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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AUDUBON SOCIETY OF PORTLAND, NATIONAL
WILDLIFE FEDERATION, NORTHWEST
ENVIRONMENTAL DEFENSE CENTER, ASSOCIATION
OF NORTHWEST STEELHEADERS,

Plaintiffs,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY,

Defendant.

Civil No.

COMPLAINT FOR
DECLARATORY
AND INJUNCTIVE
RELIEF

INTRODUCTION

1. With this action for declaratory and injunctive relief, Plaintiffs challenge the failure of defendant, Federal Emergency Management Agency (“FEMA”), to ensure, in consultation with the Secretary of Commerce, that the implementation of the National Flood

Insurance Program (“NFIP”) is not likely to jeopardize the continued existence of threatened and endangered salmon in Oregon or destroy or adversely modify designated critical habitat for those species. 16 U.S.C. § 1536(a)(2). Through the NFIP, FEMA facilitates, influences, and even promotes and encourages human development in Oregon floodplains, thereby impairing habitat functions essential to the continued survival and recovery of imperiled salmon and steelhead listed as threatened and endangered under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. However, FEMA has never addressed these direct and significant impacts to the federally protected species, in consultation with the National Marine Fisheries Service (“NMFS”), as required by law, *see* 16 U.S.C. § 1536(a), to ensure that this program does not jeopardize the continued existence of these species or destroy or adversely modify their critical habitat. Plaintiffs also challenge FEMA’s failure to use its authorities to carry out programs to conserve listed species. 16 U.S.C. § 1536(a)(1). Plaintiffs’ claims arise under the ESA and its implementing regulations, and Plaintiffs bring this action pursuant to the ESA’s citizen suit provisions. 16 U.S.C. § 1540(g).

2. Plaintiffs seek a declaration that FEMA has violated the ESA by failing to consult with the Secretary to ensure that its implementation of the NFIP in Oregon does not jeopardize federally listed species in Oregon or destroy or adversely modify the designated critical habitat of these species. Plaintiffs also seek a declaration that FEMA has failed to use its authorities to develop and implement a program to conserve threatened and endangered species in Oregon. Plaintiffs seek an injunction curtailing FEMA’s issuance and authorization of flood insurance policies for new development within the geographic range of the potentially impacted listed species in Oregon until FEMA completes consultation with the Secretary and ensures that continued implementation of the NFIP does not jeopardize listed species in Oregon.

PARTIES

3. The Plaintiffs in this action include the following:
 - A. Audubon Society of Portland is a non-profit conservation organization dedicated to the conservation of Oregon's remaining wild places, and also to protecting wildlife and wildlife habitat in urban environments. The organization has been a leading voice in creating and protecting wildlife refuges in the Willamette Valley and throughout Oregon for a century. Audubon Society of Portland has also consistently worked to increase legal protections for birds and other wildlife, and its members travel throughout the state to enjoy viewing wildlife in their natural habitat, and devote thousands of hours of volunteer work to protect, restore and monitor wildlife and wildlife habitat for the benefit of humanity and the earth's biological diversity.
 - B. Northwest Environmental Defense Center ("NEDC") is a nonprofit organization, with its principal place of business in Portland, OR. NEDC is comprised of citizens, attorneys, law students and scientists. NEDC's mission is to protect the environment and natural resources of the Pacific Northwest by providing legal support to individuals and grassroots organizations with environmental concerns, and engaging in litigation independently and in conjunction with other environmental groups. NEDC's members live, recreate and study throughout the state of Oregon, in areas impacted by the National Flood Insurance Program, and derive recreational, inspirational, scientific, and aesthetic benefit from their activities along and on the water bodies that provide habitat for the threatened and

endangered species impacted by FEMA's actions. NEDC actively participates in procedures and decisions by federal agencies concerning the management and protection of listed anadromous fish species throughout Oregon, and NEDC's members intend to continue to use and enjoy the areas impacted by FEMA's ongoing actions.

