; however, if an agency changes its interpretation, such an interpretation is not entitled to deference unless the change is accompanied by reasoned analysis).

¹¹ 5 U.S.C. § 553. FEMA would be required as part of any notice and comment rulemaking to identify the source of its statutory authority for any new regulation.

¹² 42 U.S.C. § 4332(2)(C); *San Luis & Delta-Mendoza Water Authority v. Jewell*, 747 F.3d 581, 640-41 (9th Cir. 2014). Notably, FEMA did complete NEPA review when it originally created the NFIP minimum floodplain development criteria. U.S. Dep't of Housing and Urban Dev., Fed. Ins. Admin., Office of Flood Ins., Final Environmental Impact Statement, Revised Floodplain Management Regulations of the National Flood Insurance Program (Sept. 1976). FEMA also has begun a Programmatic EIS regarding the NFIP, but there has been no apparent activity since May 2014. Docket ID: FEMA-2010-0065.

¹³ *Jewell*, 747 F.3d at 653.

¹⁴ FEMA, NMFS and the Oregon State Department of Conservation and Land Development ("DCLD") held a series of public open houses to explain the Oregon NFIP BiOp and Interim Measures, but provided no formal process for public participation—either through rulemaking or NEPA review—to weigh in regarding the proposed changes to the implementation of the NFIP. DCLD is currently hosting work groups to evaluate the Interim Measures, but those meetings are not FEMA meetings, they are not open to the public at large and they do not qualify as public comment opportunities.

if any, it is proposing to make to the NFIP in response to the BiOp and go through the required processes to adopt those changes before it may attempt to enforce any such change against any Oregon jurisdiction. Until FEMA has completed these steps—both formal notice and comment rulemaking and NEPA review—it does not have the authority to threaten, much less suspend, any local governments' participation in the NFIP for failure to implement any changes to the NFIP.

In sum, the Oregon NFIP BiOp is fatally flawed and we believe will be invalidated upon challenge. Even were the BiOp valid, we agree with FEMA that FEMA lacks the authority under the NFIA to implement the RPA. Finally, even if FEMA had the authority under the NFIA to implement the RPA, FEMA has not yet taken the necessary procedural steps to authorize enforcement of *any* changes to the implementation of the NFIP in Oregon. FEMA should decline to take any further action to implement the RPA and should instead reinstitute consultation and engage those affected – including local governments and property owners – in the consultation process.

3. To the Extent FEMA Continues to Explore Changes to the NFIP in Response to the BiOp, FEMA Must Work with Local Communities and Property Owners to Develop Appropriate Standards that Recognize Differences in Existing Floodplain Conditions and State and Local Regulations.

To the extent FEMA ignores the forewarnings set forth above regarding the BiOp and FEMA's authority to implement the RPA, the Coalition requests that FEMA revise its approach to responding to the RPA, particularly the Interim Measures, as explained below.

A. FEMA is Not Obligated to Accept NMFS's Proposed RPA.

FEMA should depart from the proposed Interim Measures in the BiOp and instead adopt a different reasonable alternative. As you know from FEMA's experience in the Puget Sound, the mere fact that NMFS suggests an RPA in a biological opinion is not a mandate that FEMA conform to that RPA. Put simply, FEMA is not obligated to implement the RPA as presented by NMFS. A Secretary can depart from the suggestions of a biological opinion, and so long as he or she takes "alternative, reasonably adequate steps to ensure the continued existing of any endangered or threatened species," no ESA violation occurs.¹⁵ In this case, there are compelling reasons to depart from the proposed Interim Measures. The BiOp entirely ignores all existing state and local regulations and programs aimed at protecting and restoring endangered species and critical habitat, significantly exaggerates the effects of the NFIP on listed species and critical habitat, and depends on FEMA exercising legal authority that FEMA has plainly stated it does not have.

¹⁵ *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988). So long as FEMA's alternatives steps are not demonstrated to be arbitrary and capricious, they will be upheld in a subsequent challenge. *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, No. C11-2004-RSM, 2014 WL 5449859, at *27, *38 (W.D.Wa. Oct. 24, 2014) (holding that the petitioner must demonstrate that FEMA's implementation was an abuse of discretion, arbitrary or capricious, or not in accordance with the law).

B. NMFS Has Repeatedly Acknowledged Varying Floodplain Conditions Yet RPA Element 2 Imposes One-Size Fits All Protections.

FEMA should not attempt to impose uniform standards on Oregon floodplains in response to the Interim Measures or any other portion of the RPA. The Interim Measures contain one-sized fits all development restrictions that entirely fail to account for existing conditions. The same 170-foot Riparian Buffer Zone, use restrictions, and mitigation requirements apply irrespective of the actual physical conditions in the floodplain.¹⁶ As a result, as was the case in the Puget Sound NFIP BiOp, the Oregon NFIP BiOp and RPA overestimate the impacts of floodplain development and the necessary degree of mitigation. As FEMA well knows, it is unwarranted to treat already developed floodplain areas in Portland, Eugene or Springfield the same as undeveloped natural floodplain areas like those along the headwaters of Willowa or John Day River.

In contrast to the Interim Measures, prior comments from NMFS evidence NMFS's understanding and agreement that not all floodplains provide equivalent habitat value. For example, as part of implementing the Puget Sound BiOp in Washington, NMFS conceded that many floodplains in the Puget Sound area were already degraded, and that the intent of the Puget Sound RPAs was only to avoid further degradation of that existing baseline. In one letter, NMFS wrote:

The RPA was written as a programmatic consultation that applies to the entire geographic region, and the applicability of each element of the RPA may vary from place to place since differing jurisdictions have differing floodplain conditions and requirements. . . . [S]ome components of the RPA may not apply to every jurisdiction, because in some jurisdictions the floodplain no longer contains essential habitat features.¹⁷

In a subsequent letter, NMFS wrote:

NMFS understands that many Puget Sound floodplain areas are already developed to the point of providing *de minimis* habitat values. In those situations jurisdictions must maintain the residual habitat functions. Although NMFS encourages restoration of floodplain functions to promote the recovery of listed salmonids, restoration of previously developed areas is generally beyond the scope of the RPA unless part of a programmatic approach to mitigating unavoidable adverse effects.¹⁸

¹⁶ BiOp, *supra* note 7, at 278-80.

¹⁷ Letter from William Stelle, Jr., Reg'l Adm'r, Nat'l Marine Fisheries Serv., to Kenneth Murphy, Reg'l Adm'r, Fed. Emergency Mgmt. Agency (Sept.26, 2011).

¹⁸ Letter from William Stelle, Jr., Reg'l Adm'r, Nat'l Marine Fisheries Serv., to Kenneth Murphy, Reg'l Adm'r, Fed. Emergency Mgmt. Agency (Feb. 3, 2012). While NMFS may express its dissatisfaction with FEMA's implementation of the RPAs from the Puget Sound NFIP BiOp, to our knowledge NMFS has not withdrawn these letter interpretations.

In fact, in contrast to the uniform development restrictions enumerated in RPA Element 2, the BiOp also acknowledges that the intent of the Interim Measures is “to ensure that *existing natural floodplain functions* are *maintained* pending full RPA implementation.”¹⁹ In light of this, it would be arbitrary and capricious for FEMA to attempt to impose one-size-fits-all standards on Oregon floodplains in response to the Interim Measures or any other portion of the RPA. To the extent any change to the NFIP is appropriate (which the BiOp fails to establish and that FEMA has questioned throughout), those changes must be limited to protecting existing functions, not assuming and then protecting non-existent habitat.

C. FEMA Must Listen to and Work with Local Jurisdictions and Property Owners to Develop Measures (if any) that Recognize Existing Floodplain Conditions and Respect Oregon Law.

FEMA’s strategy to date for implementing the Interim Measures has relied entirely on state and local conformance. Numerous jurisdictions have already expressed their resistance to the Interim Measures based on their unanswered concerns regarding the effects on their communities. We urge FEMA to work with the Oregon Department of Land Conservation and Development, the affected local cities and counties, *and the affected land owners* to develop workable strategies to address concerns regarding the impacts of development within the floodplain on listed species and their designated critical habitat. As FEMA knows, the State of Oregon and each of the cities and counties within the state, as well as individual property owners, are currently subject to liability under Section 9 of the ESA if they “take” an endangered species.²⁰ As a result, the State and many cities and counties have already taken and continue to take significant steps to address impacts to listed species and their habitat through their own laws, regulations and programs. While NMFS has arbitrarily opted to ignore those laws, regulations and programs in its review of the NFIP’s effects on listed species and designated critical habitat, FEMA should not continue that mistake. Rather than adopting NMFS’s one-size-fits-all approach, FEMA must work with each local jurisdiction and their constituents to determine what regulatory changes are appropriate, if any, based on local knowledge of the environment and potential effects. Again, in Washington, NMFS acknowledged this as the appropriate approach: “NMFS believes it is contingent upon local governments to determine which functions are in their floodplains, and how they will maintain and restore floodplain functions.”²¹

Ultimately, FEMA could both meet its legal obligations under the APA and NEPA, and consider local conditions, by initiating rulemaking and NEPA review regarding any proposals to implement the Interim Measures or any alternatives. These formal processes would enable all potentially affected people and jurisdictions to participate in developing any changes to the local floodplain development regulations.

¹⁹ BiOp, *supra* note 7 (emphasis added). *See also* Letter from City of Portland to William Stelle, Jr., Reg’l Adm’r, Nat’l Marine Fisheries Serv. (Apr. 9, 2015) (raising need for the RPA to treat build out/developed floodplains differently than intact/less developed floodplains).

