

Steven Sugarman - appearing *pro hac vice*
New Mexico Bar No. 5717
1210 Luisa Street – Suite 2
Santa Fe, New Mexico 87505
(505) 672-5082
stevensugarman@hotmail.com

Attorney for WildEarth Guardians

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION

WILDEARTH GUARDIANS,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES FEDERAL EMERGENCY)
 MANAGEMENT AGENCY,)
)
 Defendant.)
 _____)

No. CIV 09-480-DCB

**FIRST AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

I. Preliminary Statement

1. With this lawsuit Plaintiff WildEarth Guardians seeks to compel Defendant United States Federal Emergency Management Agency (“FEMA”) to comply with the mandatory procedural and substantive requirements of federal laws concerning protection of the environment in connection with its administration of the National Flood Insurance Program (“NFIP”), including

the Endangered Species Act (“ESA”), the National Environmental Policy Act (“NEPA”), Executive Order 11988 concerning the management and protection of flood plains, and Executive Order 11990 concerning the management and protection of wetlands.

2. In this action, WildEarth Guardians alleges that FEMA’s regulations governing administration of the NFIP fail to account adequately for the impacts that the regulatory scheme has on flood plains, wetlands, riparian areas, and the threatened and endangered species (“TES”) which rely on these rare habitat types. As-applied, FEMA’s continuing implementation of its NFIP regulations in Arizona violate the ESA, NEPA, Executive Order 11988, and Executive Order 11990.

3. In particular, insofar as WildEarth Guardians’ as-applied regulatory claims are concerned, WildEarth Guardians alleges (a) that FEMA has never consulted with the United States Fish and Wildlife Service (“FWS”) pursuant to ESA Section 7, 16 U.S.C. §1536, as to the continuing effects of the NFIP regulations’ impacts on TES and therefore cannot assure that the NFIP regulations comply with the conservation and no-jeopardy requirements of Section 7, (b) that FEMA has an obligation under NEPA to update its analysis of the environmental impacts of the NFIP regulations to account for significant new information, and (c) that FEMA’s continuing implementation of its NFIP regulations fails to comply with the procedural and substantive requirements of Executive Order 11988 and Executive Order 11990.

4. In this lawsuit, WildEarth Guardians also alleges that FEMA’s administration of the NFIP in Arizona violates the ESA, and WildEarth Guardians seeks to compel FEMA to comply with (a) the agency’s procedural duty to initiate and to complete a formal ESA Section 7 consultation

with the FWS as to the effects of its administration of the NFIP in Arizona and (b) the agency's substantive duty to assure that its administration of the NFIP in Arizona is consistent with the conservation of threatened and endangered species. 16 U.S.C. §1536.

5. As of April 30, 2009, there were 35,801 NFIP insurance policies in force in Arizona, insuring structures worth a total of approximately \$7.7 billion. Many of these Arizona NFIP policies insure structures that are built in the flood plains of watersheds that are particular rich in species diversity including the San Pedro River watershed, the Gila River watershed, the Verde River watershed, and the Colorado River watershed.

6. WildEarth Guardians alleges that FEMA exercises its discretion in connection with its administration of the NFIP in such a way as to encourage new development in Arizona's flood plains, and further alleges that this induced flood plain development adversely affects TES protected by the ESA and the riparian and aquatic ecosystems which are critical to those species' continued survival.¹

7. WildEarth Guardians alleges that the adverse effects identified in the paragraph immediately preceding trigger FEMA's procedural and substantive duties under the ESA (a) to initiate and to complete a formal consultation with the FWS, (b) to conserve threatened and endangered species in Arizona, and (c) to assure that its discretionary actions do not jeopardize the survival of such species, do not adversely modify the species' designated critical habitats, and do not impair the species' chances for recovery. 16 U.S.C. §§1536(a)(1), (2).

1. A list of the species that WildEarth alleges are adversely affected by FEMA's administration of the NFIP is attached to this Complaint as Attachment 1.

8. FEMA has not complied with the above referenced statutory duties in connection with its continuing implementation of regulations governing administration of the NFIP and in connection with its administration of the NFIP in Arizona. Accordingly, in this action WildEarth Guardians seeks declaratory and injunctive relief (a) in connection with FEMA's continuing implementation of its NFIP regulations and (b) in connection with FEMA's administration of the NFIP in Arizona.

