



Flood Insurance Program Subject to Revision in the Delta

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On March 8, 2012, the U.S. District Court for the Eastern District of California entered judgment in *Coalition for a Sustainable Delta and Kern County Water Agency v. Federal Emergency Management Agency, et al.*, No 1:09-cv-02024 based on a settlement agreement in which FEMA agreed to request consultation with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) under section 7 of the Endangered Species Act regarding the impacts of its implementation of the National Flood Insurance Program (NFIP) on threatened and endangered species in the legal Sacramento-San Joaquin River Delta (Delta).

The settlement could result in changes to the way FEMA administers the NFIP in participating communities in the legal Delta, which, in turn, could affect the incentives for developers to place fill in the legal floodplain in Delta communities. In the long run, however, the settlement should contribute to achieving the state's twin goals of protecting the Delta ecosystem while providing more reliable water supplies.

Any changes in how FEMA implements the NFIP in the Delta may not occur for several years. Under the settlement, FEMA must request consultation and supply the Services with a biological assessment or its equivalent within the next 14 months. Moreover, the consultation could take a year or longer if one or both of the Services issues a biological opinion and incidental take statement.

Under the NFIP, FEMA makes subsidized flood insurance available to property owners in communities that elect to participate in the NFIP by adopting floodplain management plans intended to reduce future flood risks. The citizen suit was premised on the claim that FEMA's implementation of the NFIP encourages placement of fill in the floodplain and construction and maintenance of levees to remove land from the floodplain, thus destroying habitat and impairing ecosystem services that listed salmon, steelhead, and delta smelt rely upon in the Delta.

Floodplains provide side channel habitat for listed salmon and other ecosystem services such as contributing to the productivity of various components of the food web, including phytoplankton, copepods and other organisms. Destruction of this habitat has been particularly harmful to the federally listed Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, and Delta smelt.

In the Delta, the flood zone also encompasses seasonal and perennial tidal wetlands. According to the United States Geological Survey, more than 95 percent of those Delta wetlands have been destroyed and new development threatens the remaining tidal wetlands. Indeed, one of the major focuses of the Bay Delta Conservation Plan (BDCP) is the restoration of tens of thousands of acres of tidal wetlands that have previously been removed from the flood zone via fill and levee construction.

The settlement represents the latest in a string of court orders and settlements in similar lawsuits that have been filed against FEMA in Florida, Washington, Oregon, and New Mexico in the past several years. In each instance, FEMA either lost the lawsuit and was instructed to consult by a federal court or settled the lawsuit prior to a decision and agreed to engage in consultation. In the long-run, it may be most sensible for FEMA to make program wide changes to the way it administers the NFIP, but for the time being FEMA appears to only be willing to make adjustments when compelled to do so via the courts.