²⁰ 16 U.S.C. § 1538. Notably, the Coalition entirely rejects FEMA’s assertion in the Proposed Action that any ESA based review or approval is triggered by the “potential for take.” *See* BiOp, *supra* note 7 at 2-40.

²¹ Letter from William Stelle, Jr., Reg’l Adm’r, Nat’l Marine Fisheries Serv., to Kenneth Murphy, Reg’l Adm’r, Fed. Emergency Mgmt. Agency (Sept. 26, 2011); *see also* Letter from Katherine D. Sullivan, Under Secretary of Commerce for Oceans and Atmosphere, to Ron Wyden, United States Senate (Oct. 17, 2014).

This process would also allow FEMA to evaluate how any changes to the NFIP would affect existing Oregon state and local statutes and regulations. At this point, FEMA and NMFS have both failed to address the conflicts inherent between certain Oregon laws and the directives of the RPA. For example, under Oregon Measure 49, a local government is obligated to compensate a property owner where it imposes development restrictions that limit certain uses of property. Implementation of the Interim Measures as proposed by NMFS places local governments in the untenable position of either continuing to participate in the NFIP and potentially paying out millions in Measure 49 claims, or withdrawing from the NFIP.²² As FEMA well knows, because of the NFIP's mandatory flood insurance purchase requirement, NFIP participation is not purely voluntary. FEMA has a responsibility to identify a path forward that will enable local governments to stay on the "right" side of both the NFIP and existing state and local laws and regulations.

The Coalition acknowledges the difficult position in which FEMA finds itself. It is unacceptable, however, for FEMA to attempt to pass the responsibility for addressing the BiOp's findings on to local jurisdictions and property owners without engaging us in a meaningful and substantive opportunity to shape the outcome. Because FEMA has failed to take those required steps before beginning efforts to implement the Interim Measures, FEMA's actions are arbitrary and capricious and beyond its authority. Unless FEMA redirects its efforts to challenging many of the underlying errors in the BiOp's analysis and discontinues threats against local governments for failure to comply with the bogus Interim Measures, the Coalition will bring an action to stop FEMA's efforts to implement the RPA beginning with the Interim Measures. We would welcome the chance to meet with FEMA and identify thoughtful and lawful plans for addressing NMFS's BiOp.

Very truly yours,

Oregon Homebuilders



Jon Chandler, CEO


Oregon Association of Realtors



Jenny Pakula, General Counsel & VP Business Development

²² See Letter from John A. Kitzhaber, Oregon Governor to William Stelle, Jr., Reg'l Adm'r, Nat'l Marine Fisheries Serv. (Aug. 26, 2014).

BOMA Oregon



Susan Steward, Executive Director

Oregon Concrete and Aggregate Producers Association



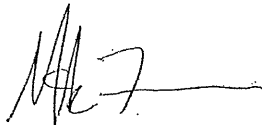
Richard Angstrom, President

Oregon Farm Bureau



David Dillion, Executive Vice President

Association of Oregon Industries



Mike Freese, Vice President

cc: Congressman Peter DeFazio
Congressman Jeffrey Merkley
Congressman Roy Wyden
Congressman Kurt Schrader
Congresswoman Suzanne Bonamici
Congressman Greg Walden
Penny Pritzker, Secretary of Commerce
Eileen Sobeck, Assistant Administrator for Fisheries, NOAA Fisheries
Barry Thom, West Coast Regional Administrator, NOAA Fisheries
Jim Rue, Director, Oregon DLCDC
Christine Shirley, Natural Hazards and Floodplain Specialist, Oregon DLCDC
Mike McArthur, Executive Director, Association of Oregon Counties
Mike McCauley, Executive Director, League of Oregon Cities
Sandra McDonough, President & CEO, Portland Business Alliance
Mark Landauer, Executive Director, Oregon Public Ports Association
Kristin Meira, Pacific Northwest Waterways Association



November 23, 2016

Penny Pritzker
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230

Eileen Sobeck
Assistant Administrator for Fisheries
NOAA Fisheries
1315 East-West Highway
Silver Spring, MD 20910

Barry Thom
West Coast Regional Administrator
NOAA Fisheries
1201 NE Lloyd Blvd., Suite 1100
Portland, OR 97232

Re: Sixty-Day Notice of Intent to Sue Relating to the Biological Opinion Issued for the Oregon National Flood Insurance Program (April 14, 2016)

Dear Secretary Pritzker, Assistant Administrator Sobeck, and Regional Administrator Thom:

The Oregon Home Builders, the Oregon Association of Realtors, BOMA Oregon, the Association of Oregon Industries, the Oregon Farm Bureau, and the Oregon Concrete and Aggregate Producers Association (collectively, the "Coalition") submit this letter to notify you of the Coalition's intent to sue the National Marine Fisheries Service ("NMFS") regarding the *Endangered Species Act ("ESA") Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) "Not Likely to Adversely Affect" Determination for the Implementation of the National Flood Insurance Program in the State of Oregon ("BiOp")*. The Coalition provides this 60-day notice letter pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g), insofar as it may apply.

Background

On April 14, 2016, NMFS issued the BiOp, which concludes that the Federal Emergency Management Agency's ("FEMA") operation of the National Flood Insurance Program ("NFIP") in Oregon violates the ESA by allowing and encouraging floodplain development that

jeopardizes the continued existence of certain ESA-listed anadromous fish species and Southern Resident killer whales, and results in the destruction or adverse modification of critical habitat for the fish species. The BiOp includes a “Reasonable and Prudent Alternative” (“RPA”) that directs FEMA to make unprecedented changes to implementation of the NFIP, including its floodplain mapping program and minimum floodplain regulatory criteria, which, if adopted, will affect all 22,000 NFIP participating jurisdictions and millions of property owners across the United States. In particular, the RPA directs FEMA to amend the NFIP implementing regulations to expand the areas mapped as floodplain, including mapping entirely new areas that have never previously been considered part of the floodplain, and to prohibit nearly all development in many mapped areas (except open space, low-intensity recreational activities, habitat restoration projects, and very limited water dependent uses). In all other floodplain areas, the RPA directs FEMA to prohibit all development unless it will have no adverse effect or a net beneficial effect on floodplain habitat. Further, while FEMA is pursuing implementation of these amendments to the NFIP regulations, the RPA directs FEMA to implement a series of “Interim Measures.” These Interim Measures would impose “one-size-fits-all” development restrictions on floodplains in Oregon irrespective of existing conditions and without the public engagement that is requisite before implementing such dramatic regulatory changes.

The BiOp and RPA are arbitrary and capricious, and contrary to law and applicable regulatory requirements. As a result of the numerous defects detailed below, the Coalition intends to sue to invalidate the BiOp unless NMFS immediately withdraws the BiOp and reinitiates consultation in a manner that addresses the concerns raised herein.

ESA Violations

1. The BiOp Fails to Include Several Required Components in the Baseline.

The BiOp is arbitrary and capricious and inconsistent with the ESA because the description of the baseline is incomplete. Without the correct environmental baseline, the entire BiOp analysis is flawed.¹ The baseline must reflect actual current conditions and is intended to be a snapshot in time of the status of the “present environment in which the species or critical habitat exists.”² NMFS must incorporate certain factors into the environmental baseline, including “the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.”³ Although the description of the baseline in the BiOp acknowledges these factors, it provides little or no analysis of how each of these factors has contributed to baseline conditions. Without any attempt to quantitatively or qualitatively describe the contributions to the baseline from these factors, the baseline is incomplete and erroneous.

¹ *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008)(“Any proposed agency action must be evaluated in the context [sic] of this baseline in order to properly determine whether the proposed actions will jeopardize the listed fishes.”)

² Interagency Cooperation; Endangered Species Act of 1973, 48 Fed. Reg. 29,990, 29,994 (1983)); *see also San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 1008 (9th Cir. 2014); *Nat. Res. Def. Council v. Rodgers*, 381 F. Supp. 2d 1212, 1229 (E.D. Cal. 2005).

³ 50 C.F.R. § 402.02.

One example of this error is the BiOp's failure to include any discussion of the impacts of existing state and local laws and regulations as part of the baseline. It is well established that the baseline must account for existing regulations and statutes.⁴ Although the BiOp acknowledges the existence of myriad state and local regulations,⁵ and a later section of the BiOp notes that aspects of the environmental baseline have improved due to these existing environmental regulations and land management practices,⁶ such regulations are neither mentioned nor evaluated in the description of the baseline. The Coalition acknowledges NMFS's decision not to include existing state and local laws and regulations as part of FEMA's proposed action,⁷ but that does not alleviate the requirement that NMFS include state and local laws and regulations in the environmental baseline. Because NMFS failed to do so, the environmental baseline is incomplete and inaccurate.

Another example of this error is the BiOp's treatment of other federal actions that have previously undergone Section 7 consultation. The description of the baseline lists a number of other consultations that have occurred in Oregon, but fails to explain how those other consultations have contributed to baseline conditions.⁸ For example, the baseline description states that NMFS considered the U.S. Environmental Protection Agency's ("EPA") consultations on the reregistration of certain pesticides,⁹ but does not attempt to quantify the impact of such consultations, including any changes to pesticide use that may be occurring as a result. Simply listing past consultations and federal actions is insufficient. Because the baseline lacks any details on the impacts of each of these other federal actions, and particularly how they have affected activities in the floodplain, NMFS fails to isolate the impacts that result from the NFIP and falsely attributes what should be baseline conditions to the NFIP.