II. Parties

9. Plaintiff WildEarth Guardians is a non-profit corporation with 5,100 members nationwide, approximately 500 of whom reside in Arizona. One of WildEarth Guardians' main endeavors is to work towards the enhancement and restoration of riparian-wetland and aquatic ecosystems in the southwestern United States that have been impaired as a result of public and private actions and projects, such as federal water projects, livestock grazing, and riparian and aquatic habitat modifications. Members of WildEarth Guardians frequently use and enjoy Arizona's rivers and the associated riparian ecosystem for recreational, aesthetic, and scientific activities. In pursuit of these activities, WildEarth Guardians' members regularly observe and enjoy wildlife, including wildlife which is dependent on Arizona's limited riparian-wetland and aquatic ecosystems. WildEarth Guardians engage in their pastime of observing endemic wildlife species on private lands, as authorized and allowed, and on public lands. The preservation of the function and biological value of aquatic and riparian ecosystems – wherever they are present in Arizona – is critical to the survival of wildlife species that are observed and enjoyed by WildEarth Guardians members. WildEarth Guardians works through administrative appeals,

litigation, and otherwise to assure that all private and public actors fully comply with the provisions of all environmental laws relevant to the protection of wildlife species and the habitats upon which wildlife rely, including the ESA, NEPA, Executive Order 11988, and Executive Order 11990. WildEarth Guardians, its staff, and its members have a substantial interest in this matter and are adversely affected and aggrieved by the FEMA's failure to comply with the ESA, NEPA, Executive Order 11988, and Executive Order 11990 since FEMA's discretionary actions in connection with the NFIP adversely affect threatened and endangered species and their habitats in a way that impairs the survival and recovery of threatened and endangered species that are observed and enjoyed by WildEarth Guardians members. WildEarth Guardians brings this action on behalf of itself and its adversely affected members

10. Defendant FEMA is a federal agency which administers the National Flood Insurance Program pursuant to the National Flood Insurance Act of 1968. FEMA has a mandatory statutory duty to comply with all relevant environmental laws in its administration of the National Flood Insurance Program, including the ESA, NEPA, Executive Order 11988 and Executive Order 11990.

III. Jurisdiction and Venue

11. The Court has jurisdiction over this action under 28 U.S.C. §1331 (federal question jurisdiction), 28 U.S.C. §2201 (declaratory judgment), 28 U.S.C. §2202 (injunctive relief), 16 U.S.C. §1540(g)(1) (ESA citizen suit provision), and 5 U.S.C. §701 *et seq.*, (Administrative Procedures Act).

12. As required by the ESA, WildEarth Guardians has provided FEMA with sixty days' notice of its intent to commence a citizen suit in connection with the ESA violations alleged in this complaint, both in connection with FEMA's ongoing implementation of its NFIP regulations and in connection with FEMA's administration of the NFIP in Arizona. 16 U.S.C. §1540(g).

13. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(e) because this is an action against an agency of the United States and because the cause of action arises in Arizona, and pursuant to 16 U.S.C. §1540(g)(3)(A) (ESA citizen suit provision).

14. There exists now between the parties hereto an actual and justiciable controversy in which WildEarth Guardians is entitled to have a declaration of its rights and of FEMA's obligations and further relief, because of the facts and circumstances hereafter set out.

IV. Facts

A. The mandatory requirements of the Endangered Species Act

15. The structure and function of the Endangered Species Act ("ESA"), 16 U.S.C. §1531 *et seq.*, are premised on Congress's finding that the biggest threat to the continued survival of TES is the destruction of their natural habitats. Accordingly, the ESA contains various provisions that are specifically intended to halt the trend of habitat destruction.

16. The expressed purpose of the ESA is "to provide a program for the conservation [of] endangered species and threatened species" and "to provide a means whereby the ecosystems upon which [such] species depend may be conserved." 16 U.S.C. §1531(b).

17. Pursuant to the ESA, the FWS has the duty to list imperiled species as threatened or endangered on the basis of biological criteria. 16 U.S.C. §1533(c).

18. Once a species is listed as threatened or endangered under the ESA, Section 7(a)(1) of the ESA imposes important obligations on federal agencies to “conserve” such species. 16 U.S.C. §1536(a)(1). For purposes of ESA compliance, the duty to “conserve” requires that federal agencies use their authorities to assure the survival of threatened and endangered species, to protect their critical habitats, and to promote the recovery of the species to the point at which they no longer require the protections of the ESA. These obligations are known as the “Section 7 substantive duties.”

19. In order to assure that federal agencies comply with their Section 7 substantive duties, Section 7(a)(2) of the ESA mandates a “consultation” process in which federal agencies are required to engage in consultation with the FWS to “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 adverse modification of habitat of such species” 16 U.S.C. §1536(a)(2).² The duties set out in Section 7(a)(2) are known as the “Section 7 procedural duties.”

20. Section 7 procedural duties are triggered whenever a federal agency proposes to take discretionary action that “may affect” threatened and endangered species.