- C. National Wildlife Federation ("NWF") is the nation's largest conservation advocacy and education organization. Founded in 1936, NWF is a non-profit organization with its headquarters in Reston, Virginia. NWF has nine regional offices, including the Western Regional Center in Seattle, Washington. NWF's mission is to inspire Americans to protect wildlife for our children's future. NWF and its approximately one million members are dedicated to protecting and restoring Pacific Northwest salmon runs and the habitat upon which the species depends.
- D. Association of Northwest Steelheaders ("ANWS") is an organization dedicated to enhancing and protecting fisheries and their habitats through conservation of fish, rehabilitation and restoration of stream habitats, angler education and fishing clinics. ANWS is the Oregon State affiliate of the NWF.

4. Plaintiffs and their members use and enjoy floodplain areas throughout Oregon and the threatened and endangered species that inhabit them for recreational, scientific, conservation and aesthetic purposes. Plaintiffs and their members derive, or, but for the threatened status of these salmon and steelhead and other imperiled Oregon species, would derive, recreational, scientific, conservation and aesthetic benefits from the existence of these

species and their properly functioning habitat through wildlife observation, study, photography, education and recreational endeavors throughout Oregon's watersheds and floodplains.

5. The plaintiffs and their respective members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected by FEMA's failure to comply with the ESA, the purpose of which is to protect threatened species and their habitat. FEMA's failure to carry out statutorily mandated consultation under ESA further impairs Plaintiffs' procedural interests in the conservation and recovery of threatened and endangered species throughout Oregon. Plaintiffs have no adequate remedy at law.

6. Defendant Federal Emergency Management Agency ("FEMA") is a federal agency that administers the National Flood Insurance Program ("NFIP"). FEMA is an agency within the Department of Homeland Security. Region 10 of FEMA, which oversees implementation of the NFIP in Oregon, is based in Bothell, Washington.

JURISDICTION AND VENUE

7. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question jurisdiction), § 2201 (declaratory relief), § 2202 (injunctive relief), and 16 U.S.C. § 1540(g)(1)(A) (ESA citizen suit). On March 18, 2009, Plaintiffs sent FEMA a 60-day notice of intent to sue for violations of the ESA, as required by 16 U.S.C. § 1540(g)(2)(C). *See* Exhibit A.

8. Venue is properly vested in this court under 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to this claim occurred in this district and because the plaintiffs Audubon, Northwest Environmental Defense Center, and Association of Northwest Steelheaders reside in this district.

FACTUAL AND STATUTORY BACKGROUND

The National Flood Insurance Program

9. The National Flood Insurance Program (“NFIP”) is a federal program administered by FEMA that enables property owners to acquire insurance for properties located within flood prone areas. Established in 1968 with the passage of the National Flood Insurance Act, the NFIP is designed to ameliorate heavy expenditures of federal disaster relief by authorizing flood insurance that would otherwise be prohibitively costly or unavailable. 42 U.S.C. § 4001.

10. Recognizing the limitations of traditional flood-control techniques, Congress conditioned eligibility for the NFIP on local community adoption of land-use and control regulations. 42 U.S.C. § 4002(b)(3). For purposes of the NFIP, a “community” is defined as “any state, area, or political subdivision . . . which has the authority to adopt and enforce floodplain management ordinances for the area under its jurisdiction.” 44 C.F.R. § 59.1. Communities become participants in the NFIP by adopting regulations in accordance with FEMA standards. These standards are intended to encourage development design that will reduce flood damage to properties built within floodplains.

11. Property owners are eligible for federal flood insurance only in those communities enrolled in the NFIP. 42 U.S.C. § 4012(c)(2); 44 C.F.R. § 59.22. The NFIP is unavailable to residents in communities that fail to adopt or enforce land-use regulations meeting these criteria minimums. 42 U.S.C. § 4022(a)(1); 44 C.F.R. § 60.1. FEMA certifies community participation in the NFIP via an application and ongoing oversight process. 44 C.F.R. §§ 59.22, 59.24.