2. The Effects Analysis Includes Numerous Errors and Consequently Significantly Overstates the Effects of the NFIP on Listed Species and Designated Critical Habitat.

A. The BiOp Erroneously Attributes Baseline Conditions to the Effects of the NFIP.

Although the baseline section of the BiOp acknowledges the varied and often degraded existing conditions of the Oregon's floodplains¹⁰, NMFS impermissibly fails to properly account for these existing conditions within the effects analysis. Rather than beginning from existing conditions, NMFS conducted the effects analysis by assuming a pre-development, pristine

⁴ See *Friends of East Fork, Inc. v. Thom*, 688 F. Supp. 2d 1245 (W.D. Wa. 2010); *Swan View Coal. v. Barbouletos*, No. CV 06-73-M-DWM, 2008 WL 5682094 (D. Mont. June 13, 2008), *enforcement granted*, 639 F. Supp. 2d 1187 (D. Mont. 2009), and *aff'd in part*, 348 F. App'x 295 (9th Cir. 2009).

⁵ Nat'l Oceanic and Atmospheric Admin., Nat'l Marine Fisheries Serv., Endangered Species Act (ESA) Section 7(a)(2) Jeopardy and Destruction or Adverse Modification of Critical Habitat Biological Opinion and Section 7(a)(2) "Not Likely to Adversely Affect" Determination for the Implementation of the National Flood Insurance Program in the State of Oregon, 27-29 (Apr. 14, 2016) [hereinafter ("BiOp")].

⁶ BiOp *supra* note 5, at 268.

⁷ BiOp *supra* note 5, at 29.

⁸ BiOp *supra* note 5, at 132-35.

⁹ BiOp *supra* note 5, at 133-134.

¹⁰ BiOp *supra* note 5, at 121-138.

floodplain habitat, then identifying all impacts that could potentially occur from development of that pristine environment, and attributing all of those potential impacts to the NFIP. The effects analysis, however, may not be conducted without reference to the actual baseline conditions of the habitat and the species.¹¹ The effects of the NFIP must be analyzed in their actual current context.¹²

NMFS's flawed approach leads to several errors in the effects analysis. First, by assuming in the effects analysis that all floodplain areas are undeveloped, the BiOp fails to differentiate between the effects of redevelopment on an already developed floodplain and the effects associated with development of an unaltered floodplain. In fact – as the baseline section of the BiOp explains – many floodplains in Oregon are already altered, many significantly. The impacts of redevelopment of an already developed floodplain are not the same as the impacts that occur when development begins on unaltered floodplains.¹³ Because NMFS failed to incorporate the current variations in conditions of Oregon floodplains into its effects analysis, and instead focused exclusively on impacts to pristine floodplains, the analysis overstates the effects of the NFIP.

Second, by evaluating the impacts of the NFIP under the false premise that all floodplains were unaltered prior to the proposed action, NMFS also improperly attributed the existing degraded habitat conditions to the NFIP. Properly evaluating the effects of the action in the context of the baseline is meant to allow NMFS to isolate the impacts of the proposed action from already existing conditions.¹⁴ The effects of the project or program are limited to “future direct and indirect impacts of the operation over the new license or contract period.”¹⁵ By failing to begin the effects analysis from the current baseline conditions, the BiOp improperly attributes effects of past activities, including seemingly all floodplain development over the past century, to the proposed action.¹⁶ Much of the altered floodplain conditions that NMFS attributes to the

¹¹ See *Nat'l Wildlife Fed'n.*, 524 F.3d at 929.

¹² *Id.* at 930; see also *ALCOA v. Bonneville Power Admin.*, 175 F.3d 1156, 1162 n. 6 (9th Cir.1999) (requiring NMFS to consider the effects of its actions “within the context of other existing human activities that impact the listed species”).

¹³ NMFS acknowledged this during implementation of the NFIP BiOp in the Puget Sound region:

NMFS understands that many Puget Sound floodplain areas are already developed to the point of providing *de minimis* habitat values. In those situations jurisdictions must maintain the residual habitat functions. Although NMFS encourages restoration of floodplain functions to promote the recovery of listed salmonids, restoration of previously developed areas is generally beyond the scope of the RPA unless part of a programmatic approach to mitigating unavoidable adverse effects.

Letter from William Stelle, Jr., Reg'l Adm'r, Nat'l Marine Fisheries Serv., to Kenneth Murphy, Reg'l Adm'r, Fed. Emergency Mgmt. Agency (Feb. 3, 2012).

¹⁴ The baseline must include “[t]he total effects of all past activities . . .” U.S. FISH & WILDLIFE SERV. AND NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK, PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT, 4-30 (Mar. 1998) [hereinafter (“ESA Handbook”)].

¹⁵ *Id.*

¹⁶ See *Nat'l Wildlife Fed'n.*, 524 F.3d at 930-31 (citations omitted) (explaining that current existence of dams must be included in environmental baseline and finding that proposed action must be evaluated in context of the baseline) (emphasis added); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1261 (E.D. Cal. 2010) (same; also noting that “BiOp itself discussed Englebright’s prevention of future migration as part of the analysis of the ‘effects of the action,’ rather than as part of the baseline, distinguishing these future effects

NFIP pre-dates the beginning of this consultation—and even the application of the NFIP to Oregon—and thus should have been included in the baseline, not the effects of the proposed action.¹⁷

B. The BiOp Erroneously Attributes All Floodplain Development to the NFIP.

In addition to this error in the baseline used in the effects analysis, the BiOp also fails to isolate the effects of the NFIP on floodplain development, and consequently which portion of the effects of floodplain development may be attributed to the NFIP. The BiOp is fatally flawed because it provides no analysis of what floodplain development is caused by or results from the NFIP and what floodplain development would occur irrespective of the NFIP. Instead of first determining what, if any, floodplain development is caused by the NFIP and then analyzing the effects of that development on listed species and designated critical habitat, the BiOp conducts the effects analysis assuming 100% of floodplain development is attributable to the NFIP. The BiOp's effects analysis provides a recitation of impacts of floodplain development in general,¹⁸ asserts that the NFIP will cause floodplain development,¹⁹ and then attributes all impacts from floodplain development to the NFIP.²⁰ This is a backwards approach to the effects of analysis.

Significant floodplain development pre-dates the NFIP. Further, absent the NFIP, floodplain development may still be financed by non-federally related financial intermediaries.²¹ Only that floodplain development that results from or is caused by the NFIP may be included in the proposed action.

C. The BiOp Fails to Connect the NFIP to Any Particular Impacts to Listed Species or Designated Critical Habitat.

The BiOp makes no effort to identify the specific effects of floodplain development that may be attributable to the NFIP. The effects analysis does not analyze the physical, biological, and hydrological effects of the NFIP itself on listed species or their critical habitat. Instead, for each species, NMFS includes boilerplate language regarding effects of the action—e.g., “the proposed action is likely to cause a decrease in abundance, productivity, spatial structure, and diversity” of the species in the action area.²² The evidence fails to support these assertions, and the BiOp fails to explain how particular aspects of the NFIP will cause these effects. For example, the effects analysis for the Southern Resident Killer whale relies upon the purported future extinction of the ESA-listed Chinook salmon species in the action area without identifying

from past effects on migration”) (emphasis in original); *see also In re Operation of Missouri River Sys. Litig.*, 421 F.3d 618, 632 (8th Cir. 2005).

¹⁷ *Locke*, 776 F.3d at 1008 (“This baseline is intended to form a basic ‘snapshot’ of the status of the species at a particular moment in time before the action is taken.”); *Rodgers*, 381 F. Supp. 2d at 1212, n. 30 (“[T]he environmental baseline is a ‘snapshot in time,’ which allows agencies to understand existing conditions before they consider the effects of a proposed action on those conditions.”)

¹⁸ *See generally* BiOp, *supra* note 5, at 146-163.

¹⁹ *See generally* BiOp, *supra* note 5, at 163-209.

²⁰ BiOp, *supra* note 5, at 141.

²¹ *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1157 (W.D. Wash. 2004).

²² BiOp *supra* note 5, at 221.

evidence or providing a rational explanation for how the NFIP will result in such a drastic loss.²³ The critical habitat effects analysis suffers from the same defects—it identifies purported general effects without any evidence or analysis of location, magnitude or significance on primary constituent elements and includes effects that are not caused by the NFIP.

D. The BiOp Fails to Establish that the Proposed Action Causes Jeopardy or Adverse Modification.

Biological opinions must include a summary of the information upon which the opinion is based, a “detailed discussion of the effects of the action on listed species or critical habitat,” and an opinion as to “whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat”²⁴ The BiOp must determine whether the proposed action, along with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.²⁵ NMFS fails to demonstrate that FEMA’s implementation of the NFIP is likely to cause jeopardy or adverse modification.

NMFS’s jeopardy determination lacks evidentiary support and is arbitrary and capricious. To jeopardize a species, the agency action must cause some deterioration in the species’ pre-action condition.²⁶ NMFS has explained that jeopardy generally results from actions that are “likely to result in significant adverse effects throughout the species’ range.”²⁷ These adverse effects must cause a “considerable or material reduction in the likelihood of survival and recovery” of the species.²⁸ NMFS fails to demonstrate that the 17 species will be jeopardized by FEMA’s proposed action. While the BiOp notes several general “weaknesses” associated with FEMA’s implementation of the NFIP,²⁹ NMFS provides no evidence or analysis regarding the magnitude of any loss or degradation of aquatic systems, the species populations’ ability to tolerate any such impacts, or how any impacts will considerably or materially reduce the likelihood of survival or recovery.³⁰ Absent this evidence and analysis, NMFS’s conclusory statements regarding generalized effects purportedly attributable to NFIP implementation do not provide the requisite basis necessary to support its jeopardy conclusion.