21. As used in the ESA, agency “action” includes those “actions directly or indirectly causing modifications to the land, water, or air” where federal agencies exercise discretionary control. 50 C.F.R. §402.02(d). FEMA exercises discretionary control over various aspects of the NFIP and,

²

In the case of threatened and endangered maritime species, federal agencies conduct their Section 7 consultations with the National Marine Fisheries Service (“NMFS”) instead of the FWS.

therefore, FEMA's implementation of the NFIP is an "action" under Section 7. Indeed, FEMA's regulations specifically state that FEMA retains the discretion to amend the regulations "from time to time . . . as experience is acquired under the [NFIP] and new information becomes available." 44 C.F.R. §66.7.

22. As described herein in this Complaint, FEMA's administration of the NFIP in Arizona "may affect" various aquatic, avian, and terrestrial threatened and endangered species.

23. Accordingly, FEMA's administration of the NFIP in Arizona triggers Section 7 substantive and procedural duties.

24. Federal agencies may comply with their Section 7 procedural duties through an "informal consultation" or a "formal consultation" with the FWS.

25. If an action agency, such as FEMA in this case, determines that an action "is not likely to adversely affect" any threatened or endangered species, then the action agency may seek to fulfill its Section 7 procedural duties through a process known as "informal consultation." 50 C.F.R. §402.13. If the FWS agrees with the action agency's determination that a proposed action "is not likely to adversely affect" any threatened or endangered species and provides a written concurrence to that effect, then the action agency's Section 7 procedural obligations with respect to the proposed action are concluded.

26. If the action agency determines that a proposed action may adversely affect a threatened or endangered species, or if the FWS does not concur with an action agency's "not likely to adversely affect" determination, then the action agency must commence a "formal consultation"

with the FWS. 50 C.F.R. §402.14. The formal consultation process concludes with the issuance of a Biological Opinion (“BO”) by the FWS. Id.

27. In the BOs that it issues at the conclusion of the formal consultation process, the FWS determines whether a proposed agency action comports with Section 7 substantive duties and provides suggestions for the modifications of agency action that will promote and enhance the survival and recovery of threatened and endangered species. Id.

28. On every occasion in which an ESA consulting wildlife agency – the FWS or NMFS – has assessed the effects of FEMA’s administration of the NFIP, it has concluded that such administration has an adverse effect on threatened and endangered species and therefore triggers ESA Section 7’s formal consultation requirements.

29. Upon information and belief, FEMA has conducted only two Section 7 formal consultations in the United States – one in Puget Sound, Washington and one in the Florida Keys. Both consultations concluded with BOs finding that FEMA’s administration of the NFIP jeopardizes threatened and endangered species, and recommending modifications to FEMA’s administration of the program.

30. In New Mexico, FEMA commenced an informal consultation with the FWS, but the FWS has determined that FEMA’s administration of the NFIP may adversely affect threatened and endangered species and their habitats. Consequently, FWS has requested that FEMA commence a formal Section 7 consultation to assess the effects of FEMA’s administration of the NFIP in New Mexico.

B. The mandatory requirements of the National Environmental Policy Act

31. NEPA was enacted to ensure that federal actions do not proceed until the environmental effects associated with a contemplated action are completely assessed and analyzed by the proponent federal agency. NEPA requires that, before proceeding with a proposed action, a federal agency take a “hard look” at the environmental consequences of the action.

32. In cases where the federal project is associated with the possibility of significant environmental impacts, then the project cannot proceed until the proponent federal agency first prepares an Environmental Impact Statement (“EIS”). 42 U.S.C. § 4332.

33. Furthermore, NEPA requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E). Agencies must “[r]igorously explore and objectively evaluate all reasonable alternatives,” including particularly alternatives “that will avoid or minimize adverse effects” of the proposed action on the environment. 40 C.F.R. §§ 1500.2(e), 1502.14. The alternatives analysis is the “heart” of the NEPA process. Center for Biological Diversity v. U.S. Department of the Interior, 581 F.3d 1063, 1071 (9th Cir. 2009).

34. An EIS must analyze and evaluate the direct and indirect environmental impacts of the alternatives, including the proposed action. 40 C.F.R. §§ 1502.16, 1508.7. In preparing an EIS, an agency must consider the direct impacts of its proposed action, together with the environmental impacts of cumulative, connected, and similar actions. An agency’s EIS must also

analyze the cumulative impacts of the project, including the incremental impact of the project when added to other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.7.

35. Finally, an agency must prepare a supplemental EIS if the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9©. When such new circumstances occur or when such new information comes to light, an agency has an obligation to take a “hard look” at the new circumstances or information and determine whether supplementation of an existing NEPA analysis requires supplementation. Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373 (2004).

36. FEMA prepared an Environmental Impact Statement to assess the environmental effects of its NFIP regulation in 1976.

37. Since FEMA prepared the 1976 Environmental Impact Statement, circumstances have changed and new information has come to light that trigger an obligation to prepare a supplemental NEPA analysis.

