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**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.

CASE NO. 3:09-cv-729-HA

**SETTLEMENT AGREEMENT
AND [PROPOSED] ORDER**

Plaintiffs, Audubon Society of Portland, National Wildlife Federation, Northwest Environmental Defense Center, and Association of Northwest Steelheaders, and Defendant, the Federal Emergency Management Agency (“FEMA”), by and through their undersigned counsel, state as follows:

WHEREAS, FEMA is the federal agency charged with administering the National Flood Insurance Program (“NFIP”), a federal flood insurance program created by Congress in 1968,

and amended in 1973 and 1994 (42 U.S.C. §§ 4001, et seq.);

WHEREAS, on June 25, 2009, Plaintiffs brought this Endangered Species Act (“ESA”) lawsuit against FEMA, alleging that FEMA violated Section 7 of the ESA by not consulting with the National Marine Fisheries Service (“NMFS”) on the impacts of the NFIP in Oregon on the following fifteen salmon and steelhead listed as threatened and endangered under the ESA in Oregon: (1) Snake River sockeye, (2) Oregon Coast Coho, (3) Upper Willamette River Chinook, (4) Lower Columbia River Chinook, (5) Upper Columbia River Chinook, (6) Snake River Spring/Summer Chinook; (7) Snake River Fall Chinook, (8) Lower Columbia River Coho, (9) Southern Oregon/Northern California Coho, (10) Columbia River Chum, (11) Upper Willamette River steelhead, (12) Lower Columbia River steelhead, (13) Middle Columbia River steelhead, (14) Snake River Basin steelhead, and (15) Upper Columbia River steelhead;

WHEREAS, the parties, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to Plaintiffs’ claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in Plaintiffs’ complaint;

WHEREAS, the parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve the dispute between them;

NOW, THEREFORE, the parties hereby stipulate and agree as follows:

1. Within fifteen (15) days of entry of an Order on this Settlement Agreement (“Agreement”) FEMA shall provide the Director of the NMFS a written request to initiate informal consultation, pursuant to 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.13, on the impacts to the fifteen ESA-listed species identified in Plaintiffs’ complaint of (i) FEMA’s implementation of 42 U.S.C. § 4102(c); (ii) the mapping of the floodplains and revisions thereof 42 U.S.C.

§ 4101(a)(1), (a)(2), and (iii) the implementation of the Community Rating System (“CRS”), a voluntary program through which Congress mandated that FEMA provide discounts on flood insurance premiums to communities that implement flood management regulations that exceed FEMA’s minimum criteria, 42 U.S.C. § 4022(b)(1).

2. Within one (1) year of entry of an Order on this Agreement FEMA shall provide the Director of the NMFS a written request to initiate formal consultation, pursuant to 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(c), on the impacts to the fifteen ESA-listed species identified in Plaintiffs’ complaint of (i) FEMA’s implementation of 42 U.S.C. § 4102(c); (ii) the mapping of the floodplains and revisions thereof 42 U.S.C. § 4101(a)(1), (a)(2), and (iii) the implementation of the CRS, 42 U.S.C. § 4022(b)(1). This written request shall include a document, which may at FEMA’s discretion be titled as a biological assessment pursuant to 50 C.F.R. § 402.12, which contains the information specified in 50 C.F.R. § 402.14(c)(1) through 402.14(c)(6). This Agreement does not limit the substantive outcome of consultation. To challenge the biological opinion resulting from the initiated consultation in accordance with this Agreement, Plaintiffs will be required to file a separate action. FEMA will not withdraw its biological assessment or from consultation.

3. Should NMFS request additional information from FEMA pursuant to 40 C.F.R. §§ 402.14(c), (d), and/or (f), FEMA shall provide such information, if available, to NMFS within sixty (60) days, or by such time as NMFS directs.

4. Within thirty (30) days of entry of an Order on this Agreement, FEMA shall begin to notify all participating communities in Oregon in writing by sending them a letter materially similar to that attached hereto as Exhibit 1 and will diligently continue notifying

communities by letter materially similar to that attached hereto as Exhibit 1 until all participating communities have received such notification.

