August 30, 2023

Dear Mayor Wheeler and Members of the Portland City Council,

Please accept the following comments from Willamette Riverkeeper, Portland Audubon, Center for Biological Diversity, Northwest Environmental Defense Center, Portland Harbor Community Coalition, Columbia Slough Watershed Council, The Conservation Angler and 350 PDX regarding the City of Portland Floodplain Resilience Plan (August 2023 Council Draft). In general, we are deeply disappointed by the changes being proposed in the current draft. They appear to be designed to appease concerns of wealthy, powerful development interests rather than meeting the City’s obligations under the Endangered Species Act, creating a climate resilient urban landscape, and protecting human health and safety. We are deeply disappointed to see the City of Portland pulling back from prior drafts without any apparent basis for doing so other than to make it easier and cheaper for developers to build in high hazard flood areas.

Doing so is not in the interest of our communities, our environment, or ultimately our economy. We believe that the plan as now proposed is not sufficient to meet the City’s legal obligations under the Endangered Species Act and that it will leave future projects that occur in the floodplain vulnerable to legal challenge. We also believe that it will potentially jeopardize the City’s eligibility and rating under the National Flood Insurance Program (NFIP). We strongly urge the City to abandon these ill-considered revisions to the draft plan and look forward to working with Council Offices on amendment concepts following the public hearing on August 30th.
**Background:**
Cities, including Portland, rely on the Federal Emergency Management Agency ("FEMA") National Flood Insurance Program ("NFIP") to provide low cost, taxpayer-subsidized flood insurance when development is allowed in flood prone areas. Without this taxpayer-subsidized flood insurance most floodplain development would not be possible. In 2009, environmental groups sued FEMA (Audubon Society of Portland et al. v. FEMA), asserting that FEMA’s management of the NFIP Program was violating the Endangered Species Act’s protections for federally listed salmonids in Oregon. This litigation ultimately resulted in a Biological Opinion ("BiOp") issued by the National Marine Fisheries Service ("NMFS") in 2016 which concluded that FEMA’s flood insurance program does in fact, violate the Endangered Species Act by subsidizing development in floodplains that jeopardizes the continued existence of fifteen salmonid species, eulachon, and the Southern Resident killer whale (which depends on salmon for food), and destroys or adversely modifies the designated critical habitat of anadromous fish species in Oregon. “Jeopardy decisions” are extremely rare and indicative of the seriousness of these violations. NMFS included a list of six reasonable and prudent alternatives ("RPAs") that FEMA should incorporate into its program in order to ensure compliance with the Endangered Species Act. In order to avoid violating the Endangered Species Act, both FEMA and local jurisdictions that allow development in floodplains adjacent to salmon bearing rivers and streams in Oregon must comply with the BiOp.

For the past several years, the City of Portland has been proceeding with a phased approach to updating its floodplain regulations to comply with the BiOp. The City adopted new regulations for the South Reach of the Willamette River in Phase 1 (2020). It has been proceeding with Phase 2 of this process to update floodplain protections for the rest of the City except the North Reach of the Willamette, and portions of the Columbia Corridor, and Johnson Creek, which were assigned to later phases of this process. While we question the need for phasing and the extended timeframe over which this work is being conducted, we were generally supportive of the Discussion Draft which was released in 2021. To be clear, we believe that the City’s floodplain regulations could have been updated in a single process instead of being spread out over multiple phases and multiple years, but felt that the work that was contained within the current phase generally conformed to the terms of the BiOp.

It is therefore deeply disappointing that the Council Draft appears to seriously weaken and delay implementation of key elements of the 2021 draft plan. The omissions are significant enough that we no longer believe that the plan is sufficient to meet the terms of the BiOp and that the City will have significant legal exposure under Section 9 of the Endangered Species Act for development projects that it permits to proceed forward in the floodplain. We would further assert that this legal exposure likely extends backwards for any development projects that the City has permitted to proceed since the BiOp was released in 2016. We again want to emphasize here that “jeopardy decisions” under the Endangered Species Act are extremely rare—the fact that the 2016 BiOp determined that floodplain development in Oregon is jeopardizing the continued existence of listed salmon, steelhead and resident Southern Resident killer whales should be taken seriously.
Specific Comments on the Council Draft Plan

