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

WILDEARTH GUARDIANS,)	
)	
Plaintiff,)	
)	No. CIV _____
vs.)	
)	
UNITED STATES FEDERAL EMERGENCY)	COMPLAINT FOR
MANAGEMENT AGENCY,)	DECLARATORY AND
)	INJUNCTIVE RELIEF
Defendant.)	
_____)	

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 Arizona is consistent with the conservation of threatened and endangered species. 16 U.S.C. §1536.

2. 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 particularly rich in species diversity including the San Pedro River watershed, the Gila River watershed, the Verde River watershed, and the Colorado 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 Arizona’s flood plains, and further alleges that this induced flood plain development adversely affects threatened and endangered species protected by the ESA and the riparian and aquatic ecosystems which are critical to those species’ continued survival.¹

4. WildEarth Guardians further 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 Arizona, and 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.

5. FEMA has not complied with these statutory duties. Accordingly, in this action 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 its administration of the NFIP, and (3) enjoining authorization and issuance of flood insurance policies for new construction in Arizona flood plains when that new construction harms 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 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. 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 Arizona and pursuant to 16 U.S.C. §1540(g)(3)(A) (ESA citizen 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(c).

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 Arizona "may affect" various aquatic, avian, and terrestrial threatened and endangered species.

20. Accordingly, FEMA's administration of the NFIP in Arizona 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. 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.

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

28. 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.”

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.”

29. 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 threatened and endangered species in Arizona.
30. The protection and recovery of Arizona's riparian ecosystems is critical to the continued survival of a large number of threatened and endangered species.
31. Riparian ecosystems also play important ecological roles in the maintenance of water quality and the health and integrity of watersheds.
32. The United States Bureau of Land Management states that "[t]he importance of western riparian areas cannot be overstated or overemphasized."
33. 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.
34. 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."
35. According to current estimates, riparian ecosystems today comprise only about 0.4% of Arizona's land mass.

36. 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 threatened and endangered species.

37. 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.”

38. 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.)

39. 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.”

40. 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 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.

41. 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 Arizona, and that leads to the increased fragmentation of this habitat to the detriment of species survival and recovery.

42. The southwestern willow flycatcher is an example of a threatened and endangered avian species that WildEarth Guardians’ members enjoy looking for and observing in its natural habitat in Arizona. The southwestern willow flycatcher is a riparian obligate that breeds, forages, and migrates in riparian ecosystems.

43. The southwestern willow flycatcher was listed as an endangered species in 1995. According to the FWS, the primary cause of the species's decline is loss and modification of riparian ecosystems associated with "increasing populations and the related industrial, agricultural, and urban developments." 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).

44. 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.

45. 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.

46. The FWS's "Recovery Plan" for the southwestern willow flycatcher specifically notes that urbanization poses a continuing threat to the southwestern willow flycatcher

and its habitat: “Urban development results in many impacts to riparian ecosystems and southwestern willow flycatcher habitat. Urbanization in or next to flycatcher habitat provides the catalyst for a variety of related and inter-related direct and indirect effects which can cause loss and/or the inability to recover habitat.”

47. FEMA’s administration of the NFIP in Arizona adversely affects the southwestern willow flycatcher and leads to the adverse modification and destruction of its critical habitat.

48. In these ways, FEMA’s administration of the NFIP in Arizona harms WildEarth Guardians’ members scientific, aesthetic and recreational interests in looking for and observing the southwestern willow flycatcher and the other avian species listed on Attachment 1 to this Complaint.

49. 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.

50. Historically, the razorback sucker ranged throughout the Colorado River basin. It was listed as an endangered species in 1991 because of habitat loss and modification, including development in flood plains adjacent to the rivers that it occupies.

51. In its designation of critical habitat for the razorback sucker, the FWS stressed the importance of its inclusion of the flood plain in its identification of critical habitat:

Large river systems are composed of the mainstream channels and adjacent habitats that are inundated during the high water levels that are usually associated with spring flows. These seasonally flooded habitats are major

contributors to the natural productivity of the river system by providing nutrient inputs and makes terrestrial food sources available to aquatic organismsThe remaining flood plain areas have great importance for recovery of endangered fish.

59 Fed.Reg. 13393 (March 21, 1994).

52. FEMA's administration of the NFIP in Arizona adversely affects WildEarth Guardians' scientific, recreational, and aesthetic interests in the continued survival of the razorback sucker and the other threatened and endangered aquatic species listed on Attachment 1 to this Complaint.

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

54. 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."

55. 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.”

56. 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.

57. 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. In this way, FEMA's administration of the NFIP in Arizona injures WildEarth Guardians' members in pursuing their scientific, aesthetic, and recreational interests in promoting the recovery of the jaguar in Arizona.

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

58. 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.*

59. 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).

60. 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 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 threatened and endangered species, and the habitats on which they rely.

61. 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).

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

63. 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.”

64. 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.”

65. 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.

66. 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

67. 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.

68. 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.

69. 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.

70. 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).

71. 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.

72. 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.

73. 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.

74. 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.

75. 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.

76. 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.

77. 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.

78. 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."

79. 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.

80. 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."

81. 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..

82. 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.

V. Claims for Relief

First Claim for Relief

Violation of 16 U.S.C. §1536
(Section 7 substantive duties)

83. WildEarth Guardians incorporates by reference all preceding paragraphs.

84. 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.

85. 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.

Second Claim for Relief

Violation of 16 U.S.C. §1536
(Section 7 procedural duties)

86. WildEarth Guardians incorporates by reference all preceding paragraphs.

87. 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.

88. Accordingly, FEMA's failure to conduct a Section 7 consultation with the FWS as to the effects of its administration of the NFIP in Arizona 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 consult with the FWS as to the effects of its administration of the NFIP in Arizona.
4. 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.
5. An order award 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: August 26, 2009

Respectfully submitted,

/s/ Steven Sugarman

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