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FAQ: Does a jurisdiction have to adopt the Riparian Buffers required by the Biological Opinion?

Under the 2009 errata to the Biological Opinion, communities that choose to use the BO checklist (Option#2) are under the obligation to explain how their existing regulations, and any proposed changes to those regulations, will adequately protect the greater of (see Appendix 4 of the BO):

- 1) "250 feet measured perpendicularly from the ordinary high water for Type S (Shorelines of the State) streams, 200 feet for Type F streams (fish bearing greater than 5 feet wide and marine shorelines), and 150 feet for Type F stream less than 5 feet wide" (and) "for lakes". "For type N (nonsalmonid-bearing) perennial and seasonal streams a 150 foot to 225 foot buffer applies, depending on slope stability (the 225 foot buffer applies to unstable slopes)."
- 2) "The Channel Migration Zone plus 50 feet."
- 3) "The mapped Floodway."

The 2009 errata also states that "The Riparian Buffer Zone is an overlay zone that encompasses lands as defined above on either side of all streams, and for all other watercourses including all off-channel areas. The RBZ is a non-disturbance zone, **other than for activities that will not adversely affect habitat function.** Any property or portion thereof that lies within the RBZ is subject to the restrictions of the RBZ, as well as any zoning restrictions that apply to the parcel in the underlying zone." Note that some actions are allowable within the RBZ. Only those actions that would Adversely Affect habitat functions for threatened and endangered species are not allowed.

Jurisdictions currently meet several regulatory standards that overlap in some of the provisions required in the NFIP BO, such as those within the State of Washington's Growth Management Act (critical areas regulations) and Shoreline Master Program, as well as local additional regulations. Each of these programs require communities to use Best Available Science (BAS) and Best Management Practices (BMPs) in managing riparian buffer zones. Often times the buffer widths mandated by the jurisdiction's current local standards are narrower than the buffer widths required in the 2009 errata. Most Best Available Science peer-reviewed literature considers impacts at basin scale or larger spatial perspectives, attempting to characterize average conditions, functions, and buffer needs across that landscape. In reality, each often varies greatly by stream reach due to variations in geomorphology, hydrology, and site potential tree heights (vegetative potential). The NFIP Biological Opinion requires that the estimated impacts of proposed projects can not Adversely Affect current existing habitat functions, nor preclude potential future instream or riparian improvements in functions (i.e. via active or passive improvements in riparian vegetation or other actions) within the Riparian Buffer Zone.



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If a community's current jurisdictional buffer is less than the required buffer in the 2009 errata to the Biological Opinion, they must demonstrate that any potential development activities allowed within the area between these two different buffer widths (referred to here as the "**delta area**," see Diagram 1) will not have an Adverse Effect to habitat functions that support threatened or endangered species. There are several options to accomplish this:

1. Extend the buffers to the required buffers contained in the 2009 errata to the Biological Opinion (see above).
2. Require a habitat assessment for each proposed project in the delta area (the land area between the community's designated buffer and the buffer required by the BO) that demonstrates that the project will not cause an Adverse Effect to any of the remaining habitat functions and processes in the affected stream reaches. There are no simple standards in ESA consultation for what constitutes an Adverse Effect. The habitat assessment needs to analyze what impacts proposed land disturbing actions (i.e. the project proposal) would have to key habitat functions in reaches that potentially support TES (similar to those variables in the Matrix of Pathways and Indicators (NMFS 1998)).
3. Require a separate ESA consultation (Section 7, 10, or 4(d)) for each proposed project in the delta area.
4. Provide a communitywide assessment of the habitat functions and process that remain in the delta area, and that may reasonably exist in the future, and describe any anticipated development for the area. In most cases the community (jurisdiction) will need to describe current and anticipated future conditions and functions across several watersheds or sub-watersheds. Hydrologic, geomorphic, and vegetative potential (e.g. site potential tree heights) can vary greatly among watersheds, and even within reaches of the same watershed, hence the potential to adversely impact functions via land management actions within their respective protected area also varies. Generalizations regarding remaining habitat functions across large geographic areas that include multiple diverse watersheds will not be accurate.

Jurisdictions need to assess the functions that may be affected within areas of similar geomorphic and hydrologic nature (i.e. by reach or subwatersheds), and either avoid those actions completely, or minimize them to the point where potential negative impacts are either "negligible or discountable". Another potential option may be for jurisdictions to propose a restoration package(s) for those watersheds where other proposed actions would result in an incremental loss of some function(s) over the short-term, but the net outcome of all actions would be beneficial (see separate FAQ regarding Habitat Analysis at an Appropriate Scale).



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Diagram 1

