

Guidance for Flood Risk Analysis and Mapping

Documentation of Endangered Species Act Compliance for Conditional Letters of Map Change

May 2016



FEMA

Requirements for the Federal Emergency Management Agency (FEMA) Risk Mapping, Assessment, and Planning (Risk MAP) Program are specified separately by statute, regulation, or FEMA policy (primarily the Standards for Flood Risk Analysis and Mapping). This document provides guidance to support the requirements and recommends approaches for effective and efficient implementation. Alternate approaches that comply with all requirements are acceptable.

For more information, please visit the FEMA Guidelines and Standards for Flood Risk Analysis and Mapping webpage (www.fema.gov/guidelines-and-standards-flood-risk-analysis-and-mapping). Copies of the Standards for Flood Risk Analysis and Mapping policy, related guidance, technical references, and other information about the guidelines and standards development process are all available here. You can also search directly by document title at www.fema.gov/resource-document-library.

Document History

Affected Section or Subsection	Date	Revision Description
Procedure Memorandum 64	October 2010	FEMA Procedure Memorandum relating to Endangered Species Act (ESA) compliance requirements for Conditionals Letters of Map Change (LOMCs).
Standard ID 215	2013	FEMA Standard relating to ESA compliance requirements for Conditionals LOMCs.
Memorandum, Subject: <i>Endangered Species Act and Review/Processing of CLOMR-Fs and CLOMRs</i>	October 2015	FEMA memorandum to clarify a requestor's responsibilities for documenting ESA compliance when requesting Conditional Letters of Map Revision based-on Fill (CLOMR-Fs) and Conditional Letters of Map Revision (CLOMRs).
First Publication	December 2015	Initial version of new transformed guidance. The content was derived from the <u>Guidelines and Specifications for Flood Hazard Mapping Partners</u> , Procedure Memoranda, and/or Operating Guidance documents. It has been reorganized and is being published separately from the standards.
Second Publication	May 2016	Updated to incorporate edits and additional language to improve usefulness for users.

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1.0 Guidance Overview

1.1 Purpose

The FEMA Standards for Flood Risk Analysis and Mapping include Standard 215 that specifies, “Conditional LOMCs are subject to the same standards of a LOMA, LOMR-F, or LOMR except:

- Because Conditional LOMCs are based on proposed construction, as-built information is not required.
- The Conditional Comment Documents that are issued by FEMA do not amend the effective FHBM or FIRM.
- Conditional LOMRs and CLOMR-Fs must demonstrate compliance with the Endangered Species Act.”

This document provides guidance to inform Conditional Letter of Map Change (CLOMC) applicants of their role, responsibilities and documentation requirements to comply with the Endangered Species Act requirements of Standard 215.

1.2 Overview of ESA Compliance Responsibilities for Private Development

The purpose of the Endangered Species Act (ESA) is to conserve threatened and endangered species and the ecosystems upon which they depend. When Congress passed the ESA in 1973, they recognized that the natural heritage of the U.S. was of “esthetic, ecological, educational, recreational, and scientific value to our Nation and its people.” Congress understood that, without protection, many of our Nation’s living resources would become extinct. Species at risk of extinction are considered endangered, whereas species that are likely to become endangered in the foreseeable future are considered threatened. The U.S. Department of Interior’s Fish and Wildlife Service (USFWS) and the U.S. Department of Commerce’s National Marine Fisheries Service (NMFS), collectively known as “the Services” share responsibility for implementing the ESA.

Section 9 of the ESA prohibits anyone from “taking” or “harming” endangered wildlife and similar prohibitions are generally extended through regulations for threatened wildlife. If an action might harm a threatened or endangered species, an incidental take authorization can be obtained from the Services following the process under Section 10 of the ESA.

Private individuals and local and state jurisdictions are required to comply with the ESA independently of FEMA’s process. Unless FEMA is directly involved with the project’s construction or funding, ESA compliance should be obtained without FEMA’s involvement.

2.0 ESA Compliance for CLOMCs

Conditional LOMCs are FEMA’s comments as to whether the proposed project, if built as proposed, would warrant a change to the National Flood Insurance Program (NFIP) flood hazard maps. These comments are issued before a physical action occurs in the floodplain.

