



ESA Compliance With Less Pain & More Gain?

January 30, 2018



WILLAMETTE PARTNERSHIP

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How I Learned to Stop Worrying and Love the BiOp

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Disclaimer

1. I don't speak for:

- DLCD
- NOAA Fisheries
- FEMA
- Any cities or counties
- Litigants on either side
- Anybody else

2. I am not a lawyer.



Disclaimer

Q: What's in this for Willamette Partnership?

A: We want to help communities find better ways to achieve their environmental, social, and economic goals through smarter development and restoration in floodplains





Top 10 Reasons Stormwater People Should Care About Floodplains

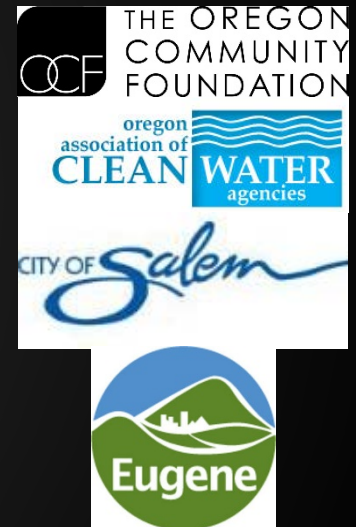
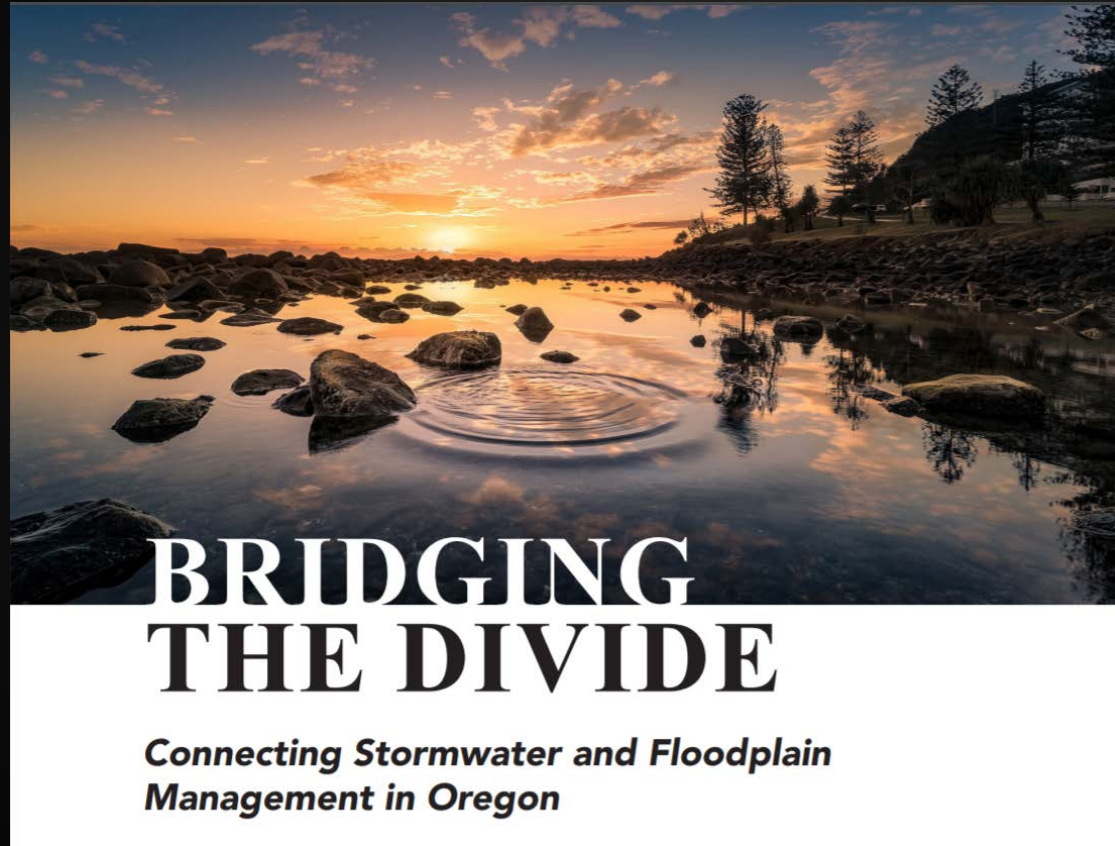


Top 10 Reasons Stormwater People Should Care About Floodplains

10. Willamette Partnership (and our friends) say so



10. Willamette Partnership Says So



<http://willamettepartnership.org>



Top 10 Reasons Stormwater People Should Care About Floodplains

9. Floodplains have what you need

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9. Floodplains Have What You Need

What can a naturally functioning floodplain do?

