

**UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA**

NATIONAL WILDLIFE FEDERATION, a District)
of Columbia Non-Profit Corporation,)
1400 16th Street, NW, Suite 501)
Washington, D.C. 20036,)

FLORIDA WILDLIFE FEDERATION, a Florida)
Non-Profit Corporation)
P.O. Box 6870)
Tallahassee, FL 32314,)

Plaintiffs,)

vs.)

W. CRAIG FUGATE, Administrator)
Office of the Administrator)
Federal Emergency Management Agency)
500 C Street, S.W.)
Washington, D.C. 204724)

Defendant.)
_____)

CASE NO. _____

**COMPLAINT FOR
DECLARATORY RELIEF**

NATURE OF THE ACTION

1. Through its implementation of the National Flood Insurance Program ("NFIP"), Defendant Federal Emergency Management Agency ("FEMA") promotes, encourages, and influences residential and commercial development along Florida's beaches. This development impairs essential habitat functions of five species of threatened or endangered sea turtles, including the loggerhead, green, hawksbill, leatherback, and Kemp's ridley.
2. FEMA has never consulted with the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NOAA Fisheries") to *ensure* that this program does not jeopardize the continued existence of these sea turtles as required by section 7(a)(2)

of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2) (2006). *See* Count One.

3. FEMA has also failed to use its authorities to carry out programs to conserve these listed species as required by section 7(a)(1) of the ESA. 16 U.S.C. § 1536(a)(1) (2006). *See* Count Two.
4. This action is brought pursuant to the citizen suit provisions of the ESA. 16 U.S.C. § 1540(g) (2006).

JURISDICTION AND VENUE

5. This court has subject matter jurisdiction over the claims set forth in this complaint under 28 U.S.C. § 1331 (2006) (federal question), 28 U.S.C. § 2201 (2006) (declaratory relief), 16 U.S.C. § 1540(c) (2006) (actions arising under the ESA).
6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) (2006).
7. On October 1, 2009, Plaintiffs notified FEMA of its ESA violations in compliance with the requirements of 16 U.S.C. § 1540(g)(2)(C) (2006).

PARTIES

8. Plaintiff National Wildlife Federation ("NWF") is the nation's largest non-profit conservation advocacy and education organization. NWF has more than one million members and has affiliate organizations in 47 states and territories, including Florida. NWF's mission is to inspire Americans to protect wildlife for our children's future. Since 1936, NWF has been working to conserve threatened and endangered species, including sea turtles.
9. Plaintiff Florida Wildlife Federation ("FWF") is a non-profit conservation and education organization incorporated in the state of Florida and is a state affiliate of NWF. FWF has over 12,500 members in Florida. FWF protects Florida's wildlife and other natural

resources through education and advocacy. FWF has been actively involved in protecting Florida's endangered species, including sea turtles.

STANDING

10. Plaintiffs bring this action on behalf of their members, many of whom regularly enjoy and plan to continue enjoying sea turtles along Florida's coasts. Many members also enjoy and plan to continue enjoying educational, recreational, scientific, and aesthetic activities in and adjacent to sea turtle habitat. Plaintiffs' members are thus harmed by FEMA's failure to consult under the ESA, as well as their failure to ensure that the NFIP will not jeopardize the continued existence of any sea turtle species. The relief sought in this action, if awarded, will redress this harm by better protecting these highly endangered turtles.

STATUTORY AND FACTUAL FRAMEWORK

A. Endangered Species Act

11. The ESA is the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 698 (1995) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978)). The Act assigns the lead roles for administering the law to the Secretary of the Interior and the Secretary of Commerce. The Secretary of Interior has delegated its duties over projects that impact terrestrial species to FWS, and the Secretary of Commerce has delegated its duties over projects that impact marine species to the NOAA Fisheries. *See* 50 C.F.R. § 402.01(b) (2009) (specifying the respective jurisdictions of FWS and NOAA Fisheries). Because sea turtles nest on land, FWS retains jurisdiction over all nesting activities. The NOAA Fisheries retains jurisdiction

over the rest of the sea turtle life cycle.