38. The enactment of the Endangered Species Act, the creation of a regulatory scheme to implement the Endangered Species Act, and the listing of numerous species that rely on flood plains, wetlands, and riparian areas for their continued survival constitute changed circumstances triggering the requirement for supplemental NEPA analysis.

39. New information regarding the likely adverse impacts of the NFIP on the environment, including but not limited to new information resulting from studies of the NFIP commissioned by FEMA, triggers the requirement for supplemental NEPA analysis.

C. The mandatory requirements of Executive Order 11988 and Executive Order 11990

40. Executive Order 11988 – entitled “Floodplain Management” – was promulgated in 1977. 42 Fed. Reg. 26951 (May 24, 1977). The stated purpose of Executive Order 11988 is “to avoid to the extent possible the long and short term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development wherever there is a practicable alternative.”

41. Executive Order 11988 requires all agencies that propose to take actions in floodplains to review their proposed action, along with alternatives to the proposed action, and to design or modify its actions in such a way as to “minimize potential harm to or within the floodplain.”

42. Executive Order 11990 – entitled “Protection of Wetlands” – was also promulgated in 1977. 42 Fed.Reg. 26961 (May 24, 1977). The stated purpose of Executive Order 11990 in order to “avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative.”

43. Executive Order 11990 specifically requires in part that all federal agencies “shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out . . . Federal activities and programs affecting land use.”

D. Threatened and endangered species in Arizona are adversely affected by NFIP-induced flood plain development

44. In the arid southwestern United States, the richest biological diversity is found in riparian ecosystems.³ The FWS reports that 80% of all vertebrates in Arizona and New Mexico use riparian areas for at least half their life cycles, and that more than 50% of vertebrates “are totally dependent on riparian areas.”

45. Arizona’s Wildlife Linkages Workgroup (“Arizona WLW”) – a consortium of nine public agencies (both federal and state) and nonprofit organizations – states that riparian areas are critical to the continued survival of 60% of all TES in Arizona.

46. The protection and recovery of Arizona’s riparian ecosystems is critical to the continued survival of a large number of TES.

47. Riparian ecosystems also play important ecological roles in the maintenance of water quality and the health and integrity of watersheds.

48. The United States Bureau of Land Management states that “[t]he importance of western riparian areas cannot be overstated or overemphasized.”

49. Unfortunately, riparian ecosystems are as rare as they are important. The western cottonwood-willow forest association that characterizes riparian ecosystems in Arizona is recognized as the rarest of the 106 forest types identified in North America. Moreover, these rare riparian ecosystems are the most modified habitat-type in the southwestern United States.

³

The Arizona Governor’s Riparian Task Force defines riparian ecosystems as those areas which include “vegetation, habitats, or ecosystems that are associated with bodies of water (streams or lakes) or are dependent on the existence of perennial, intermittent, or ephemeral surface or subsurface water drainage.”

50. The Arizona Riparian Council states that “<10% of Arizona’s original riparian acreage remains in its natural form,” and expresses “concern over the alarming rate of loss of Arizona’s riparian areas.”

51. According to current estimates, riparian ecosystems today comprise only about 0.4% of Arizona’s land mass.

52. The widespread destruction of riparian ecosystems in Arizona, and the resultant fragmentation of the remnant portions of riparian area that remain, can lead to the extinction of TES.

53. Dr. Robert Ohmart, the leading expert in riparian ecosystems in Arizona, explains: “Continuity of riparian vegetation is important for small vertebrates and when disrupted it causes reductions in population densities, terminates gene flow, and can lead to species extinction. Fragmented riparian habitats can also lead to isolated populations of animal species preventing both population expansion and gene flow.”

54. Arizona WLW states that “[g]iven the enormous significance of the habitat [associated with the riparian ecosystem], conservation of the remaining riparian areas containing flowing waters is imperative in Arizona and vital to the wildlife that rely upon it.” The consortium stresses the important of preserving the integrity and connectivity of the remaining remnants of riparian ecosystems and protecting the integrity of entire riverine ecosystems – including flood plain, wetlands, and riparian areas. It recommends:

Maintain or enhance the ability of riverine systems to provide for movement of mammals, reptiles, and other non-aquatic species by maintaining natural vegetation for at least 200 m on each side of mapped riparian zones (where

possible). Urban planners need to prevent housing from impinging on stream banks and flood plains.

(Emphasis added.)

55. Moreover, the United States Environmental Protection Agency (“EPA”) studied the ecological and biological importance of riparian areas along ephemeral and intermittent streams in the southwestern United States and concluded that these riparian areas are as biologically critical as riparian ecosystems along perennial rivers. It also noted that in light of high population growth rates in the southwest, including specifically Arizona, “it is necessary to develop plans to manage and protect streams and riparian areas that consider cumulative impacts across a watershed.”