- Slow water down
- Spread it out
- Increase infiltration
- Mellow out your hydrograph
- Improve water quality
- Provide fish habitat
- Improve air quality
- Make space for recreation and active transportation
- Raise nearby property values



Southern Flow Corridor Project, Tillamook County
(Landowner Preferred Alternative)



9. Floodplains Have What You Need

What can constrained floodplains do?

- Less of all of that



South Waterfront, Portland, 1996
Photo: City of Portland



9. Floodplains Have What You Need

How functional can an urban floodplain get?



Hall Creek, Beaverton



Top 10 Reasons Stormwater People Should Care About Floodplains

8. Your city might get sued
9. Floodplains have what you need
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8. Your City Might Get Sued

The Washington Post

Climate change: Get ready or get sued

By Gail Sullivan May 19, 2014



Cities routinely build in the floodplain. That's not an act of God; that's an act of City Council.

- Kamyar Enshayan, 2008



Floodplains and ESA-listed fish



Bottom Line:

- Fish and people are trying to use the same real estate during a flood
- Human uses of floodplains affect instream habitat
- Functional floodplains protect human communities as well as fish





Endangered Species Act

ESA Commandments for Federal Agencies:

- Do not jeopardize the species
- Do not adversely modify critical habitat

Federal agencies can't fund, authorize, or carry out any action likely to adversely affect a listed species without consulting with USFWS or NMFS.



Endangered Species Act

ESA Commandment for Everyone:

- Do not take (harm, harass, kill, make fun of) listed species

Risk of third-party litigation is low, but not zero.



National Flood Insurance Program

- Make flood insurance available nationwide
- Minimize risks:
 - Encourage land use decisions that restrict floodplain development
 - Guide development away from flood hazards
 - Encourage lending and credit institutions to assist these objectives
 - Monitor hazards



Source: USGS
Source: NASA, NGA, USGS
Copyright: © 2009 i-cube



ESA Meets NFIP

Enter the third parties:

Q: Is NFIP a federal action?

A: Yes.

Q: Did FEMA consult with NMFS?

A: Nope.

Q: Does the NFIP jeopardize listed fish?

A: Yes.



ESA Meets NFIP

Oregon NFIP Biological Opinion:

- Jeopardy for 17 fish spp. and killer whale
- Adverse modification of critical habitat for 16 spp.
- “The NFIP... leads to development in the floodplain environment.”

And then...?



Top 10 Reasons Stormwater People Should Care About Floodplains

7. Regulations are colliding or converging
8. Your city might get sued
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7. Regulations are Colliding

Reasonable & prudent alternative:

What steps could FEMA take within its existing authorities to bring NFIP implementation into compliance with ESA?



Reasonable and Prudent Alternative

1. Notice, education, and outreach
2. Interim measures
3. Mapping special hazard areas
4. Floodplain management criteria
5. Data collection and reporting
6. Compliance and enforcement



Wait... What does NOAA really want?*

- Steer new development away from “core floodplain” and erosion areas as much as possible
- Limit impacts of development that does occur
- Mitigate for lost flood storage and vegetation
- Stormwater MS-4 compliance... plus?

*my interpretation



Already On The Way?

“Community A” is!

- Balanced cut-fill in floodplain
- Vegetation and slope corridors with mitigation
- Development limits in floodway, high-risk areas
- 30% impervious limit in flood zone
- Phase II MS-4
- Open to a few more changes



Top 10 Reasons Stormwater People Should Care About Floodplains

6. Silos can hurt people
7. Regulations are colliding or converging
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6. Silos Can Hurt People



City of Portland: BES

Top 10 Reasons Stormwater People Should Care About Floodplains

5. Floodplains managers are really fun
6. Silos can hurt people
7. Regulations are colliding or converging
8. Your city might get sued
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5. Floodplain managers are really fun



Top 10 Reasons Stormwater People Should Care About Floodplains

4. We probably can't afford not to
5. Floodplains managers are really fun
6. Silos can hurt people
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4. We Probably Can't Afford Not To

Between 2016 and 2025:

- Households lose \$3,400 a year in disposable income due to infrastructure deficiencies
- \$105 billion gap in funding water infrastructure
- Lose \$4 trillion in GDP
- Lose 2.5 million jobs



4. We Probably Can't Afford Not To

\$62 million... or \$7.7 million?



Prineville, Crooked River Wetlands



4. We Probably Can't Afford Not To

\$16 million... or \$8 million?