12. FEMA maintains an ongoing regulatory relationship with NFIP communities. For example, FEMA places on probation and may suspend communities from the NFIP for failure to enforce minimum land-use regulations. 44 C.F.R. § 59.24. To monitor compliance, FEMA conducts community visits to perform comprehensive assessments of local programs and provide technical assistance to local officials. These community visits enable FEMA to ensure compliance with land-use regulations to the minimum criteria standard. *Id.*

13. FEMA further interacts with local communities through dissemination of information and development and revision of maps to identify flood-prone areas. 42 U.S.C. § 4101. FEMA maps, known as Flood Insurance Rate Maps (“FIRMs”), identify categories of flood hazard areas and their associated risk premiums. 44 C.F.R. § 64.3. FEMA is required to update the FIRMs at least every five years and may make adjustments in response to new information provided by property owners. 44 C.F.R. Pt. 72. FEMA often fails to initiate or complete such updates, however, rendering many maps inaccurate or out of date.

14. Following FEMA certification of a community for NFIP eligibility, individual property owners acquire federal flood insurance through two mechanisms. First, FEMA may enter into agreements with private insurance providers who then issue federal flood insurance policies to applicants. 44 C.F.R. § 62.23. Private insurers are referred to as “write your own” (“WYO”) companies. FEMA-approved WYO providers collect premiums from NFIP participants, retain proceeds to cover business costs and submit remaining moneys to the U.S. Treasury. *See generally* 44 C.F.R. Pt. 62, App. A. FEMA is required to conduct triennial review of WYO companies’ practices, and renews contract agreements on an annual basis. 44 C.F.R. Pt. 62, App. B. Alternatively, FEMA may issue insurance directly to property owners. *See* 44 C.F.R. §§ 62.1, 62.3.

15. Though participation in the NFIP is technically voluntary, virtually every flood-prone locale in the United States applies for eligibility and participates in the program. The reason is straightforward: failure to enroll in the NFIP can seriously diminish landowners’ opportunities for development and the property values of community residents. For example, the National Flood Insurance Act provides that other federal agencies such as the Federal Housing Administration and the Small Business Administration may not issue loans to property owners in non-NFIP communities. 42 U.S.C. § 4012(a). Additionally, without NFIP participation, mortgages from federally insured or regulated banks as well as Veterans Administration loans are unavailable where applicants secure assistance based on property or structures located within floodplain areas. *Id.*

16. The enabling statute calls for FEMA's periodic reevaluation of the minimum land-use criteria, in part to reduce the amount of development exposed to floods and "improve the long-range land management and use of flood-prone areas." 42 U.S.C. § 4102(c). Current minimum criteria, codified in 44 C.F.R. § 60.3, focus on limiting property losses and effective structural design; the criteria do not contemplate protections for floodplain ecosystems or threatened and endangered species. FEMA also implements a Community Rating System (CRS), a separate, voluntary program to encourage local floodplain management regulation that exceeds the regulatory minimums. Under the CRS, floodplain management regulation above NFIP minimums is rewarded with lower insurance flood insurance rates in the community. *See* 55 Fed. Reg. 28,291 (July 10, 1990).

17. FEMA has broad discretion to implement programs consistent with environmental protection. *See, e.g.*, 44 C.F.R. § 10.4(a) (requiring FEMA to implement flood insurance program "in a manner consistent with national environmental priorities"); *see also* Exec. Order No. 11988 (May 24, 1977) (requiring federal agencies to "restore and preserve the natural and beneficial values served by floodplains in carrying out [their] responsibilities"). In fact, the NFIP implementing statute itself calls for FEMA to "consult" with other federal agencies to make certain that the NFIP is "mutually consistent" with other agency programs and goals. 42 U.S.C. § 4024. Such programs and goals include compliance with the objectives and requirements of the Endangered Species Act.