Conditional Letters of Map Revision (CLOMRs) and Conditional Letters of Map Revision based-on Fill (CLOMR-Fs) do not constitute a permit or approval of the proposed development. The authority to approve projects and issue building permits lies with the local community and, in some instances, state agencies. A CLOMR is a FEMA letter commenting on a proposed project that would, if built as proposed, affect the hydrologic or hydraulic characteristics of a flooding source,

and thus result in the modification of the effective regulatory floodway, Base Flood Elevations (BFEs), and/or the Special Flood Hazard Area (SFHA). A Conditional Letter of Map Revision based on Fill (CLOMR-F) is a FEMA letter commenting on whether a parcel of land or proposed structure that will be elevated by fill would not be inundated by the base flood if fill is placed on the parcel as proposed or the structure is built on fill as proposed. These letters do not revise effective National Flood Insurance Program (NFIP) maps; they comment on whether the project, if built as proposed, would warrant a revision to the NFIP map for CLOMRs or that the project would not be inundated by the base flood for CLOMR-Fs.

Because CLOMRs and CLOMR-Fs are submitted to FEMA prior to construction, there is an opportunity to identify if threatened and endangered species may be affected by the potential project. If potential adverse impacts could occur, then the Services may require changes to the proposed activity and/or mitigation.

FEMA will require documentation of ESA compliance for the proposed project before it will process a CLOMR or CLOMR-F request. Obtaining such documentation shall be the responsibility of the requestor. While Section 7 of the ESA requires each federal agency to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat, the project construction for which a CLOMR or CLOMR-F is sought is not authorized, funded, or carried out by FEMA.

Therefore, it is not FEMA's role to assist with accomplishing ESA compliance for private actions or non-FEMA Federal actions. FEMA's action is, when warranted, to issue the CLOMC. Although FEMA may require certain documentation as a condition of issuing the CLOMC, it has no involvement in securing such documentation or in obtaining/providing authorization for the proposed project.

3.0 Guidance to Document ESA Compliance

It is not FEMA's role to assist with accomplishing ESA compliance for private actions. FEMA cannot require changes to proposed private development; permitting authority lies with the community. The Services may require changes to a proposed project, but that would be communicated through their coordination.

3.1 ESA Compliance Documentation for Non-Federal Projects

For requests without a Federal action, compliance with Sections 9, and if appropriate 10, of the ESA must be achieved independently of FEMA's process. Section 9 of the ESA prohibits anyone from "taking" or harming an endangered species. If an action might harm an endangered species, a permit may be obtained from the Services under Section 10 of the ESA. Documentation that the project is compliant with the ESA may be submitted in the form of a written and signed statement confirming that it has been determined that there are no endangered or threatened species present in the area or that the type of action does not have any potential to cause adverse impacts that would result in a take. A written and signed statement of this from the community official responsible for floodplain permitting will suffice. If, however, there is the potential for such adverse impacts, some coordination with the Services would be required.

If take has the potential to occur as a result of by the project, the applicant (as a non-Federal entity)

must 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.

The following list summarizes what requestors must document:

1. No potential for “Take” exists (meaning that the project has no potential to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct) to threatened and endangered species. The requester will be responsible for the potential for take determination and the determination is not required to come from, or be concurred by, the Services.
2. If the requester determines a Take will or has a potential to occur, they can consider contacting the Services to discuss potential project revisions to eliminate the “Take.”
3. If neither 1 or 2 are possible and the project has the potential to “Take” listed species, an Incidental Take Permit may be submitted showing that the project is the subject, or is covered by the subject, of the permit.

3.2 ESA Compliance Documentation for Projects with Federal Actions

If a Federal entity is involved in a project for which a CLOMR or CLOMR-F has been requested, then the applicant may use that Agency’s Section 7 consultation to demonstrate to FEMA that ESA compliance has been achieved.

The ESA documentation may be:

1. A “No Effect” determination made by, or concurred by, the Federal Agency;
2. A “Not Likely to Adversely Affect” determination with concurrence from the Services;
3. A Biological Opinion with a “no jeopardy” determination, or with accepted Reasonable and Prudent Alternatives; or
4. A copy of a federally issued permit with justification that the proposed development for which a CLOMR or CLOMR-F is sought is covered by the permit.

4.0 Resources for Additional Information

Highlighted below are helpful web resources and frequently asked questions to help applicants understand their roles and responsibilities when meeting ESA compliance. For non-Federal actions, resources are provided to assist the project proponents determine if their actions may cause a Take, and if so how to address the potential impacts and/or pursue obtaining an Incidental Take Permit.

4.1 ESA OF 1973

Additional information about the ESA and permitting requirements are available from the NMFS and the 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>

4.2 Getting Started with ESA and Who to Contact

The applicant may begin by consulting the USFWS and the NMFS websites to check for federally listed endangered species located in the county or 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. If there are species present or potentially present, the applicant needs to determine whether the project would impact the species. These entities are also available to discuss questions pertaining to listed species and ESA compliance.