Rogue River



Top 10 Reasons Stormwater People Should Care About Floodplains

3. Integrated water management is *hot*
4. We probably can't afford not to
5. Floodplains managers are really fun
6. Silos can hurt people
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3. Integrated Water Management is *HOT*

“All water has value and should be managed in a sustainable, inclusive, integrated way. We call this perspective One Water. And while our focus is water, our goals are thriving local economies, community vitality, and healthy ecosystems.



3. Integrated Water Management is

HOT



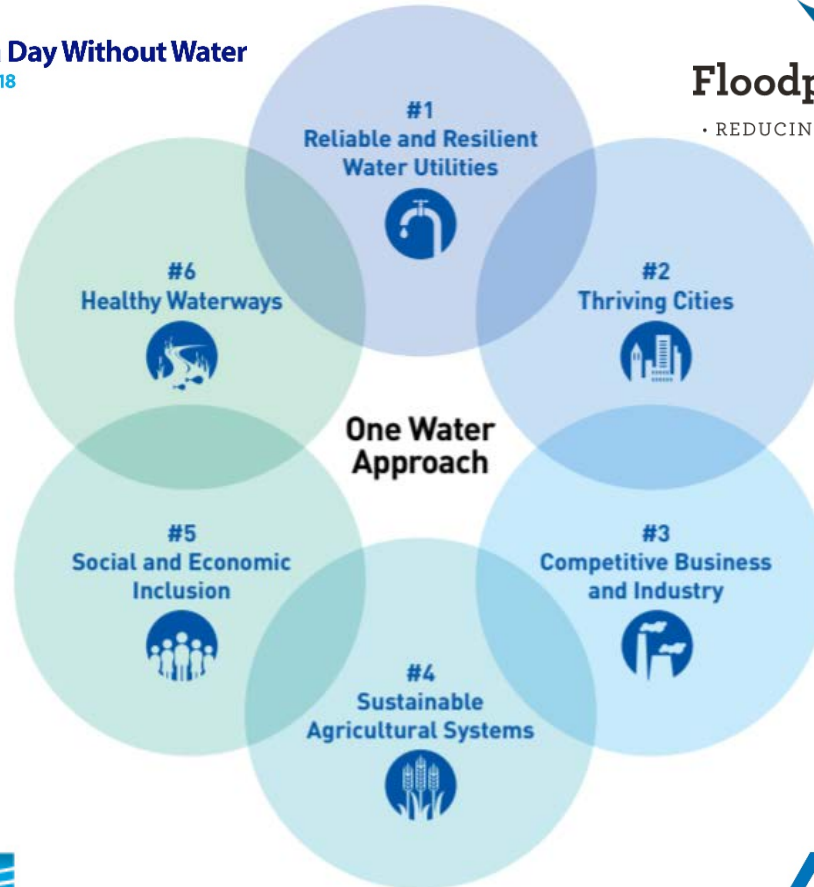
Imagine a Day Without Water
October 10, 2018



Floodplains by Design
• REDUCING RISK, RESTORING RIVERS •



US Water Alliance



THE
KRESGE
FOUNDATION

WATER RESOURCES UTILITY OF THE FUTURE TODAY



PISCES FOUNDATION



FEMA

oregon
association of
CLEAN WATER
agencies

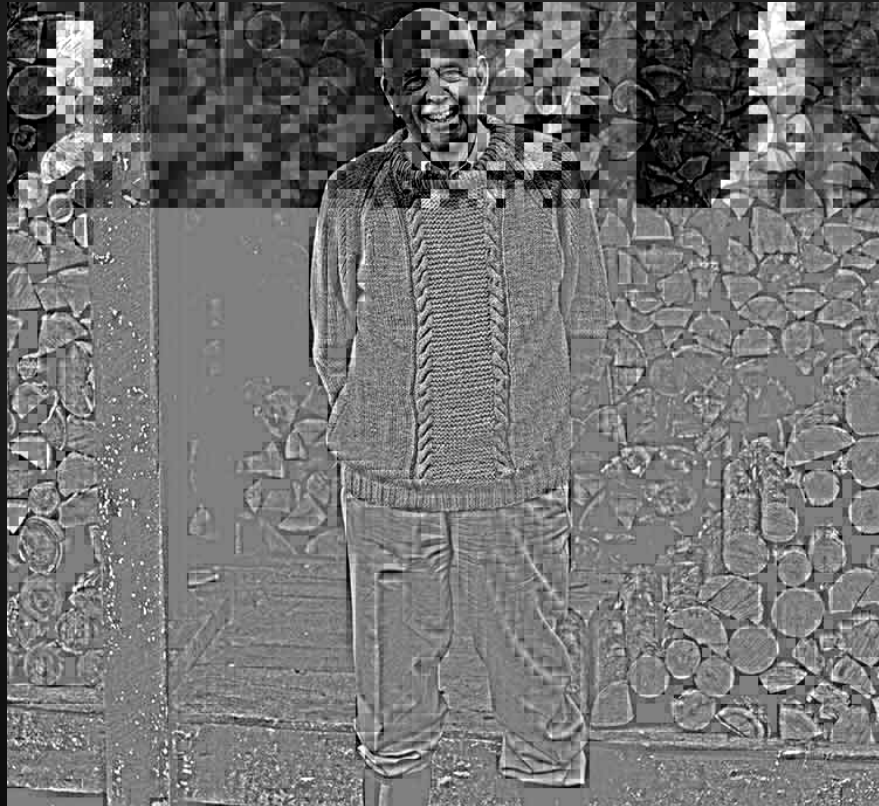
Water Environment Federation
the water quality people®