The Endangered Species Act

18. The Endangered Species Act (“ESA”) seeks to conserve threatened and endangered species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

19. To receive the protections afforded imperiled species under the ESA, the species must be placed on the Act’s “threatened” or “endangered” species lists. 16 U.S.C. § 1533(c). A “species” that may be listed for protection under the ESA includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

20. When deciding whether to list populations of Pacific salmon for protection as a “distinct population segment” under this definition, NMFS employs the concept of “evolutionarily significant unit” (“ESU”). A population of Pacific salmon is an ESU if it is “(1) . . . reproductively isolated from other population units of the same species, and (2) . . . an important component in the evolutionary legacy of the biological species.” 64 Fed. Reg. 14,308, 14,310 (Mar. 24, 1999).

21. To achieve the goal of protecting and eventually recovering imperiled species, Section 7 of the ESA prohibits federal agencies from taking any actions that are likely to jeopardize the survival and recovery of a listed species or adversely modify its critical habitat:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or

adverse modification of habitat of such species which is determined by the Secretary . . . to be critical. . . .

16 U.S.C. § 1536(a)(2). Accordingly, the Supreme Court has declared that “endangered species [have] priority over the ‘primary missions’ of federal agencies.” *Hill*, 437 U.S. at 185.

22. To assist federal agencies in fulfilling this duty to avoid jeopardy, consultation with the Secretary is required for proposed “agency actions” that “may affect” a listed species. *Id.*; 50 C.F.R. § 402.14(a). ESA implementing regulations define “agency action” broadly, encompassing “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02 (defining “action”). Similarly, the threshold for determining whether the agency action “may affect” a listed species is low. *See* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement . . .”).

23. The U.S. District Court for the Western District of Washington held the ongoing implementation of the NFIP by FEMA as an agency action triggering formal consultation requirements under Section 7. *Nat’l Wildlife Fed’n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1174 (W.D. Wash. 2004) (“FEMA’s implementation of the NFIP . . . is a discretionary ‘agency action’ for the purposes of Section 7(a)(2) of the ESA”). The U.S. District Court for the Southern District of Florida previously reached the same conclusion. *See Florida Key Deer v. Stickney*, 864 F. Supp. 1222 (S.D. Fla. 1994).

24. For agency actions that may affect listed species, the responsible federal agency must initiate consultation and provide to the appropriate expert agency -- the National Marine Fisheries Services (“NMFS”) for salmonids and the U.S. Fish and Wildlife Service (“FWS”) for other species -- information regarding the effects of its action on listed species and designated critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Formal consultation under Section 7 concludes with issuance of a final biological opinion or opinions addressing whether a proposed or ongoing agency action is likely to jeopardize the continued existence of affected species or destroy or adversely modify designated critical habitat.

25. Federal agencies may not carry out proposed or ongoing actions that may affect listed species until they initiate the required consultation process. After initiating Section 7 consultation, but prior to the conclusion of the Section 7 process, a federal agency may not make any “irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [Section 7(a)(2)].” 16 U.S.C. § 1536(d).

26. Separately, Section 7 requires federal agencies to “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species.” 16 U.S.C. § 1536(a)(1). As with §7(a)(2), the duties imposed by § 7(a)(1) are discharged “in consultation with and with the assistance of” NMFS. *Id.*

Endangered and Threatened Species in Oregon

27. NMFS has listed fifteen species of salmon and steelhead that live in Oregon for part of their life cycle as threatened or endangered under the ESA. Steelhead and salmon are anadromous fish. They are born and rear in fresh water, migrate downstream to the Pacific Ocean where they grow and live as adults, and return to their natal streams and lakes to spawn and die. The Columbia River and other rivers and streams throughout Oregon historically provided habitat for chinook, sockeye, chum, and coho salmon, as well as steelhead.

