

Getting through Door #2: Collateral Legal Considerations In BiOp Implementation

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Common Criticisms of BiOp and Implementation

- Too few options: RPA Element 3 is not the only way to avoid jeopardy/take.
- Lack of transparency:
 - “Black box” development of RPA Element 3
 - Private meetings to get through Door #2
- Need to find ways for individual Door #2 experiences to benefit other jurisdictions.

Legal Issue:

Scope of Authority

- FEMA's reliance on 44 CFR §60.3(a)(2) as basis for asserting that local jurisdictions must comply with the BiOp.
- Scope of ESA: Limited to preservation/no further harm. (*Restoration not mandated by ESA.*)
- *Recommendation:* When going through Door # 2, request clarification from FEMA and NMFS on these issues. Could enable greater flexibility in compliance.

Legal Issue:

Department of Ecology Review

WAC §173-158-084

- All changes to local floodplain management regulations must be reviewed by the Department of Ecology.
- Such regulations take effect 30 days from filing *unless* the Department disapproves those regulations.
- Review standard: Compliance with NFIP (44 CFR §59 and §60) as supplemented by state statute. (Ch. 86.16 RCW)

Legal Issue: Interface (or Conflict?) with the Growth Management Act

- NFIP standards (44 CFR § 60.2(g)) require that communities “assure that [their] comprehensive plan[s] [are] consistent with the floodplain management objectives of [the NFIP.]”
 - *Does this mean that local Comp Plan subservient to NFIP?*
 - *Does this mean local jurisdictions must modify their Comp Plan each time FEMA issues new floodplain maps?*

More GMA Interface

- Floodplains = “frequently flooded areas” = GMA critical areas.
- Impact of BiOp on “best available science”:
 - Is the BiOp BAS? (Snap shot from 30,000; developed without public participation)
 - What effect on deference to local circumstances?
 - What about previously developed areas?
Swinomish Indian Tribal Community v. Western Washington GMHB, 161 Wn.2d 415 (2007).
 - Opportunities in Door # 2 to use local BAS? How willing is FEMA to consider that information?

More GMA Interface

- Impact of floodplain remapping + BiOp on Urban Growth Area boundaries:
 - UGAs must accommodate 20 year growth projections.
 - What happens when previously developed areas are newly mapped as floodplains?
 - Need to identify new areas to meet residential or commercial land capacity requirements = unintended expansion of UGA boundaries?
- What about public participation requirements?
 - Relevance of public comments when FEMA and local jurisdiction have cut a deal in private meetings?

Legal Issue:

Interface with the Shoreline Management Act

- SMA “shoreline” jurisdiction includes floodway + contiguous floodplain areas landward 200 feet from such floodways.
- Significant overlap between shoreline jurisdiction and SFHA – particularly between shoreline and Riparian Buffer Zone in BiOp.

More SMA Interface

Competing goals/policies:

- BiOp/ESA = “no adverse effect” (or “no jeopardy”)
- SMA = “no net loss of shoreline ecological functions”
- What is the difference?
- Where local jurisdiction seeks to implement BiOp through SMP update, what standard for Ecology review?
- Does the BiOp trump SMA?

Legal Issue:

RCW 82.02.020/Takings Claims

- RCW 82.020.020: Limits authority of local jurisdictions to impose any tax, fee, or charge, either direct or indirect, except as are reasonably necessary as a direct result of the proposed development.
- *Citizens' Alliance v. Sims*, 145 Wn.App. 649 (Div. 1 2008) = no blanket set asides permitted under RCW 82.02.020.
- But will BiOp-based regulations be exempt under *Citizens for Rational Shoreline Planning*, 155 Wn.App. 937 (Div. 1 2010)?
On appeal to WA Supreme Court.
- But still face Constitutional Due Process nexus and rough proportionality requirements

Bottom Line

- *Lots and lots of unanswered questions as local jurisdictions enter Door #2.*
- *Anticipate litigation:*
 - *44 CFR 60.3(a)(2) authority*
 - *NEPA review required?*
 - *Consistency with GMA*
 - *Consistency with SMA*
 - *RCW 82.02.020/takings challenges*
- *Federal pre-emption?*

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