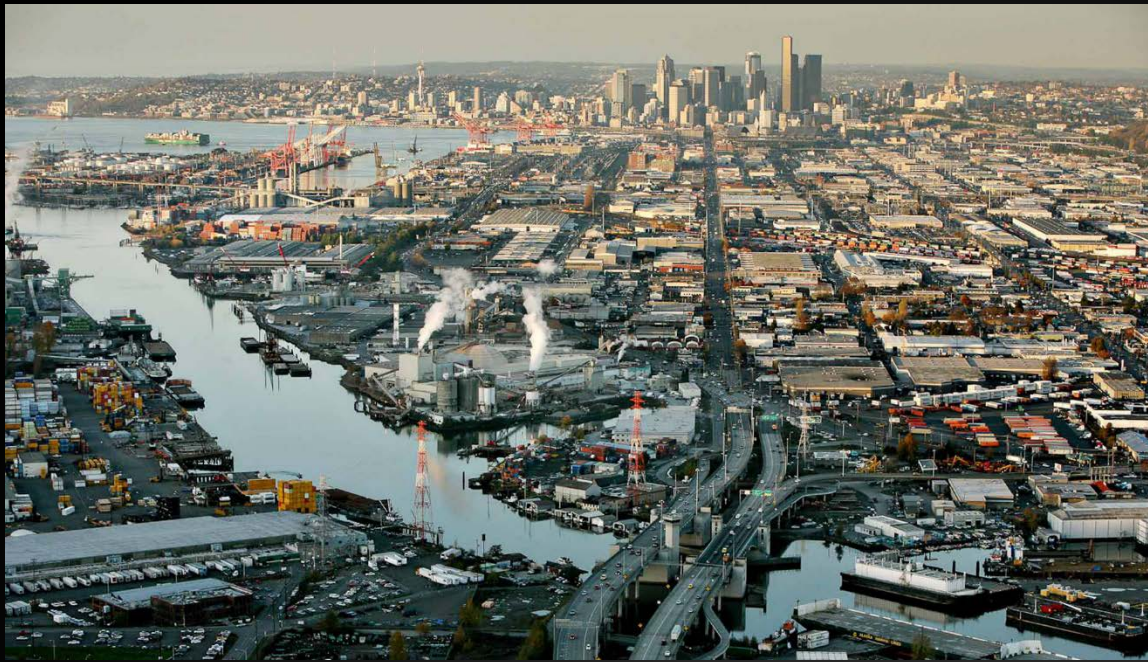
NRCS
Natural Resources Conservation Service



#2

“Do to those downstream as you would have those upstream do to you.” - Wendell Berry





Duwamish River, Seattle

Foster Floodplains,
Johnson Creek, Portland



Top 10 Reasons Stormwater People Should Care About Floodplains

1. It's better for people and fish (and people who fish)
2. "Do to those downstream..."
3. Integrated water management is *hot*
4. We probably can't afford not to
5. Floodplains managers are really fun
6. Silos hurt people
7. Regulations are colliding
8. Your city might get sued
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1. Better for fish, people, people who fish



If the BiOp were implemented tomorrow...

Potential **benefits**

- Public safety, flood storage, water quality
- Economic & climate change resilience
- Healthier fish populations
- Incidental take coverage for communities



If the BiOp were implemented tomorrow...

Potential **barriers**:

- FEMA authorities
- Capacity – FEMA, NMFS, state, local
- Intersection with other OR policies
- Litigation, legislation, political pushback
- Challenges for physically constrained cities



Help Me Help Everyone!

Today, or any day, show me your cool development code, mitigation requirements, environmental overlays, or stormwater standards, and I'll buy you a beer.

obrien@willamettepartnership.org

503-577-0421.

Seriously.





Thanks! Questions?



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