

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WILDEARTH GUARDIANS,)
)
 Plaintiff,)
) No.
 vs.)
)
 UNITED STATES FEDERAL EMERGENCY)
 MANAGEMENT AGENCY,)
)
 Defendant.)
 _____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. Preliminary Statement

1. In this Endangered Species Act (“ESA”) citizen’s suit, Plaintiff WildEarth Guardians seeks to compel Defendant Federal Emergency Management Agency (“FEMA”) to comply with the agency’s statutory duty to assure that its administration of the National Flood Insurance Program (“NFIP”) in New Mexico is consistent with the conservation of threatened and endangered species. 16 U.S.C. §1536.
2. As of April 30, 2009, there were 16,734 NFIP insurance policies in force in New Mexico, insuring structures worth a total of approximately \$2.7 billion. Many of these

New Mexico NFIP policies insure structures that are built in the flood plains of watersheds that are particularly rich in species diversity including the Rio Grande River watershed, the San Juan River watershed, and the Pecos River watershed.

3. 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 New Mexico's flood plains, and further alleges that this induced flood plain development (a) adversely affects ESA protected species that were listed as threatened or endangered species after January 22, 2001, and (b) adversely affects those critical habitats that were formally designated as critical habitats after January 22, 2001.¹

4. WildEarth Guardians alleges that the adverse effects identified in the paragraph immediately preceding trigger FEMA's procedural and substantive duties under the ESA to conserve threatened and endangered species in New Mexico, and to assure that its discretionary actions do not jeopardize the survival of such species, do not adversely

1. The following species listings and critical habitat designations occurred after January 22, 2001: on February 19, 2003 FWS designated critical habitat for the Rio Grande silvery minnow (68 Fed.Reg. 8087); on August 31, 2004, the FWS designated critical habitat for the Mexican spotted owl (69 Fed.Reg. 53182); on August 9, 2005, the FWS listed the Roswell springsnail, the Koster's springsnail, the Noel's amphipod, and the Pecos assimineia for protection under the ESA and designated critical habitat for these species (70 Fed.Reg. 46304); on October 19, 2005 the FWS designated critical habitat for the Southwester willow flycatcher (70 Fed.Reg. 60886); on November 2, 2005 the Gila chub was listed as endangered and its critical habitat was designated (70 Fed.Reg. 51732); on March 21, 2007 critical habitats were designated for the loach minnow and the spikedace (72 Fed.Reg. 13356); and on March 27, 2007 critical habitat was proposed for the Pecos sunflower (72 Fed.Reg. 14328).

modify the species' designated critical habitats, and do not impair the species' chances for recovery. 16 U.S.C. §§1536(a)(1), (2).

5. FEMA has not complied with these statutory duties. Accordingly, in this ESA citizen's suit WildEarth Guardians seeks an order (1) declaring that FEMA is in violation of its mandatory statutory duties under the ESA, (2) requiring FEMA to consult with the United States Fish and Wildlife Service ("FWS") as to the effects of its discretionary actions in connection with its administration of the NFIP, and (3) enjoining authorization and issuance of flood insurance policies for new construction in New Mexico flood plains when that new construction adversely effects threatened and endangered species and/or their habitats, until such time as FEMA is in compliance with the ESA.

II. Parties

6. Plaintiff WildEarth Guardians is a non-profit corporation with 5,100 members nation-wide, approximately 2,300 of whom reside in New Mexico. 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 New Mexico'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 New Mexico'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 New Mexico – 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. 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, 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

7. 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.

III. Jurisdiction and Venue

8. 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).

9. 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. 16 U.S.C. §1540(g).

10. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(e) because this is an action against agencies of the United States and because the cause of action arises in New Mexico and pursuant to 16 U.S.C. §1540(g)(3)(A) (ESA citizen's suit provision).

11. 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

12. 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 threatened and endangered wildlife species is the destruction of their natural

habitats. Accordingly, the ESA contains various provisions that are specifically intended to halt the trend of habitat destruction.

13. 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).

14. 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©.

15. 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.”

16. 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."