1. **The City should not use implementation delays by FEMA as an excuse to delay updating its own floodplain management regulations to comply with the 2016 Biological Opinion:** The BiOp provided both FEMA and local jurisdictions with a road map for how to update regulations to ensure compliance with the Endangered Species Act. FEMA has been exceedingly slow in updating its NFIP criteria and in fact has missed statutory deadlines for compliance. Conservation Groups including Willamette Riverkeeper, Center for Biological Diversity, Northwest Environmental Defense Center, and the Conservation Angler recently sent FEMA a 60-day notice of intent to sue under the Endangered Species Act due to its failure to comply with these deadlines. FEMA’s failure to act in a timely manner, however, does not represent an escape hatch for local jurisdictions to also delay compliance. The BiOp makes it clear that the status quo in terms of floodplain protection in Oregon is jeopardizing the continued existence of federally listed salmon, steelhead, eulachon, and orcas. Continuing to allow development that does not comply with the BiOp exposes those projects to legal risk for failing to comply with Section 9 of the Endangered Species Act. In order to minimize legal exposure both to the City and to individual projects, we believe that it is essential that the City expedite compliance with the BiOp.

2. **Exemptions for South Waterfront should be eliminated:** The City is proposing to not apply new floodplain regulations at South Waterfront and to instead carry forward an exemption to balance cut and fill requirements granted by Metro’s Title 3. To be clear, because of the Title 3 exemptions, South Waterfront does not even meet current baseline floodplain standards applied to the rest of the City of Portland, let alone the new enhanced regulations required by the BiOp. We see no basis for carrying this exemption forward other than to appease wealthy, powerful development interests. This is particularly offensive because the South Waterfront development has had among the most significant floodplain impacts of any developments in the City of Portland over the past two decades. It is also offensive because, while smaller developments will be held to current and future regulations, the huge developments at South Waterfront are getting a pass. It makes no sense to apply floodplain protections to smaller developments but provide exemptions to the developments that have the greatest impacts. The City should be aware that part of the impetus for the 2009 lawsuit that started this entire process was the Metro Title 3 decision to exempt some of the sites with the greatest floodplain impact potential from Title 3. As it stands, all development at South Waterfront is in violation of the Endangered Species Act, exposing the City and developers to Section 9 liability, and this proposal does not remedy this fact.
3. **Centennial Mills should be held to the highest protection and mitigation standards:** Based on the vesting provisions in the new proposed code, it would appear that development at Centennial Mills may have already vested based on what we understand to be a very incomplete early assistance application. If this is the case, it would be of significant concern. No project should be able to vest based on an incomplete early assistance application. Allowing such vesting would open the floodgates for developers to avoid new regulations simply by submitting the most cursory information about a potential future project. Furthermore, Centennial Mills represents one of the most significant restoration opportunities in the Central Reach. Allowing development to occur at this site without adequate protection or mitigation for impacts to listed species would potentially represent a significant violation of ESA. If development is to occur in one of the few remaining high value restoration sites in the Central Reach, it is essential that it be held to the highest protection and mitigation standards. We would urge Prosper Portland and the City to consider whether development actually represents the highest and best use at this site. Prosper Portland has owned the site since 2006 and has not been successful in advancing projects. We urge the City and Prosper to give serious consideration to whether using the site as a mitigation bank, restoration, public park and river access might be a more productive path forward.

4. **The two year moratorium on implementing the new regulations should be eliminated:** It is deeply disappointing that despite the glacially slow pace of progress to date, the City is proposing to delay implementation of this plan for two years after it is adopted. In repeated discussion with City staff, nobody was able to produce a reasonable basis for this decision. It appears to be entirely politically motivated to appease wealthy, powerful developers with impending projects in the affected area. The City is well aware that a two year delay in implementation will give developers ample time to seek preliminary permits and get vested such that they will be able to avoid application of the new floodplain regulations to their projects. In the end, we believe that the City is not doing these developers any favors. Any new projects in the affected area will receive increased public scrutiny and face significant legal exposure for failing to comply with the Endangered Species Act if they proceed forward during this interim period. In the end, this could result in far more cost and delay than simply complying with the ESA in the first place.