12. The ESA protects plant and animal species that are listed as "endangered" or "threatened." A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range" 16 U.S.C. § 1532(6) (2006). A species is "threatened" if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).
13. Once a species is listed, FWS must develop and implement a "recovery plan" for the "conservation and survival" of the species. *Id.* § 1533(f)(1).
14. Section 7(a)(2) of the ESA requires that, "in consultation with and with the assistance of [FWS and/or NOAA Fisheries]," each federal agency shall "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence" of a listed species. *Id.* § 1536(a)(2). The regulations define "jeopardize the continued existence of [a species]" as "engag[ing] in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (2009).
15. This consultation requirement is triggered whenever an agency proposes to undertake an activity which "may affect" an endangered species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14 (2009). To make this "may affect" determination, the action agency first does a Biological Assessment, analyzing the effects of its proposed activity. 50 C.F.R. § 402.12(a) (2009).

B. National Flood Insurance Program

16. The 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 (2006); 44 C.F.R. § 59.2(a) (2009).

17. 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) (2006). 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 (2009). To qualify for participation in the NFIP, communities must submit floodplain management regulations that satisfy the minimum criteria for the special flood hazard area where the community is located. 44 C.F.R. § 59.2(b) (2009). These standards are intended to encourage design standards that will reduce future flood damage to properties built within floodplains. *Id.* Florida has about 454 such communities, about 150 of which are identified as coastal high hazard areas.

18. Property owners are eligible for federal flood insurance only in those communities enrolled in the NFIP. 42 U.S.C. § 4012(c)(2) (2006); 44 C.F.R. § 59.22 (2009) (defining the required steps for participation). The NFIP is unavailable to residents in communities that fail to adopt or enforce land-use regulations meeting these minimum criteria. 42 U.S.C. § 4022(a)(1) (2006); 44 C.F.R. § 60.1(a) (2009). FEMA certifies community participation in the NFIP via an application and ongoing oversight process. 44 C.F.R. §§ 59.22, 59.24 (2009).

19. FEMA maintains an ongoing regulatory relationship with NFIP communities to ensure that the goals of the program are being carried out. That is, FEMA places on probation and may suspend communities from the NFIP for failure to enact, enforce, and maintain minimum land-use regulations. 44 C.F.R. § 59.24(a)-(d).
20. 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 (2006). 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 (2009). FEMA is required to update the FIRMs at least every five years, and may make map adjustments in response to requests by state and local governments or property owners with supplementary technical information. 42 U.S.C. § 4101(e)-(g).
21. Following FEMA certification of a community for NFIP eligibility, property owners acquire federal flood insurance through two mechanisms. First, FEMA may enter into agreements with private insurance providers who then grant federal flood insurance to FEMA-approved applicants. 44 C.F.R. § 62.23 (2009). 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 (2009) (providing guidance for the administration and structure of the standard WYO policy). FEMA is required to conduct triennial review of WYO companies' practices, and renews contact agreements on an annual basis. 44 C.F.R. Pt. 62, App. B (2009). Alternatively, FEMA may issue insurance directly to property owners. *See* 44 C.F.R. §§ 62.1, 62.3 (2009) (specifying the servicing agent for the Federal Insurance Administration).