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

18. 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, therefore, FEMA's implementation of the NFIP is an "action" under Section 7.

19. As described herein in this Complaint, FEMA's administration of the NFIP in New Mexico may adversely affect various threatened and endangered species and their designated critical habitats.

20. Accordingly, FEMA's administration of the NFIP in New Mexico triggers Section 7 substantive and procedural duties.

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

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.

22. 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.

23. However, 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.

24. 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.

25. 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.

26. 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.

B. FEMA’s failure to comply with the requirements of the Settlement Agreement in *Forest Guardians, et al. v. Federal Emergency Management Agency*

27. On January 22, 2001, WildEarth Guardians (under its former name, “Forest Guardians”) commenced a citizen’s suit against FEMA under the ESA in which WildEarth Guardians alleged that FEMA had failed to comply with its statutory and procedural duties under the ESA in connection with its administration of the NFIP in New Mexico. This lawsuit was styled *Forest Guardians, et al. v. Federal Emergency Management Agency*, Civil No. 01-0079-MCA/RLP (hereafter “the 2001 Lawsuit”).

28. On April 23, 2002 WildEarth Guardians and FEMA executed an Amended Settlement Agreement and Stipulation of Dismissal (“Agreement”) in the 2001 Lawsuit. The Agreement requires, inter alia, FEMA to conduct a Section 7 consultation with the

FWS as to the effects of FEMA's administration of the NFIP on New Mexico's threatened and endangered species:

Prior to May 15, 2002, FEMA will prepare and submit a biological assessment ("BA") to the U.S. Fish and Wildlife Service on the effects, if any, of the NFIP on listed species and designated critical habitat through the New Mexico portions of the Rio Grande, the San Juan River, and other rivers. FEMA will seek to complete consultation pursuant to Section 7 of the ESA as expeditiously as possible

29. The April 23 Agreement referenced in the paragraph immediately preceding was entered as an Order of the Court, by virtue of Judge Armijo's April 25, 2002 Order dismissing the 2001 Lawsuit which states that "[t]he parties' Amended Settlement Agreement and Stipulation for Dismissal is hereby incorporated and made an Order of this Court."

30. To date, FEMA has failed to comply with its obligation under the April 23 Agreement to complete a Section 7 consultation with the FWS.

31. Indeed, in a letter of November 5, 2007 FWS informed FEMA that its discretionary actions in connection with administration of the NFIP in New Mexico triggered the requirement for a formal Section 7 consultation, because implementation of the NFIP adversely affects threatened and endangered species in New Mexico and their designated critical habitats.

32. FEMA has not responded to the FWS's request for formal consultation in the twenty-two months since the request was made.

33. WildEarth Guardians states that any claims that it may have as to FEMA's compliance with Section 7 in connection with threatened or endangered species that were listed as of January 22, 2001 and critical habitats that had been formally designated as of January 22, 2001 were adjudicated in the 2001 Lawsuit.

34. Accordingly, in the instant ESA citizen's suit WildEarth Guardians limits its allegations of ESA Section 7 violations to those violations that relate to threatened and endangered species that were listed after January 22, 2001 and to critical habitats that were designated after January 22, 2001.³

B. Threatened and endangered species in New Mexico are adversely affected by NFIP-induced flood plain development

35. In the arid southwestern United States, the richest biological diversity is found in riparian ecosystems.⁴ 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."

36. In its 2006 "Comprehensive Wildlife Conservation Strategy for New Mexico" ("Wildlife Strategy"), the New Mexico Department of Game and Fish ("NMDGF") states

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These species and critical habitats are set out in footnote 1 above in this Complaint.

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The New Mexico Department of Game and Fish defines riparian ecosystem as "an assemblage of plant, animal, and aquatic communities whose presence can be either directly or indirectly attributed to stream induced or related factors."

that “[a] significant percentage of all wildlife in the Southwest uses riparian habitat and approximately 80% of all sensitive vertebrate species in New Mexico depend upon riparian or aquatic habitats at some time during their life cycle.”