5. **The City should not increase the vesting period from three to seven years:** In addition to delaying implementation of the Flood Resilience Plan by two years, the City is also now proposing to extend the expiration date for land use decisions for projects with more than one building from three to seven years. This effectively gives developers up to two years to seek permits to develop in floodplains with triggering the new code and then up to seven years to initiate the project. The City is also proposing to allow significant modifications of projects without triggering further review. The combination of the two year delay in implementation plus the seven years of vesting seems wholly designed to ensure that the largest, most complex, most impactful projects in the floodplain escape having to comply with new floodplain regulations.
6. **Mitigation Banks**: The City has asserted that absence of a City of Portland Mitigation Bank impedes its ability to advance the Floodplain Resilience Plan because developers do not have a City owned mitigation bank from which to seek credits when they develop in floodplains. **This is a false argument.** The fact is, the City has sought and received approval to use the Linnton Superfund Mitigation Bank for explicitly this purpose. Developers do in fact currently have a viable option from which to purchase mitigation credits. Further, the City of Portland has been discussing the need for a city-owned mitigation bank since at least the year 2000. It has repeatedly used the absence of a mitigation bank as an excuse for limiting new environmental protections. After more than 23 years of discussion, the City simply has no excuse for not having advanced this concept to implementation. We were hopeful in 2022 that the City was finally taking this need seriously when it placed a BES staffer on special assignment to develop the mitigation bank concept. However, the City inexplicably eliminated funding for this project in the 2023 budget and shows no sign of backfilling in the near future. For myriad reasons, we urge the City to urgently proceed with developing its own mitigation bank(s). However, regardless of whether it does so or not, the City and developers currently have an active, viable option in place with the Linnton Superfund Bank and there is no basis for using lack of available mitigation banking options as an excuse for delay. Further, commenters point out that sufficient mitigation procedures are a crucial element of compliance with BiOp. By implementing a mitigation standard in accordance with the BiOp, the City will be that much closer to avoiding Section 9 liability. Conversely, delaying the inevitable only further increases the City’s liability, while simultaneously allowing for detrimental impacts to water quality, climate resilience and habitat degradation.

7. **The City should not weaken the purpose of Title 24**: The purpose statement in the revisions to Title 24 has been severely modified to reflect the degree to which the floodplain plan has been weakened in this iteration. We recommend restoration of the prior “purpose” language as well as the substantive provisions within Title 24 to ensure that the original purpose is achieved. The changes can be seen in the following paragraph:

   The purpose of this Chapter is to protect the **promote** public health, safety, and **general** welfare by restricting or prohibiting uses which are dangerous to health, safety, or property in times of flood or which cause increased flood heights or velocities, and by requiring that uses minimize public and structures vulnerable private losses due to floods be protected from flood danger at the time of initial construction **flooding in flood hazard areas**.

8. **The City should not provide a permanent compliance loophole for existing structures and uses**: Section 24.50.020(C) is in violation of the BiOp and the Endangered Species Act because it provides a grandfathering exception that goes beyond that contained in RPA 4. RPA 4 provides in part that:
when a grandfathered structure is substantially damaged or substantially improved, the structure must come into compliance with Elements 4.B-4.F as applicable, e.g., mitigation is required for any adverse impacts to natural floodplain functions associated with the substantial improvement (expanded footprint, vegetation removal, placement of fill, etc.). BiOp at 292.

However, as it stands, Section 24.50.020(C) seems to provide a permanent exception to Title 24’s requirements, regardless of an existing structure enduring substantial damage or improvement. This compliance loophole violates the ESA.

9. **The City should not rely solely on mapping that depicts the 1996 Flood Inundation Area when estimating flood risk:** As evinced from recent flooding events nationwide, relying solely on mapping from past floods woefully underestimates true flood risk in most areas due to a climate change-induced increase in record, rapid rainfall events. Just this year, these rainfall events have had disastrous consequences for communities and local economies across the U.S.; indeed, the most recent floods that ravaged the Northeast are estimated to have caused at least $5 billion in damage. While the BiOp allows communities to use past flood events to update flood risk maps, the City should take a proactive approach to this important threat by using predictive rainfall models to map additional zones that will be at high-risk of flood losses as a result of intense rainfall events. Such an approach would increase the City’s resilience to climate change both ecologically and economically.