56. Past modification of riverine ecosystems, including the destruction and fragmentation of riparian ecosystems, is the cause of listing for many of Arizona’s ESA-listed TES. Protection of the remnant portions of riparian ecosystem and their associated flood plains and rivers from future alteration is critical to these species’ survival.

57. Through its administration of the NFIP, as described below in this Complaint, FEMA encourages development in riparian areas and flood plains that destroys remnant portions of habitat relied upon by TES in Arizona, and that leads to the increased fragmentation of this habitat to the detriment of species survival and recovery.

58. The southwestern willow flycatcher is an example of an avian species that has been listed for ESA protections because of riparian ecosystem loss, and that is adversely affected by FEMA’s administration of the NFIP in Arizona. The FWS explains:

Large scale losses of southwestern wetlands have occurred, particularly the cottonwood-willow riparian habitat of the southwestern willow flycatcher Changes in the riparian plant community have reduced, degraded and eliminated nesting habitat for the willow flycatcher, curtailing its distribution and numbers Habitat losses and changes have occurred (and continue to occur) because of urban, recreational, and agricultural development, fires, water diversion and impoundment, channelization, livestock grazing and replacement of native habitat by introduced species.

62 Fed.Reg. 39130 (July 22, 1997) (final rule designating critical habitat for the southwestern willow flycatcher).

59. In order to protect the southwestern willow flycatcher from extinction, the FWS has designated critical habitat for the species in “riparian areas within the 100-year flood plain along streams and rivers in southern California, Arizona, and New Mexico.” Id. at 39133.

60. In Arizona, designated critical habitat is in riparian areas along the San Pedro River, in the Verde River and some of its tributaries, in the Little Colorado River and some of its tributaries, and in the Colorado River. Id. at 39142-44.

61. The FWS states that modifying riparian vegetation in critical habitat that has been designated for southwestern willow flycatcher and altering habitat through filling and construction in flood plains adversely modifies such habitat in a way that impairs its value and biological function.

62. The razorback sucker is an example of an ESA-protected aquatic species that is adversely affected by FEMA’s administration of the NFIP in Arizona.

63. The FWS states that one of the causes of the decline in razorback sucker populations is channelization of the rivers that are the natural habitat of the species.

64. In its Recovery Plan for the razorback sucker, the FWS states that habitat types required for the species survival “include bottomland, main and side channels, secondary channels, oxbows, backwaters, and other areas in the 100-year flood plain, which when inundated may provide habitat or corridors to habitat necessary for the feeding and nursery needs of the razorback sucker.”

65. The jaguar is an example of an ESA-protected mammalian species that is adversely affected by FEMA’s administration of the NFIP in Arizona.

66. A study by the Arizona Game and Fish Department (“AzGFD”) found that 100% of the most reliable jaguar sightings in Arizona took place within 10 kilometers of a water source, and explained the association this way: “River valleys might provide travel corridors for jaguars, along with higher prey densities, cooler air, and denser vegetation than surrounding habitats.”

67. The AzGFD jaguar study discusses the human activities that have altered jaguar habitat in its traditional range. In connection with the diminished amount of habitat left for jaguars in riparian ecosystems, the study states that “[t]he lack of potentially suitable jaguar habitat in riparian areas can largely be attributed to agricultural and urban development and the concurrent loss of 90% of Arizona’s historic cottonwood and willow gallery forest.”

68. AzGFD has identified an area in southeastern Arizona as the most suitable conservation area for jaguars. Notably, this area includes portions of the San Pedro River, the Gila River and the Santa Cruz River. NFIP induced flood plain development along these rivers, and the habitat fragmentation that results in adjacent riparian areas, adversely affects the jaguar’s prospects for survival and recovery in the United States.

E. FEMA exercises substantial discretion in its administration of the NFIP, and its discretionary actions adversely affect threatened and endangered species

1. FEMA's discretionary actions encourage construction and development in flood plains

69. Prior to the passage of the National Flood Insurance Act of 1968 (“NFIA”) , homeowners in flood-prone areas relied upon federal disaster assistance to compensate them for damages resulting from periodic flood losses. Congress enacted the NFIA to establish the National Flood Insurance Program (“NFIP”) with the intent to develop an insurance risk pool to compensate home owners for flood losses as an alternative to federal disaster assistance. 42 U.S.C. §4001 *et seq.*

70. FEMA administers the NFIP. As the federal agency charged with administration of the NFIP, FEMA has the duty to designate and map flood-hazard areas and to promulgate and enforce minimum standards for development in flood plains. 42 U.S.C. §§4002(b)(2), (3).