37. The protection and recovery of New Mexico’s riparian ecosystems is critical to the continued survival of a large number of threatened and endangered species.

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

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

40. 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, “it is necessary to develop plans to manage and protect streams and riparian areas that consider cumulative impacts across a watershed.”

41. Unfortunately, riparian ecosystems are as rare as they are important. The western cottonwood-willow forest association that characterizes riparian ecosystems in New Mexico 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.

42. The NMDGF states that New Mexico has lost “an estimated 90%” of its original riparian ecosystems, and that these valuable ecosystems make up “less than 1% of New Mexico.”

43. Between 1918 and 1982, there was an 87% decrease in wetland acreage along the main stem of the Rio Grande.

44. The NMDGF 2006 Wildlife Strategy recognizes that natural floodplain processes are critical to the continued function of riparian ecosystems. The Wildlife Strategy states that the “riparian ecosystem encompasses the river and the adjacent floodplain, linking the aquatic ecosystem to the terrestrial ecosystem” and that the riparian ecosystem “is a flood-driven environment.”

45. Flood flows throughout the lateral extent of a flood plain – including over bank flows associated with flood events – are essential to the maintenance of riparian ecosystems.

46. According to the NMDGF, development within flood plains disturbs the natural dynamics of the ecosystem, and impairs its biological function: “Developments within the floodplain, such as levees, urban, agricultural, and water or transportation infrastructures, can constrain restoration of floodplain connectivity and dynamic geomorphic channel processes like bank erosion, lateral migration, and avulsion.”

47. Specifically in connection with FEMA's administration of the NFIP in New Mexico, the 2006 Wildlife Strategy states that FEMA's discretionary actions in connection with the NFIP "can result in developments within the floodplain that conflict with potential restoration activities."

48. The widespread destruction of riparian ecosystems in New Mexico, and the resultant fragmentation of the remnant portions of riparian area that remain, can lead to the extinction of threatened and endangered species.

49. Dr. Robert Ohmart, the leading expert in riparian ecosystems in the southwestern United States, 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."

50. Past modification of riverine ecosystems, including the destruction and fragmentation of riparian ecosystems, is the cause of listing for many of New Mexico's ESA-listed threatened and endangered species. Protection of the remnant portions of riparian ecosystem and their associated flood plains and rivers from future alteration is critical to these species' survival.

51. 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 threatened and endangered species in New Mexico, and that leads to the increased fragmentation of this habitat to the detriment of species survival and recovery.

52. 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 New Mexico.

53. In the 2002 Recovery Plan for the southwestern willow flycatcher, the FWS states that "conservation of existing healthy riparian systems should be a high priority" in efforts to assure the continued survival and recovery of the species.

54. The Recovery Plan notes that modification of flood plains and riparian ecosystems associated with the Rio Grande River in New Mexico has led to serious declines in what was once one of the most robust populations of southwestern willow flycatchers. In particular, the Recovery Plan notes that areas along the Rio Grande River near Espanola and Las Cruces no longer support the species or its habitat.

55. The FWS states in the Recovery Plan for the southwestern willow flycatcher that riparian habitat loss and modification is the primary cause of species listing under the ESA:

The primary cause of the flycatcher's decline is loss and modification of habitat. Its riparian nesting habitat tends to be uncommon, isolated, and widely dispersed. Historically, these habitats have always been dynamic and unstable in place and time, due to natural disturbance and regeneration events such as floods, fire, and drought. With increasing human populations

and the related industrial, agricultural, and urban developments, these habitats have been modified, reduced, and destroyed by various mechanisms.

56. 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.

57. The final rule designating critical habitat for the southwestern willow flycatcher specifically discusses and acknowledges the critical importance of natural flood-driven dynamics to the formally designated critical habitat:

[T]he dynamic aspects of flycatcher habitat are an important component of its long-term suitability for nesting and the overall quality and presence of riparian vegetation. Because flycatchers commonly place nests in the dense riparian vegetation in early successional growth, recycling of habitat from natural disturbances (i.e., flooding) is necessary to promote dense growth. Germination and growth of riparian vegetation is essential.