5. During the pendency of FEMA's consultation with NMFS, FEMA shall implement the following changes to the administration of the NFIP in Oregon:

a. Mapping. Upon entry of an Order on this Agreement, FEMA shall immediately institute the following elements:

i. FEMA shall process Conditional Letters of Map Change (CLOMC) caused by manmade alterations only when the proponent has factored in the effects on channel and floodplain habitat function for ESA-listed salmon and steelhead, and has demonstrated that the alteration avoids habitat functional changes, or that the proponent has mitigated for the habitat functional changes resulting from the alteration with appropriate habitat measures, such that the alterations do not cause a net loss of habitat function and value.

ii. FEMA shall ensure that floodplain modeling incorporates on-the-ground data as is readily available to increase the accuracy of maps depicting the floodplain. In addition, FEMA will use a 2-dimensional model in estuarine floodplains and in other areas as applicable.

Any challenge to any determination made by FEMA pursuant to this paragraph shall be reviewed under the standard of review set out in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

6. Either party may seek to modify the terms of the Agreement specified in Paragraph 1 for good cause shown, consistent with the Federal Rules of Civil Procedure. In that event, or in the event that either party believes the other party has failed to comply with any

term or condition of this Agreement, the parties shall use the dispute resolution procedures specified in Paragraph 7 below.

7. This Agreement may be modified by the Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by (i) written stipulation between the parties filed with and approved by the Court, or (ii) upon written motion filed by one of the parties and granted by the Court. In the event that either party seeks to modify the terms of this Agreement, including the deadline specified in Paragraph 1, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either party believes that the other party has failed to comply with any term or condition of this Agreement, the party seeking the modification, raising the dispute, or seeking enforcement shall provide the other party with notice of the claim. The parties agree that they will meet and confer (telephonically or in-person) at the earliest possible time in a good-faith effort to resolve the claim before seeking relief from the Court. If the parties are unable to resolve the claim themselves, either party may seek relief from the Court. In the event that Plaintiffs believe FEMA has failed to comply with a term of this Agreement and has not sought to modify it, Plaintiffs' first remedy shall be a motion to enforce the terms of this Agreement. This Agreement shall not, in the first instance, be enforceable through a proceeding for contempt of court.

8. No party shall use this Agreement or the terms herein as evidence that FEMA is required to initiate consultation with NMFS on the impacts of any portion of the NFIP, in any other proceeding involving FEMA's implementation of the NFIP or compliance with the ESA.

9. FEMA agrees that Plaintiffs are the "prevailing parties" in this action, and agrees to pay to Plaintiffs reasonable attorneys' fees and costs, pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540 (g). The parties agree to attempt to resolve Plaintiffs' claims for fees and

costs expeditiously and without the need for Court intervention. The Court shall retain jurisdiction over the case for the purpose of resolving any dispute between the parties regarding Plaintiffs' claims for an award of fees and costs. If the parties are unable to resolve attorneys' fees and costs among themselves, Plaintiffs shall file a motion seeking such award. By this Agreement, FEMA does not waive any right to contest fees claimed by Plaintiffs, including the hourly rate, in any continuation of the present action or any future litigation.

10. The parties agree that Plaintiffs reserve the right to seek additional fees and costs incurred subsequent to this Agreement arising from a need to enforce or defend against efforts to modify terms of this Agreement or for any other continuation of this action. By this Agreement, FEMA does not waive any right to contest fees claimed by Plaintiffs or Plaintiffs' counsel, including the hourly rate, in any future litigation or continuation of the present action. Further, this Agreement as to attorneys' fees and costs has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.

11. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that FEMA take action in contravention of the ESA, the Administrative Procedure Act ("APA"), or any other law or regulation, either substantive or procedural. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to the FEMA by the ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in making any determination required herein, or as to the substance of any final determination.

12. This Agreement is being entered into so as to avoid further litigation of the Plaintiffs' pending lawsuit. Nothing in this Agreement shall be construed to constitute an admission of any issue of fact, law or liability by any of the parties. Except as expressly

provided in this Agreement, none of the parties waives or relinquishes any legal rights, claims or defenses it may have.

13. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that FEMA is obligated to pay any funds exceeding those available, or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other appropriations law.