71. FEMA has significant discretionary control over implementation of the NFIP, and the manner in which it exercises this discretion determines the extent to which implementation of the NFIP will adversely affect flood plains, riparian ecosystems, and the habitats that are critical for the survival and recovery of TES in Arizona. FEMA exercises its discretion in ways that lead to the development and destruction of remnant areas of riparian habitat and flood plains, and this destruction has an adverse effect on aquatic, avian, and mammalian TES, and the habitats on which they rely.

72. Congress recognized that federal incentives, such as the NFIP, can play a significant role in driving development toward, or away from, certain locations. The NFIA states that “the

availability of Federal loans, grants, guaranties, insurance, and other forms of financial assistance are often determining factors in the utilization of land and the location of construction of public and of private industrial, commercial, and residential facilities.” 42 U.S.C. §4002(a)(2).

73. In fact, just as Congress acknowledged, the availability of federal flood insurance in flood-prone areas encourages development in flood plains.

74. Indeed, an October 2006 study by the American Institutes for Research (“AIR”) that was commissioned by FEMA “to obtain an objective . . . characterization of the NFIP’s developmental and environmental impacts” concludes that the best designed studies of NFIP “suggest the NFIP encourages, to varying extent, flood plain development.”

75. The October 2006 AIR study also found that FEMA’s national minimum standards – which allow flood plain development and construction – may be inconsistent with FEMA’s ESA-imposed duty to conserve threatened and endangered wildlife species: “[p]roviding flood insurance through the NFIP to entities wishing to develop within the 1 percent flood plain may be inconsistent with the conservation of endangered and threatened species of fish, wildlife and plants in aquatic and riparian ecosystems.”

76. The October 2006 study commissioned by FEMA expressly notes the association between NFIP-induced flood plain development and adverse effects to TES:

Given the NFIP’s association with reducing barriers to flood plain development and the adverse environmental consequences that sometimes arise for endangered species from urban growth, a national investigation concerning the NFIP potential impact on ESA-protected species would seem desirable.

Despite this finding, FEMA has never commenced such an investigation.

77. In light of the significant discretion that Congress left to FEMA when it created the NFIP, various courts have found that FEMA's administration of the NFIP is an "action" within the meaning of the ESA. Florida Key Deer v. Paulison, 522 F.3d 1133 (11th Cir. 2008), National Wildlife Federation v. FEMA, 345 F.Supp.2d 1151(W.D. Wash. 2004), Florida Key Deer v. Stickley, 864 F.Supp. 1222 (S.D. Fla. 1994).

2. Examples of FEMA discretionary actions in connection with administration of the NFIP that adversely affect threatened and endangered species

78. In its administration of the NFIP, FEMA performs three basic functions: (a) identifies and maps flood hazard areas in flood-prone communities, (b) adopts and enforces minimum requirements for flood plain management and development, and (c) provides for the availability of flood insurance, for federal disaster assistance, and for federal government-backed mortgages in those communities that participate in the NFIP.

79. In connection with its mapping function, FEMA exercises its discretion by determining the detail of flood hazard maps prepared for each participating community. As FEMA prepares increasingly more detailed flood hazard maps for a community, more restrictive layers of flood plain regulation apply to flood plain development in the community.

80. Accordingly, when FEMA elects not to prepare a detailed map for a participating community, the lowest level of flood plain protection applies in that community. FEMA's failure to prepare detailed maps for all participating communities where threatened and endangered species and their habitat are present has an adverse effect on such species.

81. Also in connection with its mapping function, FEMA exercises its discretion by allowing landowners to remove their flood-prone lands from regulated special flood hazard areas

(“SFHAs”) by filling-in the flood plain above the base flood elevation (“BFE”). For purposes of the NFIP, FEMA defines the BFE as the elevation of flood waters associated with a flood that has a 1% chance of occurring in any given year (in other words, a 100-year flood event).

82. The October 2006 AIR study commissioned by FEMA found that this aspect of FEMA’s administration of the NFIP creates a perverse incentive to landowners to fill-in flood plains in order to avoid the regulatory standards that apply to construction and development in SFHAs. This adversely affects TES and their habitats.

83. In connection with the adoption of minimum requirements for flood plain management and development, FEMA exercises its discretion in ways that have a profound impact on the development of flood plains. For example, the minimum requirements promulgated by FEMA allow for construction and development in flood plains that are within designated SFHAs, so long as this flood plain construction and development meets certain design criteria such as raising the lowest built level of a structure above the base flood elevation (“BFE”). 44 C.F.R. §60.3.

84. In general terms, FEMA’s regulations implementing the NFIP discourage development in the “regulatory floodway,” but encourage development in the “flood plain fringe.” The “regulatory floodway” is the channel of a river together with that portion of the adjacent flood plain that must be reserved from development in order to accommodate the discharge of a base flood without cumulatively increasing the water surface elevation by more than one foot over the BFE. 44 C.F.R. §59.1.