Similarly, NMFS’s determination that the NFIP causes destruction or adverse modification to designated critical habitat also lacks evidentiary support and is arbitrary and

²³ *E.g.*, BiOp *supra* note 5, at 247 (noting that annual reduction in prey availability is “small” and the percentage reduction in prey abundance is “not anticipated to be different from zero by multiple decimal places”).

²⁴ 50 C.F.R. § 402.14(h); *see also* *Defs. of Wildlife v. U.S. Dep’t of Navy*, 733 F.3d 1106, 1112 (11th Cir. 2013); *Nat’l Parks Conservation Ass’n v. U.S. Dep’t of Interior*, 46 F. Supp. 3d 1254, 1333 (M.D. Fla. 2014)(subsequent history omitted).

²⁵ 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.02,402.12(g)(4).

²⁶ *Nat’l Wildlife Fed’n*, 524 F.3d at 930.

²⁷ ESA Handbook, *supra* note 14, at 4-36.

²⁸ *Oceana, Inc. v. Pritzker*, 125 F. Supp. 3d 232, 239 (D.C. Cir.. 2015) (upholding NMFS’s interpretation of “reduce appreciably”).

²⁹ BiOp, *supra* note 5, at 267.

³⁰ *S. Yuba River Citizens League*, 723 F. Supp. at 1269; *Nat’l Wildlife Fed’n*, 524 F.3d at 936 (NMFS could not make jeopardy conclusion without knowing “in-river survival levels necessary to support recovery” and “at what point survival and recovery will be placed at risk” by habitat degradation).

capricious.³¹ NMFS's longstanding interpretation of "appreciably diminish" requires the proposed action to "considerably reduce the capability of designated . . . critical habitat to satisfy requirements essential to both the survival and recovery of a listed species."³² Further, it is not adverse modification if portions of critical habitat would be degraded or altered when all critical habitat elements would remain functional.³³ In the BiOp, NMFS concludes that "adverse effects from the proposed action will negatively affect the quality, quantity, and function of multiple PCEs at the watershed scale, across all watersheds to a greater or lesser degree, with the overall effect of diminishing conservation values at the designation scale for affected critical habitats."³⁴ The evidence fails, however, to demonstrate that any adverse effects will "considerably reduce" the value of critical habitat.³⁵ On the contrary, the BiOp notes that some habitat aspects have improved in the last 30 to 40 years, and that many watersheds have PCEs that are in good to excellent condition.³⁶ Since the NFIP has only been in effect in Oregon since the late 1970s (at the earliest), this could actually signal that the NFIP has assisted in improving conditions, rather than degrading habitat. Accordingly, NMFS has failed to provide the requisite basis for the BiOp's conclusion that FEMA's implementation of the NFIP destroys or adversely modifies critical habitat.

In sum, by starting the effects analysis with a false premise of a pristine, unaltered floodplain as the environmental baseline rather than current conditions, the BiOp both overstates the effects of the floodplain development on current conditions, and erroneously attributes 100% of floodplain degradation to the NFIP. Moreover, by failing to isolate the floodplain development caused by the NFIP or to analyze the specific effects of that development on listed species or their designated critical habitat, furthers this error and significantly overstates the effects of the NFIP.

³¹ Similar to the jeopardy analysis, NMFS's adverse modification analysis is also flawed because it relies upon an erroneous determination of the environmental baseline and effects of the action, which improperly attributes historic effects and conditions to FEMA's proposed implementation of the NFIP.

³² ESA Handbook, *supra* note 14, at 4-36. NMFS recently opined that "considerably" means "'worthy of consideration' and is another way of stating that we can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of critical habitat." *Definition of Destruction or Adverse Modification of Critical Habitat*, 81 Fed. Reg. 7214, 7218 (Feb. 11, 2016). NMFS's interpretation conflates "appreciably" with any "perceptible effect," which courts have rejected as producing irrational results. *E.g., Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1208 (E.D. Cal. 2008).

³³ *E.g., Conservation Congress v. U.S. Forest Serv.*, 720 F.3d 1048, 1057 (9th Cir. 2013) (upholding no adverse modification when portion of critical habitat would be degraded but no reduction in functionality); *Rock Creek Alliance v. U.S. Fish & Wildlife Serv.*, 663 F.3d 439, 442 (9th Cir. 2011) (upholding no adverse modification when all critical habitat elements would remain functional, although at a lower functional level).

³⁴ BiOp, *supra* note 5, at 270.

³⁵ While NMFS provides a general recitation of potential effects of the proposed action to critical habitat, there is no evidence or analysis of the magnitude of any effects, the scope or location of effects in relation to human development or existing habitat conditions, or how any diminishment will impact functionality of the critical habitat or its value for the conservation of the affected species.

³⁶ BiOp *supra* note 5, at 114-120, 268.

3. The BiOp Fails to Use the Best Available Science.

In fulfilling the Section 7 consultation requirements, NMFS is required to use the best scientific and commercial data available.³⁷ While NMFS is not required to conduct independent studies, “[t]he best available data requirement merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.”³⁸ Here, NMFS failed to consider existing scientific and commercial data. One example of this is NMFS’s repeated assertion that floodplain development will impact habitat by promoting the runoff of pollutants such as herbicides and pesticides.³⁹ However, the best available data demonstrate that concentrations of pesticides are not exceeding aquatic life criteria.⁴⁰ Similarly, NMFS identifies forestry as one of the activities contributing to a limiting factor for several listed species,⁴¹ but NMFS cites no authority for the proposition. To the contrary, there is abundant evidence that modern forest practices are not impairing aquatic life.⁴² These are only a few examples of the pattern that plagues the entire effects analysis. By failing to consider the best available scientific and commercial data available, the BiOp fails to meet the requirements of the ESA.

4. The Reasonable and Prudent Alternative Is Arbitrary and Capricious and Not In Accordance with the Law and Relevant Regulatory Requirements.

Building on the flaws and inadequacies of the BiOp’s analysis and conclusions, the RPA is similarly erroneous. An RPA must meet four basic criteria to be considered a “reasonable and prudent alternative.” An RPA must be: (1) capable of being implemented in a manner consistent with the intended purpose of the action, (2) capable of being implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction, (3) be economically and

³⁷ 16 U.S.C. § 1536(a)(2); *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (The purpose of the best available data requirement is to “ensure that the ESA [will] not be implemented haphazardly, on the basis of speculation or surmise.”)

³⁸ *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006) (quotation omitted); *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (agency “cannot ignore available biological information”).

³⁹ See, e.g., BiOp, *supra* note 5, at 146, 150, 246.

⁴⁰ See, e.g., USGS/Eugene Water and Electric Board, *Reconnaissance of Land-Use Sources of Pesticides in Drinking Water, McKenzie River, Oregon* (2012). This study involved twice yearly sampling from various sites in the lower McKenzie River basin from 2002 through 2010. The samples were tested for 175 compounds (including a large number of herbicides, insecticides, and fungicides) and found no significant detections of any pesticide compounds.

⁴¹ See, e.g., BiOp, *supra* note 5, at 58, 59, 62, 64, 66, 76, 79, 82, 84, 230, 231, 234.

⁴² Oregon State University is the home of the Watersheds Research Cooperative, which has conducted “[t]hree paired watershed studies of unprecedented scope” analyzing “the environmental effects caused by contemporary forest management activities at a watershed scale.” WATERSHEDS RESEARCH COOPERATIVE, <http://www.watershedsresearch.org> (last visited Nov. 16, 2016). These studies have repeatedly found that modern forest practices have virtually eliminated negative environmental impacts due to logging. See, e.g., Douglas S. Batemen et al., *Effects of Stream-Adjacent Logging in Fishless Headwaters on Downstream Coastal Cutthroat Trout*, *Can. J. Fish. Aquat. Sci.* 73: 1-16 (2016) (finding that “logging did not have significant effects on the coastal cutthroat trout population for the duration of the sample period.”); Kevin D. Bladon, et. al., *A Catchment-Scale Assessment of Stream Temperature Response to Contemporary Forest Harvesting in the Oregon Coast Range*, 379 *Forest Ecology and Management* 153-164 (2016) (finding that “[t]here was no evidence that the (a) 7-day moving mean of daily maximum stream temperature, (b) mean daily stream temperature, or (c) diel stream temperature changed in the study stream reaches following contemporary forest harvesting practices,” and that “current harvesting practices have improved protection for stream water temperatures.”)

technologically feasible, and (4) be an alternative to the proposed action that NMFS believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.⁴³ The RPA included in the BiOp fails to meet at least three of these criteria: it is unable to be implemented within the scope of FEMA's authority, it is not economically and technically feasible, and NMFS fails to explain how it would avoid jeopardy or adverse modification.

A. The RPA Cannot Be Implemented Consistent with the Scope of FEMA's Authority.

1. *FEMA's Authority is Limited to Protecting People and Property from Flood Hazards.*

The RPA's proposed changes to the NFIP's mapping and regulatory programs are beyond the scope of FEMA's authority under the National Flood Insurance Act ("NFIA"). The ESA, a later-enacted statute, does not operate to amend the NFIA or add additional statutory authority.⁴⁴ Although the ESA directs agencies to "utilize their authorities" to carry out the ESA's objectives, it does not *expand* the powers conferred on an agency by its enabling act.⁴⁵ FEMA has no ability or obligation to implement those provisions of the RPA for which it lacks legal authority.