- NMFS Regional Offices:
 - Alaska: www.alaskafisheries.noaa.gov/
 - Northeast: www.nefsc.noaa.gov/
 - Northwest: www.nwr.noaa.gov/
 - Pacific Islands: www.fpir.noaa.gov/
 - Southeast: www.seo.nmfs.noaa.gov/
 - Southwest: www.swr.nmfs.noaa.gov/
 - USFWS Office Directory: www.fws.gov/offices/

The following website may be consulted for documentation showing no listed species are present in the county where the project is taking place: <http://ecos.fws.gov/ecos/indexPublic.do>.

The following links provide additional information on the permitting process:

- ITPs and NMFS: www.nmfs.noaa.gov/pr/permits/faq_esapermits.htm
- ITPs and USFWS: www.fws.gov/endangered/what-we-do/hcp-overview.html
- NMFS Permit applications: www.nmfs.noaa.gov/pr/permits/esa_permits.htm
- USFWS Permit application: www.fws.gov/forms/3-200-56.pdf

4.3 Frequently Asked Questions

1. For which map change applications is ESA documentation to be submitted to FEMA?

FEMA requires applicants to demonstrate compliance for CLOMRs and CLOMR-Fs only, except in Washington and Oregon which also includes select LOMRs.

2. Why is documentation of ESA compliance required before FEMA will review a CLOMR or CLOMR-F application?

For all potential projects submitted for a CLOMR or CLOMR-F, FEMA regulations require that the community must certify compliance with the appropriate floodplain management criteria. The minimum criteria at 44 CFR 60.3(a)(2) requires that floodplain development be compliant with all applicable Federal and state laws. All individuals in the country (private and public) have a legal responsibility to comply with the ESA. As a result, FEMA requires documentation of ESA compliance for potential projects to be submitted before a CLOMR or CLOMR-F application will be reviewed.

3. What will FEMA require from CLOMR and CLOMR-F applicants to document ESA compliance?

See appropriate documentation in Section 3.

4. For non-Federal projects, can a federally issued permit (e.g. a 404 Permit for wetlands from U.S. Army Corps of Engineers) be used to document ESA compliance?

Yes, if the requestor can demonstrate that the LOMC project is within the project described in the federally issued permit. Federal Agencies that authorize, fund, or carry out actions are required to adhere to the Endangered Species Act as part of their approval process. If a federally issued permit is approved for the LOMC project, or if the LOMC project is a portion of the subject of the federally issued permit, ESA compliance can be documented through the issuance of the Federal Permit. The requestor is responsible to document that the project is either the subject, or is covered by the ESA determination for the subject, of the permit before it will be accepted as documentation of ESA compliance.

5. 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 provided earlier in this guidance document to identify the nearest available Service office.

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

The applicant may begin by consulting the USFWS or NMFS website to check for federally listed endangered species located in the county or 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 may adversely affect the species.

7. Is FEMA involved in locally permitted floodplain actions?

No. It is important to understand that FEMA is not authorized by statute to act as a permitting authority. Floodplain development is regulated at the community level through the community's floodplain management regulations and floodplain development permitting process. Before a property owner can undertake any development in the Special Flood Hazard Area, a permit must be obtained from the community. The community is responsible for reviewing the proposed development to ensure that it complies with the community's floodplain management ordinance and that all necessary permits have been received from those governmental agencies from which concurrence is required by Federal or state law.

8. Is ESA compliance needed for an LOMC?

The community needs to ensure that the appropriate permits are obtained per the requirement of 44 CFR § 60.3(a)(2).

9. Is documentation of ESA compliance needed to process a LOMC?

For LOMC requests involving floodplain development activities that have already occurred, private individuals and local and state jurisdictions are required to comply with the ESA independently of FEMA's process. FEMA always retains the option of requesting additional information related to compliance with 44 CFR § 60.3(a)(2).

5.0 Review Procedures

All CLOMR and CLOMR-F applications must include documentation of ESA compliance before they can be processed

Once a case is received, it will be inventoried and the LOMC reviewer will check for documented ESA compliance consistent with the options in Section 3 of this document.

If necessary documentation has been received, the LOMC reviewer will complete the FEMA Review Form and the MT-1/MT-2 Lead will send it to the FEMA ESA Compliance Documentation point of contact for concurrence. Once the LOMC reviewer receives concurrence, processing of the case can resume.

An additional data request letter will be issued for all incomplete items, including submittal of ESA compliance documentation. The ESA guidance should be included with all additional data letters sent requesting documentation of ESA compliance. No technical review of a CLOMR or CLOMR-F request will occur until ESA compliance documentation is submitted.

