

# Procedures for Endangered Species Act Compliance

## 1. General Background on the Endangered Species Act (ESA)

FEMA requires that compliance with the Endangered Species Act (ESA) of 1973 be demonstrated for CLOMR and CLOMR-F requests. The Act in its entirety is available through the following link: <http://epw.senate.gov/esa73.pdf>. Section 9 of the ESA prohibits anyone from taking or harming a threatened or endangered species. If an action might harm a threatened or endangered species, a permit is required from the U.S. Fish & Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS), under Section 10 of the ESA.

NMFS and USFWS, collectively referred to as “the Services,” share responsibility for implementing the ESA. Generally, USFWS manages land and freshwater species, while NMFS manages marine and anadromous species. For additional information, please visit the following websites:

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

USFWS: <http://www.fws.gov/endangered/>

## 2. ESA Requirements

Nationally, FEMA will require demonstration of ESA compliance for all submittals of CLOMRs and CLOMR-Fs starting October 1, 2010. A request received on or after October 1, 2010 cannot be processed until compliance has been achieved. This policy applies to any case processed by FEMA’s contractors or its Cooperating Technical Partners performing reviews as part of a LOMR Delegation program.

For the State of Oregon, all CLOMRs and CLOMR-Fs not approved before **July 9, 2010**, will be required to demonstrate ESA compliance.

For the State of Washington, LOMRs and LOMR-Fs are also reviewed for ESA compliance. For these LOMRs and LOMR-Fs, if the action occurred before **March 24, 1999**, then it may be grandfathered, and the request can be processed. If it occurred after **March 24, 1999**, then the requestor must provide specific biological documentation and enter the informal consultation process with NMFS. This date is significant because it marks the listing of the Puget Sound chinook salmon as a threatened species. If a requestor can document that the action occurred prior to the listing date, then the case can be processed. The requestor must provide reputable information, such as community permits (e.g., floodplain development or occupancy permits). FEMA must first concur that the documentation is satisfactory before the request can be processed.

The following table provides a general summary of FEMA’s ESA requirements.

Request	ESA-related Action	ESA Requirement Related to FEMA Process
<i>Conditional LOMC Requests</i>		
CLOMA	No physical modification to floodplain is proposed.	ESA compliance is required independently of FEMA’s process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA’s regulations.
CLOMR-F	Proposed placement of fill in the floodplain.	ESA compliance must be documented to FEMA prior to issuance of CLOMR-F. FEMA must receive confirmation of ESA compliance from the Services.
CLOMR	Proposed modifications of floodplains, floodways, or flood elevations based on physical and/or structural changes.	ESA compliance must be documented to FEMA prior to issuance of CLOMR. FEMA must receive confirmation of ESA compliance from the Services.
<i>LOMC Requests</i>		
LOMA	No physical modification to floodplain has occurred.	ESA compliance is required independently of FEMA’s process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA’s regulations.
LOMR-F	Placement of fill in floodplain has occurred.	ESA compliance is required independently of FEMA’s process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA’s regulations.
LOMR	Modifications of floodplains, floodways, or flood elevations have occurred based on physical and/or structural changes.	ESA compliance is required independently of FEMA’s process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA’s regulations.

### 3. Processing of CLOMRs and CLOMR-Fs

If the request is received on or after October 1, 2010, then the requestor must provide documentation of ESA compliance. As stated, all CLOMRs and CLOMR-Fs will need to comply with the ESA before they can be processed. The ESA requirements will not change the review process for CLOMA, LOMA, LOMR-F, or LOMR applications, except for LOMR-Fs in the State of Washington.

Once a case is received, it will be inventoried, and an additional data request letter will be issued for all incomplete items, including submittal of ESA compliant documentation. The ESA guidance and FAQ sheet should be included with all additional data letters sent requesting ESA documentation. No technical review of a CLOMR or CLOMR-F request will occur until ESA documentation is submitted.

The following language must be used for the 216 and 316 AD letters:

*This [CLOMR-F or CLOMR] request will be processed by FEMA only after FEMA receives documentation from the requestor that demonstrates compliance with the Endangered Species Act (ESA). The requestor must demonstrate ESA compliance by submitting to FEMA either an Incidental Take Permit, Incidental Take Statement, “not likely to adversely affect” determination from the National Marine Fisheries Service or the US Fish and Wildlife Service (collectively known as “the Services”), or an official letter from the Services concurring that the project has “No Effect” on listed species or critical habitat.*

*If the project is likely to cause jeopardy or adverse modification to species, then FEMA may deny the Conditional LOMC request. Please see the enclosed guidance for additional information about the ESA and compliance requirements and for responses to frequently asked questions.*

The requestor must demonstrate ESA compliance by submitting to FEMA any of the following documents from the Services:

- Incidental Take Permit,
- Incidental Take Statement,
- “not likely to adversely affect” determination from the Services, or
- an official letter from the Services concurring that the project has “No Effect” on listed species or critical habitat.

For the State of Washington, the requester must submit a Biological Evaluation for review. Once all data is received with the ESA documentation, it will be updated in the ESA tracking spreadsheet. The PTS Biologist performs a review of the Biological Evaluation and submits a written recommendation to FEMA Region X for their review. Following Region X’s review, the PTS either processes the CLOMR or CLOMR-F as a removal/denial or requests additional information. .