28. The first of these species to receive federal protection, Snake River sockeye, was listed in 1991. 55 Fed. Reg. 58,619 (Nov. 20, 1991); 70 Fed. Reg. 37,160 (June 28, 2005) (maintaining endangered status in status review). Over the next two decades, NMFS listed fourteen additional evolutionarily significant units (“ESUs”) in Oregon, most recently listing the Oregon Coast Coho as “threatened” in February 2008. 73 Fed. Reg. 7816 (Feb. 11, 2008). The other thirteen listed ESUs in Oregon include: Upper Willamette River Chinook, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Lower Columbia River Chinook, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Upper Columbia River Spring Chinook, 70 Fed. Reg. 37,160 (June 28, 2005) (endangered); Snake River Spring/Summer Chinook, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Snake River Fall Chinook, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Lower Columbia River Coho, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Southern Oregon/Northern California Coho, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Columbia River Chum, 70 Fed. Reg. 37,160 (June 28, 2005) (threatened); Upper Willamette River steelhead, 71 Fed. Reg. 834 (Jan. 5, 2006) (threatened); Lower Columbia River steelhead 71 Fed. Reg. 834 (Jan. 5, 2006) (threatened); Middle Columbia River steelhead, 71 Fed. Reg. 834 (Jan.

5, 2006) (threatened); Snake River Basin steelhead, 71 Fed. Reg. 834 (Jan. 5, 2006) (threatened); and Upper Columbia River steelhead.

29. Each of these ESUs, except the Lower Columbia River Coho has designated critical habitat in Oregon. *See* 58 Fed. Reg. 68,543 (Dec. 28, 1993) (Snake River sockeye and Snake River Fall chinook); 70 Fed. Reg. 52,630 (Sept. 2, 2005) (Columbia River coho, Columbia River chum, three ESUs of Chinook, and five DPSs of steelhead in Oregon); 64 Fed. Reg. 57,399 (Oct. 25, 1999) (Snake River Spring/Summer Chinook); 64 Fed. Reg. 24,049 (May 5, 1999) (Southern Oregon/Northern California Coast Coho).

30. Listed salmon and steelhead require for their survival and recovery, properly functioning habitat, which includes healthy functioning riparian ecosystems including the 100-year floodplain of rivers and streams in Oregon. For example, as part of the critical habitat needed to ensure the survival and recovery of the Oregon coast coho, NMFS defined as one of the Primary Constituent Elements “[f]reshwater rearing sites with water quantity and floodplain connectivity to form and maintain physical habitat conditions and support juvenile growth and mobility.” 73 Fed. Reg. at 7832. Just as in previous critical habitat determinations, NMFS found that urbanization is one of the “activities that threaten the physical and biological features essential to listed salmon and steelhead.” *Id.* at 7833. Further, the agency indicated, “the quality of aquatic habitat within stream channels is intrinsically related to the adjacent riparian zones and floodplain Human activities that occur outside the stream can modify or destroy physical and biological features of the stream.” *Id.* at 7834. With regard to the Lower Columbia River Chinook ESU, NMFS wrote, “[m]ajor habitat problems are related primarily to blockages, forest

practices, urbanization in the Portland and Vancouver areas, and agriculture in floodplains and low-gradient tributaries.” 63 Fed. Reg. at 11,495; NMFS Biological Review Team, Review of the Status of Chinook Salmon in Washington, Oregon, California and Idaho under the Endangered Species Act 229, 231 (1997) (same); *see also id.* at 227 (“Urban development has had substantial impacts in the lower Willamette Valley, including channelization and diking of rivers, filling and draining of wetlands, removal of riparian vegetation, and pollution.”). NMFS has specifically indicated that habitat modifications authorized by FEMA that may affect salmonid critical habitat require Section 7 consultation. *See, e.g.*, 73 Fed. Reg. at 7839.

31. Urban and rural development in many places in Oregon has replaced intact floodplains and naturally migrating rivers with channelized, simplified drainage systems. Flood control measures such as dredging, dikes and dams work to separate the deep-water portions of rivers from their adjacent floodplains, lessening the supply of large woody debris, organic matter, shade, and dissolved nutrients to the system. Without these inputs, estuarine and riverine environments lack refuge, suitable water quality and food sources essential to salmon survival.