85. FEMA refers to that portion of the flood plain outside of the “regulatory floodway” as the “flood plain fringe.” The “flood plain fringe” is that strip of land on both sides of the flood plain – bordered on its outer edges by the outside boundary of the flood plain and on its inner edges by the boundary of the “regulatory floodway” – that can be developed under FEMA’s national minimum standards.

86. It is within FEMA’s discretion to modify its minimum requirements for flood plain development in such a way as to significantly reduce the extent of construction and development in flood plains. If FEMA were to regulate the entire flood plain as it now regulates the “regulatory floodway,” there would likely be far less development in the “flood plain fringe” and the important hydrological and biological values of the flood plains and associated riparian ecosystems would be protected and preserved.

87. In exercising its discretion to determine that new structures constructed in flood plains are eligible for government-backed financing, federal flood insurance, and federal disaster assistance – so long as they are built in the “flood plain fringe” – FEMA has failed to account for the biological function and value of flood plains and riparian ecosystems. This failure adversely affects TES, and the riparian and aquatic habitats that these species need for their continued survival.

88. FEMA’s adoption of the “1% standard” – in which the BFE of a 100-year flood event defines the scope of the regulated flood plain – also adversely affects TES and the habitats that they rely on for continued survival.

89. The October 2006 AIR study commissioned by FEMA found that “the flood plain defined by the 1 percent standard has no scientific connection to the natural, biological, physical, or geomorphologic flood plain” and “may also exclude natural and beneficial [flood plain] values.” The AIR study acknowledges that “a more restrictive floodway, based upon a more restrictive standard, may sometimes be more desirable to protect those values.”

90. FEMA also exercises its discretion in connection with the NFIP through its administration of the Community Ratings System (“CRS”). Through the CRS, FEMA rewards NFIP-participating communities that take supplementary steps to protect flood plain values by reducing flood insurance premiums within those communities.

91. The 2006 AIR study commissioned by FEMA concludes that “[b]ecause FEMA has considerable discretion in creating such credits, the CRS provides an important opportunity for FEMA to define and improve incentives for desirable community flood plain conservation.”

92. FEMA has failed to exercise its discretion in connection with the CRS in such a way as to promote the survival and recovery of threatened and endangered species..

93. FEMA exercises its discretion in connection with its administration of the NFIP in such a way as to cause adverse effects to TES and their habitats in additional ways not set out above.

F. FEMA’s regulations governing administration of the NFIP

94. The regulations adopted by FEMA to govern its administration of the NFIP do not account for the fact that the flood plain development that is induced by the availability of flood insurance in flood prone areas has a significant adverse effect on the natural beneficial functions

of flood plains, wetlands, and riparian areas. As explained above, these natural beneficial functions include provision of critical wildlife habitat and protection of water quality.

95. FEMA has the discretion, expressly granted to it by statute, to revise its regulations governing the administration of the NFIP. 42 U.S.C. §4102(c), see also 44 C.F.R. §60.7 (“[f]rom time to time part 60 may be revised as experience is acquired under the Program and new information becomes available”).

96. Notwithstanding that FEMA has the authority and the discretion to modify its NFIP regulations to account for and to protect the natural beneficial functions of flood plains, wetlands, and riparian areas, FEMA’s NFIP regulations – as applied in Arizona – continue to adversely affect threatened and endangered species and other important natural resources in violation of ESA, NEPA, Executive Order 11988, and Executive Order 11990.

V. Claims for Relief

First Claim for Relief

Violation of 16 U.S.C. §1536(a)(1) in connection
with ongoing implementation of FEMA’s NFIP regulations

(Section 7 substantive duties)

97. WildEarth Guardians incorporates by reference all preceding paragraphs.

98. FEMA has a duty to assure species survival, to protect designated critical habitat and to promote the recovery of TES.

99. As applied in Arizona, FEMA’s ongoing implementation of its NFIP regulations violates each of the duties set forth in the paragraph immediately preceding and therefore violates the ESA.

Second Claim for Relief

Violation of 16 U.S.C. §1536(a)(2) in connection
with ongoing implementation of FEMA's NFIP regulations

(Section 7 procedural duties)

100. WildEarth Guardians incorporates by reference all preceding paragraphs.
101. FEMA exercises discretionary control over the NFIP, and specifically has the discretion to modify its NFIP regulations.
102. As applied in Arizona, FEMA's NFIP regulations are likely to adversely affect TES and are likely to adversely modify their designated critical habitats.
103. Accordingly, FEMA's failure to initiate and to conclude a formal Section 7 consultation with the FWS as to the effects of its ongoing implementation of the NFIP regulations violates the ESA.