If the Services determine that the project complies with ESA, then the technical review and processing of the CLOMR or CLOMR-F can proceed. If the Services determine that the project is likely to cause jeopardy or adverse modification to species, then FEMA may deny the Conditional LOMC request.

When a case is awaiting additional data, if ESA compliant documentation is not received within 90 days of the request for additional data, the case will be suspended. If the case is suspended due to lack of ESA compliance documentation, and all other required information was received, the fee may be transferred to the new case if and when it is resubmitted and the fee transfer has been requested. No refunds will be processed unless requested and then approved by FEMA.

## **Case Tracking**

A tracking spreadsheet of CLOMRs and CLOMR-Fs will be maintained by each PTS to track the progress and decision on all cases requiring ESA compliance. The tracking spreadsheet will be sent to the Region and HQ monthly to report on ESA required cases received for that month and status of existing cases. The following FEMA staff will receive the tracking spreadsheet with monthly updates:

HQ Program Area E lead,  
HQ ESA lead,  
Regional liaison,  
Regional Environmental Officer,  
Region Floodplain Management lead and,  
Regional mapping lead

### **MIP Workflow**

The MIP currently does not include a “flag” for ESA cases in the Amendments or Revisions processing workflows; therefore, the ESA tracking spreadsheet will need to track all cases requiring ESA compliance. Additional data request language can be added by using the Supplementary Data, data type: Other Data Type, then typing “ESA Compliance” in the blank field. The approved ESA additional data letter language included herein can then be added. Case comments can also be added in case comments field.

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

This document supplements the Federal Emergency Management Agency's (FEMA's) Procedure Memorandum No. 54. It highlights additional resources and frequently asked questions to help guide Conditional Letter of Map Revision (CLOMR) and Conditional Letter of Map Revision based on Fill (CLOMR-F) applicants in the Endangered Species Act (ESA) compliance process. The following sections identify helpful web resources, while the final section includes responses to frequently asked questions.

## NATIONAL FLOOD INSURANCE PROGRAM AND LETTERS OF MAP CHANGE

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

NFIP: <http://www.fema.gov/hazard/flood/info.shtm>

LOMCs: <http://www.fema.gov/hazard/map/lomc.shtm>

## ESA OF 1973

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

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

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

## GETTING STARTED WITH ESA COMPLIANCE AND WHO TO CONTACT

CLOMR and CLOMR-F applicants are responsible for demonstrating to FEMA that ESA compliance has been achieved prior to FEMA's review of a CLOMR or CLOMR-F application. The applicant may begin by contacting a local Service office, State wildlife agency office, or independent biologist to identify whether threatened or endangered species exist on the subject property and whether the project associated with the CLOMR or CLOMR-F request would adversely affect the species. These entities are also available to discuss questions pertaining to listed species and ESA compliance.

NMFS Regional Offices: <http://www.nmfs.noaa.gov/regional.htm>

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

## DEMONSTRATING COMPLIANCE WITH THE ESA

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

ITPs and NMFS: [http://www.nmfs.noaa.gov/pr/permits/faq\\_esapermits.htm](http://www.nmfs.noaa.gov/pr/permits/faq_esapermits.htm)

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

HCPs and NMFS: <http://www.nwr.noaa.gov/Salmon-Habitat/Habitat-Conservation-Plans/Index.cfm>

HCPs and USFWS: <http://www.fws.gov/endangered/hcp/index.html>

NMFS Permit applications: [http://www.nmfs.noaa.gov/pr/permits/esa\\_permits.htm](http://www.nmfs.noaa.gov/pr/permits/esa_permits.htm)

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

To demonstrate to FEMA that ESA compliance has been achieved, the requestor must provide an ITP, an Incidental Take Statement, a “not likely to adversely affect” determination from the Services, or an official letter from the Services concurring that the project has “No Effect” on proposed or listed species or designated critical habitat. If the project is likely to cause jeopardy of a species’ continued existence or adverse modification to designated critical habitat, then FEMA may refuse to review the CLOMR or CLOMR-F request without prior project approval from the Services. If a Federal entity is involved in a proposal or project for which a CLOMR or CLOMR-F has been requested, then the applicant may coordinate with that agency to demonstrate to FEMA that Section 7 ESA compliance has been achieved through that other Federal agency.

## Frequently Asked Questions

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

FEMA requires applicants to demonstrate compliance for CLOMRs and CLOMR-Fs only.

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

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

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

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

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

As part of the CLOMR or CLOMR-F application, the requestor must provide an ITP, an Incidental Take Statement, a “not likely to adversely affect” determination from the Services, or an official letter from the Services concurring that the project has “No Effect” on proposed or listed species or designated critical habitat.

### ***How much time will be required to achieve ESA Compliance?***

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

### ***Who is available to answer my questions about ESA compliance?***

NMFS and the USFWS both have staff available around the country to answer questions about threatened and endangered species and ESA compliance. Refer to the *NMFS Regional Offices* and *USFWS Office Directory* links on Page 1 of this guidance document to identify the nearest available Service office. FEMA does not have staff available to assist with this process.

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

The applicant may begin by contacting a local Service office, state wildlife agency office, or independent biologist to identify whether threatened or endangered species exist on the subject property and whether the project associated with the CLOMR or CLOMR-F would adversely affect the species.

***Do I need to hire a biologist for this process?***

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

***How are the following ESA-related terms defined?***

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

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

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

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

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

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

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

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