70 Fed.Reg. 60885, 60888 (Oct. 19, 2005).

58. Again, the FWS's final critical habitat rule for the southwestern willow flycatcher emphasizes the importance of maintaining natural dynamic processes within flood plain environments:

The natural hydrologic regime (i.e., river flow frequency, magnitude, duration, and timing) and supply of (and interaction between) surface and subsurface water will be a driving factor in the maintenance, growth, recycling, and regeneration of southwestern willow flycatcher habitat. As streams reach the lowlands, their gradients typically flatten and surrounding terrain open into broader floodplains. Combine this setting with the integrity of stream flow frequency, magnitude, duration, and timing, and conditions will occur that provide for proper river channel configuration, sediment

deposition, periodic inundation, recharged aquifers, lateral channel movement, and elevated groundwater tables throughout the floodplain that develop flycatcher habitat. Maintaining existing river access to the floodplain when overbank flooding occurs is integral to allow deposition of fine moist soils, water, nutrients, and seeds that provide essential material for plant germination and growth.

Id. at 60909 (citations omitted).

59. In New Mexico, the FWS has designated portions of the Rio Grande floodplain and the Gila River floodplain as critical habitat for the southwestern willow flycatcher.

60. 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 biological value and function.

61. The Rio Grande silvery minnow is an example of an ESA-protected aquatic species that is adversely affected by FEMA's administration of the NFIP in New Mexico.

62. The FWS designated critical habitat for the endangered Rio Grande silver minnow in a final rule which specifically identifies the floodplain as a critical and integral component of the minnow's habitat. The minnow critical habitat rule designates 300 feet of the riparian zone on each side of the bankfull stage river channel as a component part of the species' critical habitat. 68 Fed.Reg. 8088, 8119 (Feb. 19, 2003).

63. The FWS provides three biological reasons for including the floodplain and the riparian ecosystem in the critical habitat for an aquatic species like the Rio Grande silvery minnow:

(1) The biological integrity and natural dynamics of the river system are maintained within this area (i.e., the floodplain and its riparian vegetation provide space for natural flooding patterns and latitude for necessary natural channel adjustments to maintain appropriate channel morphology and geometry, store water for slow release to maintain base flows, provide protected side channels and other protected areas for larval and juvenile silvery minnow, allow the river to meander within its main channel in response to large flow events, and recreate the mosaic of habitats necessary for the conservation of the silvery minnow); (2) conservation of the adjacent riparian zone also helps provide essential nutrient recharge and protection from sediment and pollutants, which contributes to successful spawning and recruitment of silvery minnows; and (3) vegetated lateral zones are widely recognized as providing a variety of aquatic habitat functions and values (e.g., aquatic habitat for fish and other aquatic organisms, moderation of water temperature changes, and detritus for aquatic food webs) and help improve or maintain local water quality.

Id.

64. The FWS rule designating critical habitat for the Rio Grande silvery minnow acknowledges the importance of flood dynamics to maintenance of the critical habitat:

This critical habitat designation takes into account the naturally dynamic nature of riverine systems and recognizes that floodplains (including riparian areas) are an integral part of the stream ecosystem. For example, riparian areas are seasonally flooded habitats (i.e., wetlands) that are major contributors to a variety of vital functions within the associated stream channel Among other things, the floodplain provides space for natural flooding patterns and latitude for necessary natural channel adjustments to maintain channel morphology and geometry. We believe a relatively intact riparian area, along with periodic flooding in a relatively natural pattern, is

important in maintaining the stream conditions necessary for long-term conservation of the silvery minnow.

Id. at p. 8120.

C. 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

65. 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.*

66. 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).

67. 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 threatened and endangered species in New Mexico. 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 threatened and endangered species, and the habitats on which they rely.

68. 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).

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

70. 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.”

71. 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.”

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

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.

73. 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

74. 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 © 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.

75. 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.

76. 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.

77. 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).

78. 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 threatened and endangered species and their habitats.

79. 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.

80. 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.

81. 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.

82. 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.

83. 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 threatened and endangered species, and the riparian and aquatic habitats that these species need for their continued survival.