FEMA, through three separate letters sent to NMFS and numerous meetings and calls over the course of the consultation, explained that the RPA adopted in the BiOp is not within its authority.⁴⁶ Most recently during a hearing before the Committee on Transportation and Infrastructure in the U.S. House of Representatives, Michael Grimm, Assistant Administrator for Mitigation for FEMA, was asked whether FEMA has "the authority to regulate privately funded development on private land under the NFIP?" Mr. Grimm responded simply, "No."

Ignoring FEMA's steady assertions, the BiOp nevertheless proclaims that FEMA has the authority to implement the RPA. NMFS does not have the expertise to make such a judgment, and NMFS cannot override or ignore FEMA's interpretation of its own enabling statute.⁴⁷ Indeed, NMFS's own guidance documents declare that NMFS is to defer to FEMA regarding FEMA's interpretation of its authority. The ESA Handbook recognizes that action agencies are "the only ones who can determine if an alternative is within their legal authority and jurisdiction

⁴³ 50 C.F.R. § 402.02; *see also San Luis & Delta-Mendota Water Auth. v. Salazar*, 666 F. Supp. 2d 1137, 1145 (E.D. Cal. 2009).

⁴⁴ *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007).

⁴⁵ *See Platte River Whooping Crane Critical Habitat Maint. Trust v. F.E.R.C.*, 962 F.2d 27 (D.C. Cir. 1992); *see also Am. Forest and Paper Ass'n v. U.S. Evtl. Prot. Agency*, 137 F.3d 291, 299 (5th Cir.1998) ("the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their existing authority in a particular direction"); *Evtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509-10 (9th Cir. 1995).

⁴⁶ Letter from Roy E. Wright, Deputy Assoc. Adm'r, Federal Insurance and Mitigation Admin., Fed. Emergency Mgmt. Agency, to William Stelle, Reg'l Adm'r, Nat'l Marine Fisheries Serv. (May 29, 2014); Letter from Mark Carey, Director, Fed. Emergency Mgmt. Agency, to Kim Kratz, Assistant Reg'l Adm'r, Nat'l Marine Fisheries Serv. (Jan. 14, 2015); Letter from Mark Carey, Director, Fed. Emergency Mgmt. Agency, to Kim Kratz, Assistant Reg'l Adm'r, Nat'l Marine Fisheries Serv. (June 3, 2015).

⁴⁷ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.")

...⁴⁸ NMFS and USFWS' prior approaches to RPAs demonstrate deference to the action agency regarding the scope of the agency's authority. Both agencies have revised RPAs in final biological opinions to align with the action agency's understanding of its authority.⁴⁹ Here, NMFS opted to ignore FEMA's statements regarding its authority, and press its own agenda.

FEMA's concerns in its letters are valid. The statutory authority conferred upon FEMA by the NFIA does not authorize FEMA to take action for the purpose of protecting animal and plant species. The scope and purpose of the NFIA is limited to protecting people and property from flood hazards. No provision under the NFIA (including 42 U.S.C. §§ 4001-4002, which set forth the purpose of the NFIA; 4101-4101c, which set forth FEMA's mapping obligations; or 42 U.S.C. § 4102, which establishes the boundaries for the NFIP's minimum criteria for land development) authorizes⁵⁰ FEMA to adopt measures for the benefit of threatened and endangered species with disregard for the primary purposes of the NFIA—avoidance of flood damage and flood losses.⁵¹ Although NMFS attempts to insulate the RPA by stating that it will also provide corollary flood protection benefits for people and property, NMFS's proposed development restrictions go far beyond what is necessary to achieve the NFIP's purpose and intent.⁵² As FEMA has explained, the NFIA does not permit FEMA to limit or prohibit all floodplain development. Instead, the NFIA limits FEMA to development restrictions that are "necessary" and "practicable" to protect people and property from flood damages and loss.⁵³ In many cases, implementation of the RPA would require actions antithetical to protecting people and property from floods.

NMFS cites several historical studies and reports that discuss the "natural and beneficial functions of floodplains" in the context of the NFIA. NMFS's attempt to rely on these materials ignores the simple fact that the only provision in the NFIA that mentions "natural and beneficial floodplain functions" is the community rating system ("CRS").⁵⁴ The CRS, however, is a program of *voluntary* additional measures that may be undertaken by local communities. This CRS provision may not be used to expand FEMA's authority to encompass adoption of mandatory development restrictions for protection of threatened and endangered species. Even if the "natural and beneficial floodplain functions" language from the CRS applied across the

⁴⁸ ESA Handbook, *supra* note 14, at 4-43.

⁴⁹ See, e.g., *Sw. Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 518 (9th Cir.1998) (explaining that USFWS revised a draft RPA after Bureau of Reclamation indicated that it lacked discretion to take measures required by the RPA).

⁵⁰ NMFS asserts that the NFIA gives FEMA broad discretion in developing the federal floodplain management standards, citing 42 U.S.C. § 4002(b) and 42 U.S.C. § 4102. In making this argument, NMFS conflates the concept of "discretion" for purposes of triggering the requirement to consult under 50 C.F.R. § 402.03, with the concept of "authority" which is a required component of an RPA under 50 C.F.R. § 402.02. This is apparent from NMFS's misplaced reliance on *Nat'l Wildlife Fed'n*, 345 F. Supp. 2d at 1173-74 and *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1142 (11th Cir. 2008), both of which determined that FEMA's proposed action was discretionary, and therefore, subject to the consultation requirement under 50 C.F.R. § 402.03. If, however, "discretion" were the same as "authority", there would be no reason to list "authority" as one of the criteria for a valid RPA. Based on canons of statutory construction, "authority" must require a separate analysis to support an RPA.

⁵¹ See, e.g., *Nat'l Ass'n of Home Builders*, 551 U.S. at 671 ("Nothing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application.")

⁵² BiOp, *supra* note 5, at 306.

⁵³ 42 U.S.C. §§ 4001(e), 4102(c).

⁵⁴ 42 U.S.C. § 4022(b).

NFIA—which it does not—the consideration of “natural and beneficial floodplain functions” is not equivalent to consideration of endangered and threatened species. As used in the NFIA, the term “natural and beneficial floodplain functions” means:

(A) the functions associated with the natural or relatively undisturbed floodplain that (i) moderate flooding, retain flood waters, reduce erosion and sedimentation, and mitigate the effect of waves and storm surge from storms, *and (ii) reduce flood related damage*; and

(B) ancillary beneficial functions, including maintenance of water quality and recharge of ground water, *that reduce flood related damage*.⁵⁵

Even this definition incorporates the requirement of flood damage prevention. It demonstrates that there is only limited overlap between “natural and beneficial functions” as used in the NFIA and the concerns raised by NMFS in the BiOp.

Further, NMFS reads 42 U.S.C. § 4102(c)(4), which provides FEMA with authority to guide development to “otherwise improve the long-range land management and use of flood-prone areas,” as authorizing FEMA to change the NFIP to incorporate ESA concerns. NMFS takes this phrase out of its proper context to reach this stretched interpretation, in violation of basic tenants of statutory construction: “where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated.”⁵⁶ The three provisions in 42 U.S.C. § 4102(c) preceding this final “catch all” all relate exclusively to reducing flood risk and damage and do not encompass endangered species consideration.⁵⁷

Also, although 42 U.S.C. § 4024 requires FEMA to coordinate the NFIP with other programs, neither NMFS nor the ESA are mentioned. Instead, the requirement to coordinate is limited to agencies having responsibility for flood control, flood forecasting, or flood damage prevention in order to assure that the programs of such agencies and the NFIP are mutually consistent.

2. *RPA Elements 2, 4 and 5 Depend on the Actions by Third Parties Who Were Not Participants in the Consultation.*

RPA Elements 2, 4, and 5 are also invalid because they rely on acts by third parties. As the courts have previously declared, FEMA has no land use authority and issues no permits.⁵⁸ For the RPA to affect the outcome NMFS intends, cities and counties in Oregon (and throughout the United States) will need to adopt the changes into their local development codes. Because participation in the NFIP is voluntary, adoption of such measures by local governments is also voluntary. FEMA can change its regulations, but unless/until local governments adopt those

⁵⁵42 U.S.C. § 4121(12) (emphasis added).

⁵⁶ *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980); *Wa. Dep't of Social Servs. v. Keffeler*, 537 U.S. 371, 384 (2003).

⁵⁷ 42 U.S.C. § 4102(c)(1)-(3).

⁵⁸ *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, No. C11-2004-RSM, 2014 WL 5449859, at *20 (W.D. Wa. Oct. 24, 2014).

changes through their own local regulations, the RPA will have no effect. As the ESA Handbook explains, where corrective action depends on the actions of third parties who were not party to the consultation, the proposed measure is not an RPA.⁵⁹

3. *NMFS Cannot Rely on a Scheme to Implement RPA Element 2 that NMFS Has Stated is Invalid and Outside FEMA's Existing Authority.*

FEMA's ability to implement the Interim Measures depends on FEMA relying on a legal theory that NMFS expressly denounced in the BiOp. In explaining its proposed action in the *Program Level Biological Assessment from the National Flood Insurance Program in Oregon*, FEMA asserted that 44 C.F.R. § 60.3(a)(2) authorizes it to require local governments to compel applicants to demonstrate ESA compliance prior to issuing a floodplain permit.⁶⁰ FEMA now intends to use the same basis to authorize implementing RPA Element 2 *before* FEMA completes rulemaking or National Environmental Policy Act ("NEPA") review. Contrary to FEMA's current interpretation, 44 C.F.R. § 60.3(a)(2) requires only that local communities "[r]eview 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 U.S.C. 1334."⁶¹

In the BiOp, NMFS plainly denounced FEMA's proposed reliance on 44 C.F.R. § 60.3(a)(2) to authorize implementing any of the changes called for by the RPA. NMFS wrote:

A significant flaw in this aspect of FEMA's proposed action is the reliance on local entities "complying with the ESA" prior to issuing a floodplain development permit.