14. The parties agree that this Agreement was negotiated in good faith and that this Agreement constitutes a settlement of claims that were denied and disputed by the parties. By entering into this Agreement, the parties do not waive any claim or defense.

15. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to the Court's entry of the terms and conditions of this Agreement and do hereby agree to the terms herein.

16. The terms of this Agreement shall become effective upon entry of an order by the Court ratifying the Agreement.

17. Upon approval of this Agreement by the Court, Plaintiffs' First Claim for Relief that FEMA has violated the requirements of the ESA and its implementing regulations failing to initiate and/or complete consultation with NMFS shall be dismissed with prejudice. Nothing in this agreement shall prevent Plaintiffs from filing, at the conclusion of formal consultation between FEMA and NMFS, contemplated in this agreement, a separate action challenging FEMA's substantive compliance with 16 U.S.C. §1536(a)(2) to ensure the agency's actions authorized, funded, or carried out pursuant to the NFIP are "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). Upon approval of this Agreement by the Court, Plaintiffs’ Second Claim for Relief shall be dismissed without prejudice. Upon approval of this Agreement by the Court Plaintiff shall withdraw any and all pending Freedom of Information Act requests related to this litigation. The parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this Agreement and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994). This Agreement shall terminate automatically upon conclusion of formal consultation.

Dated: July 9, 2010

Respectfully submitted,

s/ Daniel J. Rohlf
Daniel J. Rohlf (OR Bar No. 99006)
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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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NATIONAL WILDLIFE FEDERATION,)
NORTHWEST ENVIRONMENTAL)
DEFENSE CENTER, ASSOCIATION OF)
NORTHWEST STEELHEADERS,)
)
Plaintiffs,)
)
v.)
)
FEDERAL EMERGENCY)
MANAGEMENT AGENCY,)
)
Defendant.)
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CASE NO. 3:09-cv-729-HA

**CERTIFICATE OF
SERVICE**

I hereby certify that on July 9, 2010, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Bradley H. Oliphant
BRADLEY H. OLIPHANT

OF COUNSEL:

Barbara Montoya, Dep. Assoc. Chief Counsel
Litigation Division
Federal Emergency Management Agency
U.S. Department of Homeland Security
409 3rd Street, SW Room 206
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The Honorable Participant, Mayor
Address

Dear Mayor Participant:

In 2009, Audubon Society of Portland, National Wildlife Federation, Northwest Environmental Defense Center and the Association of Northwest Steelheaders (collectively, Audubon) sued the U.S. Department of Homeland Security's Federal Emergency Management Agency (FEMA) for failure to consult under the Endangered Species Act (ESA) with respect to administration of the National Flood Insurance Program (NFIP). On July 9, 2010, FEMA entered into an agreement with Audubon settling this lawsuit. The agreement requires FEMA to request the initiation of formal consultation with the National Marine Fisheries Service (NMFS) on the impacts of certain aspects the NFIP was having on ESA-listed salmon and steelhead. The agreement further provided that communities participating in the NFIP would receive this letter notifying them of the agreement and relevant provisions of the ESA.

Under section 7 of the ESA, Federal Agencies are prohibited from causing jeopardy to a listed ESA species or adversely modifying its critical habitat. Certain portions of the ESA are applicable to everyone, whether a federal agency, state agency, local jurisdiction or individual. We all have a responsibility to ensure our actions do not cause a take (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct) to ESA-listed threatened and endangered species. Under section 9 of the ESA, actions or decisions enacted by you and your officials are subject to this prohibition regardless of federal involvement. Additionally, any person can be subject to criminal or civil penalties for causing a take.

During the consultation FEMA will process Conditional Letters of Map Change (CLOMC) caused by manmade alterations only when the requestor has demonstrated compliance with the ESA. In addition, FEMA will also ensure that floodplain modeling incorporates on-the-ground data as is readily available to increase the accuracy of maps depicting the floodplain.

FEMA recognizes that many of you have already been implementing measures which protect/mitigate floodplain development actions affecting ESA-listed species and their habitat. For those that may need assistance in designing and implementing such measures, FEMA will work diligently with you, the state resource agencies, and NMFS to provide as much assistance as possible and to facilitate favorable opportunities for complying with the ESA.

Sincerely,

Regional Administrator