84. 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 threatened and endangered species and the habitats that they rely on for continued survival.

85. 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.”

86. 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.

87. 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.”

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

89. FEMA exercises its discretion in connection with its administration of the NFIP in such a way as to cause adversely effects to threatened and endangered species and their habitats in additional ways not set out above.

3. The FWS has already determined that FEMA’s administration of the NFIP in New Mexico triggers the statutory requirement for a formal Section 7 consultation

90. As explained above, the Amended Settlement Agreement and Order of Dismissal in the 2001 Lawsuit against FEMA required FEMA to conclude a Section 7 consultation with the FWS “as expeditiously as possible” in connection with species that were listed on or before January 22, 2001 and critical habitats that were formally designated on or before January 22, 2001.

91. FEMA has failed to comply with this obligation, which has been imposed as an Order of this Court.

92. FEMA's failure to comply with its obligation to consult with the FWS as expeditiously as possible is the product of FEMA's refusal to acknowledge that its administration of the NFIP in New Mexico is associated with adverse effects on listed species and their designated critical habitats.

93. On a number of occasions, FEMA has informed the FWS that it need not conduct a formal Section 7 consultation with the FWS because its discretionary activities in connection with the NFIP do not adversely affect listed species.

94. FWS expressly disagrees with FEMA's position on this issue and states in its November 5, 2007 letter to FEMA that "[b]ased on our previous review and analyses and additional information we are requesting in this letter, we have determined that your [administration of the NFIP] may affect listed species or designated critical habitat. Therefore formal consultation is required."

95. FWS expressly notes in its November 5, 2007 letter that FEMA's administration of the NFIP fails to account for the important flood-driven dynamics of riparian ecosystems: "Little or no attention has been paid to the impacts of more frequent flood events that can be most crucial to natural and beneficial functions of the floodplain."

96. The FWS letter concludes with a representation that the formal Section 7 consultation required by the ESA could be concluded within 135 days of a “complete initiation package.”

97. Since November 5, 2007, FEMA has not commenced a formal consultation as required by the ESA, and as requested by FWS, as to threatened and endangered species that were listed after January 22, 2001 and critical habitats that were designated after January 22, 2001.

V. Claims for Relief

First Claim for Relief

Violation of 16 U.S.C. §1536(a)(1)

(Section 7 substantive duties)

98. WildEarth Guardians incorporates by reference all preceding paragraphs.

99. In connection with its administration of the NFIP in New Mexico, FEMA fails to exercise its discretion in a manner that conserves threatened and endangered species.

100. FEMA’s administration of the NFIP in New Mexico 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.

Second Claim for Relief

Violation of 16 U.S.C. §1536(a)(2)

(Section 7 procedural duties)

101. WildEarth Guardians incorporates by reference all preceding paragraphs.

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

103. Accordingly, FEMA's failure to conduct a Section 7 consultation with the FWS as to the effects of its administration of the NFIP in New Mexico violates the ESA.

104. FWS has determined that FEMA's administration of the NFIP in New Mexico triggers the legal requirements for a formal Section 7 consultation, and FEMA's failures: (1) to commence and (2) to conclude a formal Section 7 consultation with the FWS is arbitrary and capricious, and violates the ESA.

VI. Relief Requested

WHEREFORE, WildEarth Guardians respectfully requests the following relief:

1. An order declaring that FEMA is in violation of its substantive duties under the ESA.

2. An order declaring that FEMA is in violation of its procedural duties under the ESA.
3. An order requiring FEMA to commence and to conclude a formal Section 7 consultation with the FWS as to the effects of its administration of the NFIP in New Mexico.
4. An order enjoining FEMA from issuing and/or authorizing the issuance of NFIP flood insurance policies for new construction in New Mexico flood plains, when that proposed new construction is in the geographic range of threatened or endangered species.
5. An order awarding WildEarth Guardians its reasonable costs in this action, including attorney's fees.
6. Such other relief as this Court determines is just and proper.

Dated: September 14, 2009

Respectfully submitted,

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