While FEMA indicates that ESA section 10(a)(1)(B) permits are that vehicle, they misunderstand how that section of the ESA operates – ESA section 10 permits are not a required permit. The services' regulations at 50 CFR 222.301 state "any person who desires to obtain permit privileges" for take incidental to an otherwise lawful activity must apply for that permit in accordance with applicable regulatory provisions. *In other words, section 10 permits are elective, not required, and therefore do not appear to fall within the purview of 44 CFR 60.3(a)(2).*⁶²

Having rejected FEMA's proposed reliance on 44 C.F.R. § 60.3(a)(2) as part of FEMA's proposed action, NMFS can hardly now depend on that same interpretation as providing FEMA authority to require local governments to implement the Interim Measures. Instead, FEMA would need to complete rulemaking to require local governments to implement RPA Element 2.

⁵⁹ ESA Handbook, *supra* note 14, at 4-44.

⁶⁰ Fed. Emergency Mgmt. Agency, Program Level Biological Assessment for National Floodplain Insurance Program, Oregon State, at 2-40-41 (Feb. 2013).

⁶¹ 44 C.F.R. § 60.3(a)(2) (emphasis added).

⁶² BiOp, *supra* note 5, at 40 (emphasis added).

Because FEMA cannot realistically complete the necessary notice and comment rulemaking process and attendant NEPA review by the March 15, 2018 “deadline” established in the BiOp, implementing RPA Element 2 as proposed is practically impossible. This legal and practical impossibility renders the RPA arbitrary and capricious.

B. The RPA Is Not Technically and Economically Feasible.

The RPA also fails because it is not technically and economically feasible.⁶³ The requirement that the RPA be economically and technologically feasible requires that the action agency have the resources and technology necessary to implement the RPA.⁶⁴ This requires “analysis of whether the corrective measures required by an RPA can be implemented from a purely budgetary perspective.”⁶⁵

NMFS’s analysis of economic feasibility of the RPA amounts to a heavily skewed cost-benefit analysis that fails to consider FEMA’s budget. The BiOp contains no evidence or indication that NMFS analyzed the actual costs of implementing the RPA or FEMA’s ability to bear those costs. NMFS was required to determine that FEMA has the resources and technology necessary to implement the RPA.⁶⁶

Again, as FEMA explained to NMFS throughout the consultation process, FEMA does not have the budgetary resources to implement the substantive elements of the RPA.⁶⁷ NMFS should have deferred to FEMA’s judgment that the RPA is not economically feasible.

As one example, RPA Element 3 would require FEMA to significantly revise its floodplain mapping program, including replacing its current steady-state mapping protocols with more elaborate modelling techniques (e.g., multi-dimensional and unsteady-state models), and mapping areas that FEMA until now has not modelled (e.g., erosion zones, channel migration zones).⁶⁸ As of December 2015, since the inception of the NFIP in 1968, FEMA has invested approximately \$7 billion (adjusted to 2012 dollars) in floodplain mapping *nationwide*.⁶⁹ The cost to maintain accurate and up-to-date flood maps using a *steady-state only* model ranges from \$116 million to \$275 million annually. This does not include the additional costs for more elaborate mapping techniques proposed in RPA Element 3. Further, the Technical Mapping

⁶³ 50 C.F.R. § 402.02; *see also Bennett*, 520 U.S. at 177 (“economic consequences are an explicit concern of the ESA ...”).

⁶⁴ *See In re: Operation of the Missouri River Sys. Litig.*, 363 F. Supp. 2d 1145, 1161 (D. Minn. 2004).

⁶⁵ *In Re Consolidated Salmonid Cases*, 791 F. Supp. 2d 802, 921 (E.D. Cal. 2011).

⁶⁶ *See In re: Operation of the Missouri River Sys. Litig.*, 363 F.Supp.2d at 1161.

⁶⁷ Letter from Roy E. Wright, Deputy Assoc. Adm’r, Federal Ins. and Mitigation Admin., Fed. Emergency Mgmt. Agency, to William Stelle, Reg’l Adm’r, Nat’l Marine Fisheries Serv. (May 29, 2014); Letter from Mark Carey, Director, Fed. Emergency Mgmt. Agency, to Kim Kratz, Assistant Reg’l Adm’r, Nat’l Marine Fisheries Serv. (Jan. 14, 2015); Letter from Mark Carey, Director, Fed. Emergency Mgmt. Agency, to Kim Kratz, Assistant Reg’l Adm’r, Nat’l Marine Fisheries Serv. (June 3, 2015).

⁶⁸ BiOp, *supra* note 5, 282-83.

⁶⁹ Technical Mapping Advisory Council, *TMAC Annual Report*, 4-100 (Dec. 2015), https://www.fema.gov/media-library-data/1454954097105a94df962a0cce0eef5f84c0e2c814a1f/TMAC_2015_Annual_Report.pdf [hereinafter (“TMAC Report”)].

Advisory Council⁷⁰ has estimated the cost to incorporate future conditions risk assessments in map revisions—which is only one piece of what NMFS calls for in RPA Element 3—at between \$4 billion and \$7 billion nationwide. This is in abrupt contrast to FEMA’s actual budget. As NMFS acknowledges in the BiOp, “FEMA had about one million dollars of discretionary funding in 2012 for all of Region X (Alaska, Washington, Idaho, Oregon), which would fund approximately 1½ watersheds.”⁷¹

Further, based on the National Hydrographic Dataset, there are 3.5 million miles of streams in the nation. Currently, only 1.2 million miles have flood maps. As of December 2015, Oregon had between 10,000 and 20,000 miles of unknown river that still need to be mapped.⁷² This figure does not include the additional erosion zones that NMFS states FEMA must map under RPA Element 3. Although the BiOp indicates it would cost approximately \$300/mile to complete the floodplain mapping suggested in the RPA, this significantly underestimates the actual cost, which is between \$1,500–\$2,500 per mile of river and \$3,000–\$4,000 per linear mile of coastline.⁷³

Finally, the NFIP incurred substantial debt to help affected homeowners who maintained flood insurance coverage. Because of these natural disasters, the NFIP was \$23 billion in debt as of December 31, 2014. NMFS appears to have entirely failed to consider the costs of its proposed mapping protocols in light of actual mapping costs and FEMA’s budgetary constraints.

RPA Elements 2 and 4, which would require changes to the minimum floodplain development criteria, are similarly flawed. The BiOp contains no evidence that NMFS considered the costs to FEMA of implementing either the Interim Measures (RPA Element 2) or the substantial permanent regulatory changes proposed in RPA Element 4. Further, while ordinarily it might have been acceptable for NMFS to consider only the costs to FEMA of changing its regulations (something which NMFS failed even to do), in this case implementation of RPA Elements 2 and 4 depends on more than 250 NFIP participating communities in Oregon adopting FEMA’s revised program into their own regulations. This will require each local jurisdiction to go through a separate public rulemaking process to amend its existing flood hazard regulations at significant cost. Because the efficacy of the RPA depends on the adoption by local governments, the costs to local governments must be considered when evaluating the economic feasibility of the RPA.

Ultimately, there is no evidence that NMFS analyzed whether the changes proposed by the RPA were within the budgetary means of either FEMA or the NFIP participating communities. Without any evidence that NMFS considered the financial feasibility of its proposed mandates, the RPA is arbitrary and capricious.

⁷⁰ The Technical Mapping Advisory Council is a federal advisory committee established to review and make recommendations to FEMA on matters related to the national flood mapping program authorized under the *Biggert-Waters Flood Insurance Reform Act of 2012*.

⁷¹ BiOp *supra* note 5, at 17.

⁷² TMAC Report, *supra* note 69, at 4-106.

⁷³ TMAC Report, *supra* note 69, at 4-102.

C. The BiOp Fails to Explain How the RPA Avoids Jeopardy or Adverse Modification.

NMFS also failed to explain how the RPA “would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.”⁷⁴ First, the BiOp makes no distinction between whether the RPA is intended to address jeopardy to the species or adverse modification to critical habitat. Second, the BiOp contains no evidence or explanation for how the RPA will address the underlying effects causing jeopardy and adverse modification for each particular species and each critical habitat designation.

Further, the RPA establishes a “no net loss” standard for floodplain functions.⁷⁵ Nowhere in the BiOp or RPA does NMFS explain or provide data supporting the broad and uniform imposition of a “no net loss” standard. The imposition of “no net loss” goes well beyond what is necessary to avoid jeopardy or adverse modification.

While NMFS has flexibility in the identification of an RPA, and is not required to propose the least restrictive alternative, the RPA is still limited to those measures necessary to satisfy the ESA’s jeopardy and adverse modification standards. NMFS failed to demonstrate that the avoidance or mitigation of any adverse impacts to the species or critical habitat is necessary to prevent jeopardy or adverse modification.⁷⁶ Even if such a standard were appropriate in some instances/environments, NMFS also failed to demonstrate that such requirements are uniformly necessary throughout the action area, and uniformly necessary for all the implicated species and critical habitat, when floodplain functions vary by location and degree of existing development.⁷⁷ Finally, NMFS failed to provide a “thorough explanation” of how the RPA, and its component elements, would avoid jeopardy and adverse modification.⁷⁸

Absent evidence or analysis demonstrating that the RPA meets the regulatory criteria for a reasonable and prudent alternative, the RPA is arbitrary and capricious.