22. 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 financial opportunities and property values for community residents. For example, the National Flood Insurance Act states that "no Federal officer or agency shall approve any financial assistance for acquisition or construction purposes" to properties within NFIP special flood hazard areas that do not purchase and maintain flood insurance. 42 U.S.C. § 4012A (2006). Additionally, federally insured or regulated lenders and federal agency lenders such as the Veterans Administration are prohibited from making, extending, or renewing loans secured by property or structures located within floodplain areas that do not purchase flood insurance. *Id.* § 4012A(b).
23. 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) (2006). Current minimum criteria codified in 44 C.F.R. § 60.3 primarily focus on limiting property losses and effective structural design. *But see Florida Key Deer v. Paulison*, 522 F.3d 1133, 1142 (11th Cir. 2008) ("[A]lthough FEMA is required to issue flood insurance to localities that satisfy certain criteria, FEMA itself is charged with developing those criteria and enjoys broad discretion in doing so.").
24. FEMA acknowledges the relationship between human development and impaired floodplain function in its implementation of the Community Rating System ("CRS") feature of the NFIP. Through the CRS, FEMA provides financial incentives for land-use regulations that voluntarily exceed the minimum criteria. A stated goal of the CRS is to

"protect natural and beneficial floodplain functions." FEMA, *National Flood Insurance Program: Program Description* (Aug. 1, 2002) at 12. A higher rating under the CRS results in reduced flood insurance rates being charged to property owners within that community. About 217 of Florida's 454 NFIP communities participate in the CRS program.

25. The Eleventh Circuit has stated that "[FEMA's] administration of the NFIP is a relevant cause of jeopardy to [certain] listed species" *Fla. Key Deer*, 522 F.3d at 1144.
26. FEMA is granted broad discretion to implement programs consistent with environmental protection. 44 C.F.R. § 10.4(a) (2009) (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 its responsibilities"). 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 (2006). Such programs and goals include compliance with the objectives and requirements of the Endangered Species Act. *See Fla. Key Deer*, 522 F.3d at 1143 ("FEMA has discretion to consider endangered and threatened species in its administration of the NFIP"); *id.* at 1144 ("[S]ection 7(a)(2) applies to FEMA's administration of the NFIP").

C. Sea Turtles

27. Our oceans are home to seven species of sea turtles, five of which may be found in Florida: the loggerhead, green, hawksbill, leatherback, and Kemp's ridley.

Loggerhead Sea Turtles

28. With as many as 68,000 nests found in Florida annually, loggerhead sea turtles are the most common sea turtles in Florida. They grow to about three feet in length and weigh up to 350 pounds. They feed in coastal bays and estuaries, as well as shallow water along the continental shelves of the Atlantic, Pacific and Indian Oceans. They do not reach sexual maturity until they are 20-30 years old and then they nest at intervals of two, three or more years, laying four to seven nests per season.

29. Loggerheads are listed as threatened in the United States and endangered internationally.

30. Florida's beaches are home to 80% of the United State's loggerheads.

31. The greatest threat to the loggerhead is a loss of nesting habitat due to coastal development, predation of nests, and human disturbances (such as coastal lighting and housing developments) that cause hatchlings to become disoriented.

Green Sea Turtles

32. Named for the greenish color of its body fat, green sea turtles are listed as endangered in the United States. While most nest in the Caribbean, green sea turtles produce up to 2,000 nests in Florida, making it a regionally significant colony.

33. Threats to the green turtle include the loss or degradation of nesting habitat from coastal development and beach armoring; disorientation of hatchlings by beachfront lighting; excessive nest predation by native and non-native predators; and degradation of foraging habitat.

Leatherback Sea Turtles

34. The leatherback is the largest, deepest diving, and most migratory and wide ranging of all sea turtles. The adult leatherback can reach four to eight feet in length and 500 to 2000 pounds in weight. Recent estimates of global nesting populations indicate 26,000 to

43,000 nesting females annually, which is a dramatic decline from the 115,000 estimated in 1980. This is due to exponential declines in leatherback nesting that have occurred over the last two decades along the Pacific coasts of Mexico and Costa Rica. In the United States, small nesting populations occur on the Florida east coast, Sandy Point, U.S. Virgin Islands, and Puerto Rico.

35. Factors threatening leatherbacks globally include loss or degradation of nesting habitat from coastal development; disorientation of hatchlings by beachfront lighting; excessive nest predation by native and non-native predators; and degradation of foraging habitat.