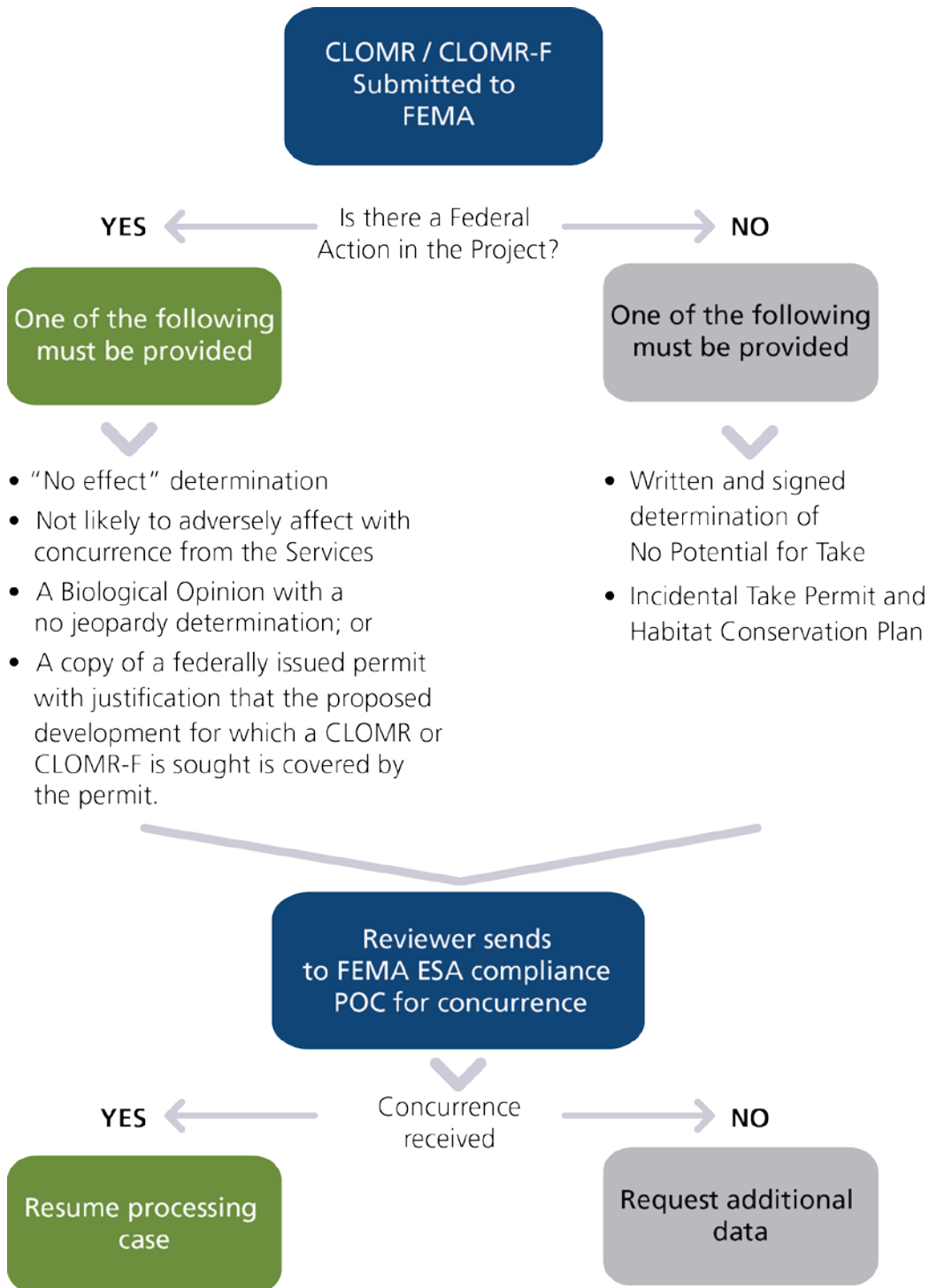
The following language must be used for the 216 and 316 AD letters:

“The [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). For projects that are not constructed, funded or permitted by a Federal agency, the requestor must document ESA compliance by submitting to FEMA a written and signed justification that a "Take," meaning to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct, has no potential to occur to threatened and endangered species present in the county as a result of the project. If a project has the potential to “Take” listed species, an Incidental Take Permit may be submitted with justification that the project is the subject, or is covered by the subject, of the permit.

For projects with Federal construction, funding, or permitting, a “not likely to adversely affect” determination, with concurrence from the Services, a determination from the Federal Action Agency that the project has “No Effect” on listed species or critical habitat, or other approval from the Services is acceptable documentation of ESA compliance.”

Figure 1 illustrates FEMA’s role in the ESA review of Conditional LOMCs.

Figure 1: Review Procedures



6.0 Common Terms:

“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 habitat conservation plan.

“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: www.fws.gov/endangered/esa-library/index.html.