D. NMFS Should Withdraw the BiOp and Reinitiate Consultation to Develop a Defensible BiOp.

Finally, since issuing the RPA in April, NMFS has held a number of meetings and calls with FEMA and the Oregon Department of Land Conservation and Development to explain to local governments and property owners the meaning and effect of the Interim Measures. At those meetings, NMFS has routinely described the RPA as less restrictive than it appears in

⁷⁴ 50 C.F.R. § 402.02; 16 U.S.C. § 1536(b)(4)(A).

⁷⁵ BiOp, *supra* note 5, at 278-79, 290.

⁷⁶ *E.g., Butte Envtl. Council v. U.S. Army Corps of Eng’rs*, 620 F.3d 936, 948 (9th Cir. 2010) (“An area of a species’ critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species’ survival or recovery”).

⁷⁷ For example, RPA Element 4 recognizes that there could be different conditions, but RPA Element 2 imposes uniform compensatory storage and 170 foot riparian buffer zones with use restrictions irrespective of existing conditions.

⁷⁸ ESA Handbook, *supra* note 14, at 4-43; *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 635 (9th Cir. 2014).

writing in the BiOp. For example, nothing in subsections A or B of RPA Element 2 suggests that floodplain redevelopment proposals would not be subject to the prescriptive standards as written. Yet during meetings, NMFS has suggested that redevelopment that creates any net benefit as compared to existing conditions would be permissible.

The Coalition acknowledges and appreciates NMFS's efforts to be responsive to feedback and local conditions. However, NMFS must align the words in the BiOp with its in-person interpretations because FEMA, local communities, and property owners will be held to the language on the page, not the less restrictive interpretation stated by NMFS staff in-person. Furthermore, the gap between the written words in the BiOp and NMFS's oral explanations and interpretations demonstrates that NMFS itself does not believe the extremely restrictive provisions written in the BiOp are in fact necessary to achieve its ESA goal. This gap demonstrates the arbitrary and capricious nature of the RPA as issued.

Conclusion

Thank you for considering this notice. We request that NMFS withdraw the BiOp and reinstate consultation to address the myriad defects identified in this letter. We welcome the opportunity to work with NMFS and FEMA to identify approaches that work within the bounds of FEMA's authority and budget, and existing state and local programs aimed at recovering endangered species and their habitat. If you have any questions regarding this notice, please do not hesitate to contact the undersigned.

Very truly yours,

Oregon Homebuilders



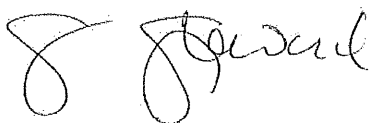
Jon Chandler, CEO

Oregon Association of Realtors



Jenny Pakula, General Counsel & VP Business Development

BOMA Oregon



Susan Steward, Executive Director

Oregon Concrete and Aggregate Producers Association



Richard Angstrom, President

Oregon Farm Bureau



David Dillion, Executive Vice President

Association of Oregon Industries



Mike Freese, Vice President

cc: Congressman Peter DeFazio
Congressman Jeffrey Merkley
Congressman Roy Wyden
Congressman Kurt Schrader
Congresswoman Suzanne Bonamici
Congressman Greg Walden
Mark Carey, Mitigation Director, FEMA Region X
Kenneth Murphy, Regional Administrator, FEMA Region X
Jim Rue, Director, Oregon DLCD
Christine Shirley, Natural Hazards and Floodplain Specialist, Oregon DLCD
Mike McArthur, Executive Director, Association of Oregon Counties
Mike McCauley, Executive Director, League of Oregon Cities
Sandra McDonough, President & CEO, Portland Business Alliance
Mark Landauer, Executive Director, Oregon Public Ports Association
Kristin Meira, Pacific Northwest Waterways Association


6-F

"Making a difference through excellence of service"



CITY OF WARRENTON

AGENDA MEMORANDUM

TO: The Warrenton City Commission
FROM: Skip Urling, Community Development Director 
DATE: For the Agenda of April 11, 2017
SUBJ: Public Hearing: Code Amendment to Allow Multifamily Development as a Conditional Use in the C-1 General Commercial Zoning District

SUMMARY

In an effort to loosen up the housing market, the City Commission asked the Planning Commission to consider and make a recommendation to amend the Development Code to allow multifamily development in the General Commercial zoning district as a conditional use.

The Planning Commission held a public hearing March 9th and received limited but positive testimony supporting the proposed amendment. AT the end of the hearing, the Planning Commission voted unanimously to recommend to the City Commission to make the code amendment. The Planning Commission staff report and proposed ordinance effecting the amendment are attached.

RECOMMENDATION/SUGGESTED MOTION

Based on the findings and recommendation of the Planning Commission, I move to approve the first reading, by title only, of Ordinance No. 1211-A amending Warrenton Municipal Code 16.40.030 Conditional Uses, to allow

multifamily housing development as a conditional use in the General Commercial zoning district.

ALTERNATIVE

None recommended

FISCAL IMPACT

None.

Approved by City Manager:



All supporting documentation, i.e., maps, exhibits, etc., must be attached to this memorandum.

"Making a difference through excellence of service"



CITY OF WARRENTON

March 2, 2017

To: Warrenton Planning Commission

From: Skip Urling, Community Development Director

Re: Proposed Code Amendment to Warrenton Municipal Code (WMC) 16.40.030.B to add Multifamily Housing Development as a Conditional Use in the C-1 General Commercial Zoning District outside the Highway 101 corridor.

In an effort to increase the opportunity for the provision of housing in an increasingly tight market, staff proposes an amendment to the C-1 General Commercial zoning district to allow multifamily housing as a conditional use in all areas other than the C-1 territory along the Highway 101 corridor. The suggestion originally came from the development community. Included in the proposed ordinance with the addition of allowing multifamily housing as a conditional use is a reference that such applications meet the development standards spelled out expressly in the Residential High Density district code (WMC 16.36), or other pertaining code sections referred to therein.

Statutory 35-day notice to the Department of Land Conservation and Development was sent January 11, 2017 and The Columbia Press published notice of the planning commission public hearing February 24, 2017.

FINDINGS

A. Conformance with applicable state statutes.

ORS 197 governs comprehensive land use planning in Oregon. In the mid-oughts, multifamily housing was permitted outright in the C-1 zone until the code was amended to remove them. Staff is not aware of any statute that would prevent multifamily development in the general commercial zone.

B. Conformance with statewide planning goals.

Nineteen statewide planning goals define the content of local government planning in Oregon. Most of these have no applicability to the proposal.

Goal 1, the citizen involvement goal, establishes a requirement for public participation and input in the planning process. The City's existing procedures for notice and hearing comply with goal 1. The proposed amendment does not alter this procedure.

Goal 2 reads as follows:

To establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.

Proposed text amendments are consistent with part 1 of goal 2, quoted above, because the amendments rely on the City's established policies and frameworks. These findings are sufficient to provide an adequate factual basis for the City's decision on this proposal. Part 2 of goal 2, dealing with exceptions to statewide planning goals, is not applicable to this proposal, because an exception is neither proposed nor required.

Goal 3, Agricultural Lands , is not applicable to the proposal because it affects only rural lands, not urban lands.

Goal 4, Forest Lands , is not applicable to the proposal because it affects only rural lands, not urban lands.

Goal 5 addresses Natural Resources, Scenic and Historic Areas, and Open Spaces :

To protect natural resources and conserve scenic and historic areas and open spaces.

A long list of natural resources is covered under goal 5, including non-estuarine wetlands. The amendment package does not change the City's goal 5 policies or implementation measures. Any goal 5 resources present on a commercially-zoned development site in Warrenton are subject to the same protection under the proposed amendments as they are currently. The proposed development code text amendments do not require analysis under the goal 5 administrative rules because the amendments do not affect a goal 5 resource.

Goal 6 is To maintain and improve the quality of the air, water and land resources of the state.

The amendment package does not alter the City's planning and implementation approach to goal 6. Various types of commercial uses are currently permitted in the General Commercial zoning district; this proposal would merely expand the list. It will not affect the city's efforts to continue to comply with Goal 6 of maintaining and improving these resources.

Goal 7, Areas Subject to Natural Disasters and Hazards, reads as follows: To protect people and property from natural hazards. The proposed text change will only allow multifamily development in the general commercial zoning district by conditional use. It will not increase

the risks presented by potential natural hazards. Development will be reviewed for the proposed use similarly to the review conducted for any currently permitted use.

Goal 8 addresses recreational needs. The proposed text amendments do not expand or hinder opportunities for recreational facilities in the General Commercial zone. Only commercial recreational uses are permitted in the C-1 district. The proposed amendment will not affect those opportunities except through market choice.

Goal 9 is Economic Development:

To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens.

The proposal is to allow multifamily development in the general commercial zoning district by conditional use permit only. The scrutiny provided by the conditional use permit review process will serve to evaluate such development proposals and the potential effects they would have on the opportunities otherwise presented by a particular site for economic activities as compared to the need for additional housing.