32. The sweeping extent of floodplain loss is one of the most pervasive and unregulated forms of habitat degradation in the Pacific Northwest. As a result of these and other habitat-degrading human activities, Oregon salmon and steelhead populations have declined drastically over the past few decades. A century ago, between 10 and 16 million salmon returned to the Columbia Basin each year. As of 1991, 67 stocks of Columbia River salmonids were extinct and 76 stocks were at risk of extinction. Continued ongoing development in already degraded floodplain areas continues to impact salmon habitat through the addition of impervious

surfaces, introduction of pollutants and toxics, hydrologic alterations, and impaired water quality and quantity.

33. The negative effects the continued floodplain development will be further exacerbated by the impacts associated with global climate change. Climate change has the potential to profoundly alter aquatic habitat and impact salmon conservation and recovery in Oregon and the Northwest. *See* NMFS, Endangered Species Act – Section 7 Consultation Final Biological Opinion And Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation Implementation of the National Flood Insurance Program in the State of Washington Phase One Document – Puget Sound Region, at 143 (Sept. 22, 2008) (NMFS BiOp). Salmon are especially vulnerable to the impacts of climate change in large part because they require cold water for spawning and incubation, and because their breeding habitat can be negatively impacted by changes in stream flow. NMFS BiOp, at 45, 60. Climate change will impact salmon by causing alterations of water yield, peak flows, and stream temperature.

34. In a recent biological opinion finding the NFIP as implemented in Washington State jeopardizes salmon populations in Puget Sound, NMFS noted that ongoing and future climate change in Washington “has the potential to profoundly alter aquatic habitat.” NMFS BiOp at 143. A recent report issued by the U.S. Global Change Research Program and submitted to Congress by the White House Office of Science and Technology Policy and National Oceanic and Atmospheric Administration confirms that climate change is likely to cause such habitat alterations in Oregon as well. *See* Global Climate Change Impacts in the United States (2009). Warmer air temperatures, increases in winter precipitation (much of it in the form of rain rather

than snow), and decreases in summer precipitation will occur as a result of climate change. As the snow pack diminishes, seasonal hydrology will shift, changing stream flow timing and generally decreasing river flows during spring and summer when salmon need cold temperatures and higher flows. Climate-induced impacts may also render unsuitable for salmon and steelhead about one-third of their existing habitat. *See* Global Climate Change Impacts in the United States at 137.

35. In light of the risks to salmon recovery posed by climate change, further development in and destruction of floodplains and the functions they perform pose an especially dire threat to salmon conservation and recovery. NMFS has concluded that “to mitigate the adverse impacts of climate change on salmon” efforts must be made to “restor[e] connections to historical floodplains and freshwater and estuarine habitats to provide fish refugia and areas to store excess floodwaters, protect[] and restor[e] riparian vegetation to ameliorate stream temperature increases, and purchas[e] or apply[] easements to lands that provide important cold water or refuge habitat.” NMFS BiOp, at 143. The NMFS further found that “cumulative effects from land-use change and climate change on salmon further hinder salmon survival and recovery.” *Id.* at 144

The National Flood Insurance Program in Oregon

36. In Oregon 259 local communities participate in the NFIP. Of these, the overwhelming majority are found within the geographic boundaries of the range of the listed species. Within these communities, currently 32,757 individual insurance policies are held under the NFIP. These policies provide for a total of \$6,817,980,600.00 in flood insurance coverage.

37. FEMA's administration of the NFIP in relation to threatened and endangered species in Oregon remains essentially unchanged over time. Indeed, in the years since the listings, FEMA has issued hundreds and perhaps thousands of new individual flood insurance policies for new structures within floodplains used by and relied upon by threatened and endangered species in Oregon. Indeed, From September 2004 to October 2007, the most recent period for which FEMA has made data available, the number of policies in Oregon increased by over 17 percent. FEMA also continues to implement other elements of the program, such as revising maps, assuring and assisting with community compliance, and reviewing local regulations, all without adequate consideration of potential impacts to listed species.