Third Claim for Relief

Violation of 16 U.S.C. §1536(a)(1) in connection with FEMA's
administration of the NFIP in Arizona

(Section 7 substantive duties)

104. WildEarth Guardians incorporates by reference all preceding paragraphs.
105. In connection with its administration of the NFIP in Arizona, FEMA fails to exercise its discretion in a manner that conserves threatened and endangered species.
106. FEMA's administration of the NFIP in Arizona does not assure species survival, does not protect designated critical habitat, and does not promote the recovery of threatened and endangered species, and therefore violates the ESA.

Fourth Claim for Relief

Violation of 16 U.S.C. §1536(a)(2) in connection with FEMA's administration of the NFIP in Arizona

(Section 7 procedural duties)

107. WildEarth Guardians incorporates by reference all preceding paragraphs.

108. FEMA exercises discretionary control over the NFIP in Arizona in ways that adversely affect threatened and endangered species, and that adversely modify their designated critical habitats.

109. Accordingly, FEMA's failure to initiate and to conclude a formal Section 7 consultation with the FWS as to the effects of its administration of the NFIP in Arizona violates the ESA.

Fifth Claim for Relief

(Violation of NEPA – requirement for Supplemental NEPA analysis)

110. WildEarth Guardians incorporates by reference all preceding paragraphs.

111. FEMA's 1976 Environmental Impact Statement addressing the environmental impacts of its NFIP regulations requires supplementation because of changed circumstances and new information.

112. The enactment of the Endangered Species Act, the creation of a regulatory scheme to implement the Endangered Species Act, and the listing of numerous species that rely on flood plains, wetlands, and riparian areas for their continued survival constitute changed circumstances triggering the requirement for supplemental NEPA analysis.

113. New information regarding the likely adverse impacts of the NFIP on the environment, including but not limited to the new information incorporated into the AIR study commissioned by FEMA, triggers the requirement for supplemental NEPA analysis.

114. FEMA's failure to conduct supplemental NEPA analysis in connection with its NFIP regulations is arbitrary and capricious, and constitutes a violation of NEPA.

Sixth Claim for Relief

(Violation of Executive Order 11988)

115. WildEarth Guardians incorporates by reference all preceding paragraphs.

116. As applied in Arizona, FEMA's ongoing implementation of its NFIP regulations fails to minimize harm to flood plains and, therefore, constitutes a violation of Executive Order 11988.

Seventh Claim for Relief

(Violation of Executive Order 11990)

117. WildEarth Guardians incorporates by reference all preceding paragraphs.

118. As applied in Arizona, FEMA's ongoing implementation of its NFIP regulations fails to minimize the destruction of wetlands and fails to preserve and enhance the natural and beneficial values of wetlands and, therefore, constitutes a violation of Executive Order 11990.

VI. Relief Requested

WHEREFORE, WildEarth Guardians respectfully requests the following relief:

1. An order declaring that, as applied in Arizona, FEMA's ongoing implementation of its NFIP regulations constitute a violation of FEMA's substantive duties under the ESA.

2. An order declaring that, as applied in Arizona, FEMA's ongoing implementation of its NFIP regulations constitute a violation of FEMA's procedural duties under the ESA.
3. An order declaring that FEMA's administration of the NFIP in Arizona constitutes a violation of FEMA's substantive duties under the ESA.
4. An order declaring that FEMA's administration of the NFIP in Arizona constitutes a violation of its procedural duties under the ESA.
5. An order declaring that, as applied in Arizona, FEMA's ongoing implementation of its NFIP regulations constitutes a violation of Executive Order 11988.
6. An order declaring that, as applied in Arizona, FEMA's ongoing implementation of its NFIP regulations constitutes a violation of Executive Order 11990.
7. An order requiring FEMA to initiate and to complete a formal Section 7 consultation with the FWS as to the effects of FEMA's ongoing implementation of its NFIP regulations.
8. An order requiring FEMA to initiate and to complete a formal Section 7 consultation with the FWS as to the effects of FEMA's administration of the NFIP in Arizona.
9. An order requiring FEMA to prepare supplemental NEPA analysis as to the environmental effects of its NFIP regulations.
10. An order requiring FEMA to modify its NFIP regulations to bring them into compliance with the requirements of Executive Order 11988 and Executive Order 11990.
11. An order enjoining FEMA from issuing and/or authorizing the issuance of NFIP flood insurance policies for new construction in Arizona flood plains, when that proposed new construction is in the geographic range of threatened or endangered species, until such time as

FEMA complies with the mandatory requirements of the ESA, NEPA, Executive Order 11988, and Executive Order 11990.

12. An order awarding WildEarth Guardians its reasonable costs in this action, including attorney's fees.

13. Such other relief as this Court determines is just and proper.

Dated: November 20, 2009

Respectfully submitted,

/s/ Steven Sugarman
Steven Sugarman
1210 Luisa Street – Suite 2
Santa Fe, New Mexico 87505
Telephone: (505) 672-5082