Goal 10, Housing, is To provide for the housing needs of citizens of the state. Goal 10 requires the City to provide an adequate supply of buildable land for its 20-year projected housing needs. The proposed development code text amendments will potentially provide additional housing opportunities if any development proposals can pass the conditional use permit test.

Goal 11 is primarily concerned with the provision of water and sewer services, though transportation facilities are also addressed here (but more comprehensively under goal 12). Proposed amendments do not address public facilities and services covered under goal 11; nor do the amendments change the way goal 11 is implemented in Warrenton. In cases where a potential development site comes up under the proposed amendments, and all requisite facilities are not available, it would be the developer's responsibility to provide the necessary improvements.

Goal 12 is the Transportation goal. The city's Transportation System Plan (TSP) is the principal instrument for implementing goal 12 in Warrenton. Compared to other allowed uses in the General Commercial zone, multifamily developments generate relatively fewer vehicle traffic volumes.

Goal 13 is the Energy goal. The proposed amendments do not change or hamper the City's goal 13 implementation measures. Any new multifamily development built in Warrenton will meet current code standards for energy conservation.

Goal 14 is Urbanization. It addresses urbanization, urban growth boundaries, unincorporated communities, and rural industrial areas. Proposed amendments deal with development in an existing urban area. The text amendment, and any subsequent multifamily development resulting from issuance of a conditional use permit will not change the City's compliance with goal 14 topics.

Goal 15 concerns the Willamette River Greenway, and is not applicable in Warrenton.

Goal 16 addresses Estuarine Resources. The City's General Commercial zone is not in an area covered by goal 16, nor would the proposed amendments allow any development in goal 16 waters. Goal 16 is not applicable to the proposal.

Goal 17, Coastal Shorelands, reads as follows:

To conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelands, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics. The management of these shoreland areas shall be compatible with the characteristics of the adjacent coastal waters; and To reduce the hazard to human life and property, and the adverse effects upon water quality and fish and wildlife habitat, resulting from the use and enjoyment of Oregon's coastal shorelands.

Proposed text development code amendments do not change the coastal shoreland boundary in Warrenton, nor do they allow non-compliant uses in coastal shorelands areas. The proposed amendment will not affect any coastal shorelands.

Goal 18, Beaches and Dunes, reads as follows:

To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and to reduce the hazard to human life and property from natural or man-induced actions associated with these areas.

Proposed text development code amendments do not change the extent of beach and dune areas in Warrenton, nor do they allow non-compliant uses in coastal beach or dune areas. There are no beach or dune areas zoned general commercial.

Goal 19 is Ocean Resources. There are no General Commercial zone areas in the goal 19 planning area.

C. Conformance with the City's comprehensive plan.

The comprehensive plan summary of future land needs concludes in Section 3.280 that “there is a need for additional multifamily units and some other types of units that are potentially more affordable to those with lower or moderate incomes....” It further concludes that “the housing market cannot be expected to meet the projected housing needs of Warrenton residents alone, particularly for people with very low incomes. A variety of strategies can be implemented by the City in partnership with non-profit and for profit developers and others to encourage the development of housing in price ranges and types that would be affordable to a wider range of residents. “Although not specifically identified in the strategies section, allowing multifamily development in the C-1 zone by conditional use is a strategy that would help fulfill the need identified in the conclusion quoted above. We find it notable that a policy in section 3.310 identifies” new single family attached, multifamily, and mixed use housing may be allowed in some of the city's commercial zones. Residential densities in these commercial zones may not exceed those in a High Density Residential district.”

Section 3.320 Commercial Lands discusses the various types of commercial zoning districts and their purposes, and discusses generally the forecast commercial developments along the highway corridor. There is no discussion of not allowing multifamily developments in the general commercial zone.

D. Changed circumstances or further studies justifying the amendment.

It is broadly acknowledged that there is a housing shortage across the spectrum of income levels along the north coast of Oregon. Various causes for this situation have been discussed, including an increase in service employment in the tourism industry, the proliferation of second homes which removes the units from the long-term housing market, and an increase in vacation homes which become income properties for the owners and also remove the units from the long-term rental market.

CONCLUSIONS

Allowing multifamily development in the general commercial zone as a conditional use would provide additional properties for the potential development of housing which would contribute to a solution to the current problem. A safeguard is built into the measure because of the additional scrutiny such applications receive during the development review process. Rather than merely evaluating the proposal's consistency with the applicable development standards, the application would have to meet the six conditional use review criteria: That the proposed use is in conformance with the Comprehensive Plan. The location, size, design and operating characteristics of the proposed use are such that the development will be compatible with, and

have a minimal impact on, surrounding properties. The use will not generate excessive traffic, when compared to traffic generated by uses permitted outright, and adjacent streets have the capacity to accommodate the traffic generated. Public facilities and services are adequate to accommodate the proposed use. The site's physical characteristics, in terms of topography, soils and other pertinent considerations, are appropriate for the use. And, the site has an adequate area to accommodate the proposed use. The site layout has been designed to provide for appropriate access points, on-site drives, public areas, loading areas, storage facilities, setbacks and buffers, utilities or other facilities which are required by City ordinances or desired by the applicant.

The proposal is consistent with the applicable state planning goals, would help to fulfill the goals and policies of the city comprehensive plan, and help fill a growing need on the north coast. Staff believes the proposed amendment warrant approval.

Suggested motion:

I move to forward draft Ordinance No. 1121-A allowing multifamily developments a conditional use in the C-1 General Commercial zoning district to the City Commission for review and approval.

Ordinance No. 1211-A

An Ordinance Amending Warrenton Municipal Code (WMC) 16.40.030 Conditional Uses to allow Multifamily housing development as a conditional use.

The City of Warrenton ordains as follows:

Section 1. WMC 16.040.030 is hereby amended as follows:

16.40.030 Conditional Uses.

The following uses and their accessory use may be permitted in the C-1 zone when approved under Chapter 16.220 and shall comply with Sections 16.40.040 through 16.40.060 and Chapters 16.124 (Landscaping) and 16.212 (Site Design Review):

A. Only the following uses and their accessory uses are permitted along Highway 101, SE Marlin and SW Dolphin Avenues, and shall comply with the above noted sections and Chapter 16.132:

1. Cabinet, carpenter, woodworking or sheet metal shops.
2. Processing uses such as bottling plants, bakeries and commercial laundries.
3. Research and development establishments.
4. Wholesale storage and distribution facilities, including cold storage.
5. RV park.
6. Similar uses as those stated in this section.

B. The following uses and their accessory uses are permitted in all other C-1 zoned areas within the City limits of Warrenton:

1. Cabinet, carpenter, woodworking or sheet metal shops.
2. Building contractor shops, including plumbing, electrical and HVAC.
3. Fuel oil distributor.
4. Processing uses such as bottling plants, bakeries and commercial laundries.
5. Research and development establishments.
6. Wholesale storage and distribution facilities, including cold storage.
7. Veterinary clinic, kennels.
8. Tool and equipment rental.
9. Mini-warehouses or similar storage uses.
10. Church, synagogue, or other place of worship.
11. Commercial uses with 2nd floor residential use(s) [apartment(s)].

6-6

"Making a difference through excellence of service"



CITY OF WARRENTON

AGENDA MEMORANDUM

TO: The Warrenton City Commission
FROM: Linda Engbretson, City Manager *LE*
DATE: April 11, 2017
SUBJ: Consideration of Request From Commissioner Newton to Adopt
Resolution of Inclusivity

SUMMARY

Commissioner Newton provided the attached draft Resolution of Inclusivity and requested it be on the Agenda for your discussion and consideration. The City of Astoria recently adopted a similar resolution, and the City of Seaside will consider a resolution on April 10.

RECOMMENDATION/SUGGESTED MOTION

If the Commission so chooses, a motion to adopt Resolution No. 2485, *A Resolution Reaffirming the City of Warrenton's Policy of Inclusivity with Respect to the People of all Nations*, is suggested.

ALTERNATIVE

Other action as deemed appropriate by the City Commission

FISCAL IMPACT

N/A

RESOLUTION NO. 2485

INTRODUCED BY COMMISSIONER RICHARD NEWTON

REAFFIRMING THE CITY OF WARRENTON'S POLICY OF INCLUSIVITY WITH RESPECT TO THE PEOPLE OF ALL NATIONS

WHEREAS, Immigrants from all nations, as well as Native Americans, have made vital contributions, as families and our neighbors, to the health, well-being, and general welfare of the City; and

WHEREAS, Inclusion and integration of all Warrenton residents is a matter of vital concern for the general welfare of the City; and

WHEREAS, Any discrimination based on nation of origin, race, ethnicity, or religion does not promote the health, well-being, and general welfare of the City; and

WHEREAS, Immigrants and refugees of all nations, as well as Native Americans, have contributed to the prosperity of Oregon as leaders, workers, and taxpayers; and

WHEREAS, Every Warrenton resident should be treated with compassion and respect regardless of nation of origin or citizenship status;

NOW, THEREFORE, The City of Warrenton resolves that Warrenton is an inclusive City that embraces, celebrates, and welcomes the people of all nations and their contributions to the collective prosperity of all residents; and

BE IT FURTHER RESOLVED, that the use of City funds, personnel, or equipment for the enforcement of federal immigration law is prohibited; and

BE IT FURTHER RESOLVED, that the provision of services or benefits by the City shall not be conditioned upon a person's federal immigration status, except as required by federal or state law.

Adopted by the Warrenton City Commission this ____ day of April, 2017.

This resolution takes effect immediately upon its adoption.

Henry Balensifer, Mayor Pro-tem

ATTEST

Dawne Shaw, Deputy City Recorder