10. **The City should expedite application of new floodplain regulations to the North Reach, Columbia Corridor, Johnson Creek, and on industrial lands within the Central Reach:** The City of Portland has adopted a phased approach to implementing new floodplain protections. It completed the South Reach of the Willamette in 2021 after nearly three years of work. It anticipates completing the Central Reach of the Willamette in 2024 after a separate three year long process. It does not anticipate completing work on the North Reach, Columbia Corridor, Johnson Creek, and on industrial lands within the Central Reach until 2027. We question why the city took a phased approach in the first place as applying new regulations to the entire city at one time would have been much more efficient and cost effective. Based on the RPAs in the BiOp, there should be relatively little variation on floodplain protections and mitigation requirements from one area of the city to another. Enacting new floodplain protection and mitigation requirements in this phased manner simply extends the process by years, and requires at least three duplicative outreach efforts, three duplicative planning commission processes, and three duplicative City Council approval processes. It also requires stakeholders to allocate resources to engage in these processes over the course of more than a decade. In the meantime, projects continue to be approved for development in the floodplain that jeopardize public health and safety, property, and federally listed species.
The City has asserted that in the case of the North Reach, the Columbia Corridor and other industrial lands, it is waiting for an up-to-date Economic Opportunities Analysis (EOA) before advancing new floodplain regulations. However, we would note that the City has been using an “out of date” EOA as an excuse to postpone new environmental regulations in the North Reach and Columbia Corridor for more than a decade. Examples include not only floodplain protection regulations, but also tree code, environmental zone updates, and the North Reach River Plan. An “out-of-date” EOA has become a perennial excuse for failing to address some of the most important environmental issues in the City of Portland. Despite repeated pleas from stakeholders, the City has repeatedly delayed long promised updates to the EOA, which is supposed to be updated every five years but which is now years behind schedule with no end date in site.

Further, we assert that the City does not need an updated EOA in order to proceed forward with new floodplain protections in the North Reach, Columbia Corridor and on other industrial lands. Increased floodplain protection however, is necessary to comply with federal law, specifically the Endangered Species Act. The City appears to be viewing new floodplain protections in these areas as contingent upon the outcome of the updated EOA when in fact legally required floodplains protections should be viewed as part of the baseline on which the EOA is updated. In other words, the City should evaluate its industrial land base with new required floodplain protections in place as opposed to its current approach of evaluating its industrial land base and then determining what level of protections it will put on floodplains. The floodplain protections are not optional, but the City appears to be viewing them that way.

11. **The City should require enhanced balance cut and fill ratios for the 1996 flood inundation area:** The City appears to be proposing to apply only a 1:1 balance cut and fill ratio to 1996 flood inundation areas outside the existing 100 year floodplain. This is inconsistent with the BiOp. The City was unable to provide any reasonable basis for not applying enhanced cut/ fill ratios other than reducing costs to development interests. Failure to apply enhanced cut/ fill ratios in these areas will leave development in these areas with significant legal exposure for failure to comply with the Endangered Species Act.

12. **In locations not covered by the current plan or the previously completed South Reach Plan (e.g. North Reach, Columbia Corridor, Johnson Creek and industrial lands), the City should adopt interim measures outlined in the BiOp until permanent protections can be put in place.** The BiOp included interim measures to protect listed species (RPA 2) while permanent floodplain protections are put into code. NMFS correctly anticipated that it might take some time to adopt permanent protections (although the timeline that both the City and FEMA are now on exceeds, by years, NMFS’ worst case scenario when the BiOp was issued in 2016). These interim measures were meant to limit harm to listed species during the interim period. We would strongly urge the City to both:
• Expedite permanent code revision to meet the requirements of the BiOp in the North Reach, the Columbia Corridor, and Johnson Creek, and on other currently unaddressed industrial lands and
• Immediately apply the interim measures contained in RPA 2 to the North Reach, Columbia Corridor, Johnson Creek, other, industrial lands, and any other floodplains in the City not covered by the South Reach Plan or the current Floodplain Resilience Plan. This is essential in order to ensure that harm is minimized to endangered species over the next several years.

Conclusion:
We respectfully urge the Portland City Council to amend the Floodplain Resilience Plan to remedy these deficiencies. The Floodplain Resilience Plan has the potential to be one of the City’s most significant strategies for advancing climate resilience, salmon recovery, protection of people and property and compliance with federal law. Unfortunately in its current iteration, it fails to achieve any of these objectives. It is imperative that the plan, including both the Title 33 and the Title 24 revisions, moves forward expeditiously and it is also imperative that the plan ensures that the City meets its legal obligations under the Endangered Species Act.

Thank you for your consideration of these comments.

Respectfully,

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