38. FEMA's administration of the NFIP is a federal agency action. Implementation of the NFIP in Oregon includes, but is not limited to: certifying community eligibility, monitoring and assisting community compliance and enforcement with land-use criteria standards, providing federal flood insurance directly or authorizing insurance through private insurers, establishing and updating minimum land-use criteria, and revising flood-hazard maps.

39. FEMA's implementation of the NFIP "may affect" listed species throughout Oregon. The NFIP has widespread participation throughout Oregon and involves disincentives for non-participation. FEMA's implementation of the NFIP provides incentives and disincentives relative to construction of new structures in floodplains and where, how, and when development in flood-prone areas occurs. Without FEMA's implementation of the NFIP, some structures in floodplains would not be built, purchased or sold. The floodplain development

induced or affected by FEMA's action, in turn, has impaired the survival of listed species in Oregon, and will continue to affect the likelihood of these species' conservation and recovery. Such development poses even more acute risks to salmon conservation and recovery in the light of the impacts expected from climate change.

40. Accordingly, FEMA's implementation of the NFIP within the range of the threatened and endangered species in Oregon is a federal action that may affect such listed species and thus, requires consultation under Section 7. Since the date of ESA listing, FEMA has not engaged in consultation with the Secretary to insure that its actions do not jeopardize Oregon listed species.

41. Further, FEMA has not utilized its authority to develop and/or carry out programs to conserve listed species, in consultation with NMFS, consistent with the ESA's goals, as required by ESA § 7(a)(1).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF VIOLATION OF 16 U.S.C. § 1536(a)(2)

42. Plaintiffs incorporate by reference all preceding paragraphs.

43. The ESA requires that federal agencies ensure that agency actions are not likely to jeopardize the continued existence of endangered or threatened species or destroy or adversely modify designated critical habitat, and requires an interagency consultation process to ensure that agencies fulfill these mandates. 16 U.S.C. § 1536(a)(2).

44. FEMA has violated these requirements of ESA and its implementing regulations by its failure to initiate and complete consultation with NMFS to ensure that its ongoing administration of the NFIP, an action that may affect listed species in Oregon, does not jeopardize such federally protected species or destroy or adversely modify designated critical habitat.

**SECOND CLAIM FOR RELIEF
VIOLATION OF ESA 16 U.S.C. § 1536(a)(1)**

45. Plaintiffs incorporate by reference all preceding paragraphs.

46. The ESA requires that FEMA, in consultation with NMFS, use its authorities in furtherance of the purposes of the ESA by developing and carrying out programs for the conservation of threatened and endangered species. 16 U.S.C. § 1536(a)(1).

47. FEMA has violated the requirements of ESA by its failure to develop and carry out programs for the conservation of federally listed species in Oregon in consultation with NMFS.

RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully request that this Court:

1. Declare that FEMA has violated the ESA by failing to ensure, in consultation with the Secretary, that its action of implementing the NFIP does not jeopardize listed species or destroy or adversely modify designated critical habitat in Oregon.

2. Declare that FEMA has violated the ESA by failing to use its authorities to develop or carry out programs, in consultation with the Secretary, to conserve federally listed species in Oregon.

3. Issue an injunction curtailing FEMA's issuance and/or authorization of insurance policies for new development through the NFIP within the geographic range of federally threatened and endangered species in Oregon until FEMA ensures compliance with the ESA through completion of the consultation process with NMFS, and adherence to all requirements imposed by the ESA.

4. Award plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys fees, associated with this litigation; and,

5. Grant plaintiffs such further and additional relief as the Court may deem just and proper.

DATED: June 25th, 2009

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Daniel J. Rohlf". The signature is fluid and cursive, with a large initial 'D' and 'R'.

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