Hawksbill Sea Turtles

36. The hawksbill sea turtle has experienced global population declines of 80% or more during the past century and continued declines are projected. Most populations are declining, depleted, or remnants of larger aggregations. In contrast to all other sea turtle species, hawksbills nest in low densities on scattered small beaches. They have been hunted to the brink of extinction for their beautiful shell. Although once relatively common in Florida, these turtles now rarely nest there.

Kemp's Ridley Sea Turtles

37. The rarest and smallest of all the sea turtles, the Kemp's ridley sea turtle feeds in the coastal waters of Florida on blue crabs, other crabs and shrimp. Unlike other sea turtles, all Kemp's ridleys nest on a single stretch of beach at Rancho Nuevo, on the Gulf coast of Mexico.

D. Threats to Sea Turtles from the National Flood Insurance Program

38. Unlike other marine animals, sea turtles nest on shore. Although they have outlived the dinosaurs, they are now threatened with extinction due to human ignorance and

irresponsibility.

39. Nowhere are these threats more evident than on Florida's beaches. The largest loggerhead, green, and leatherback nesting colonies in the continental United States rely on Florida's beaches. In fact, 90% of all sea turtles in U.S. waters nest in Florida.
40. This critical nesting habitat is threatened in large part by poorly sited coastal development. Because 60% of Florida's beaches are eroding, and 46% are "critically eroding," upland structures are under eminent threat. To protect development against this erosion, increasingly strong storms, and rising sea levels, sea walls are often constructed, which in turn, leads to more development.
41. Tall buildings shade beaches while human removal of beach vegetation reduces shade, affecting crucial nest temperatures.
42. Increased artificial light from development may discourage females from nesting and disorient hatchlings.
43. Nevertheless, the National Flood Insurance Program continues to encourage development along even the most erosive beaches.

COUNT ONE
Violation of ESA § 7(a)(2)

44. Plaintiffs incorporate by reference all preceding paragraphs.
45. The ESA requires federal agencies to insure that their actions are not likely to jeopardize the continued existence of endangered and threatened species and requires an interagency consultation process to ensure that this mandate is fulfilled. 16 U.S.C. § 1536(a)(2).
46. FEMA has violated the ESA §7(a)(2) and its implementing regulations by failing to initiate and complete consultation with FWS and NOAA Fisheries to ensure that the

administration of the NFIP, an action that may affect listed sea turtles, does not violate the ESA's substantive mandate.

COUNT TWO
Violation of ESA § 7(a)(1)

47. Plaintiffs incorporate by reference all preceding paragraphs.
48. The ESA requires that federal agencies, in consultation with the Secretary, utilize their authorities in furtherance of the purposes of the ESA by developing and carrying out programs for the conservation of endangered and threatened sea turtles. 16 U.S.C. § 1536(a)(1).
49. FEMA has violated the requirements of the ESA §7(a)(1) by its failure to develop or carry out programs for the conservation of sea turtles in consultation with FWS and NOAA Fisheries.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Honorable Court grant the following relief:

- A. Declare that FEMA has violated the ESA §7(a)(2) by failing to consult with FWS and NOAA Fisheries and thereby insure that its implementation of the NFIP does not jeopardize sea turtles throughout Florida.
- B. Order FEMA to consult with FWS and NOAA Fisheries and thereby insure that its implementation of the NFIP does not jeopardize sea turtles throughout Florida.
- C. Declare that FEMA has violated the ESA §7(a)(1) by failing to use its authorities to develop or carry out programs, in consultation with FWS and NOAA Fisheries, to conserve listed sea turtles.
- D. Order FEMA to use its authorities to develop or carry out programs, in consultation with FWS and NOAA Fisheries, to conserve listed sea turtles.

E. Award Plaintiffs their reasonable costs and attorney fees.

F. Provide such further and additional relief as the Court deems just and proper.

Dated: July 13, 2010

Respectfully submitted,

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