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11 UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

12 NATIONAL WILDLIFE FEDERATION, ) Civ. No.  
13 PUBLIC EMPLOYEES FOR )  
ENVIRONMENTAL RESPONSIBILITY )  
14 ) COMPLAINT  
Plaintiffs, )  
15 )  
v. )  
16 )  
FEDERAL EMERGENCY MANAGEMENT )  
17 AGENCY )  
18 Defendant. )  
19 )

20 INTRODUCTORY STATEMENT

21 1. This is an action for declaratory and injunctive relief. Plaintiffs challenge the failure of  
22 defendant, Federal Emergency Management Agency (“FEMA”), to consult with the Secretary of  
23 Commerce to insure that its actions are not likely to jeopardize the continued existence of  
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25 COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF  
26 (Civ. No. ) - 1 -

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1 threatened Puget Sound chinook salmon. 16 U.S.C. § 1536(a)(2). Through its implementation  
2 of the National Flood Insurance Program (“NFIP”), FEMA promotes, encourages, and influences  
3 human development in Puget Sound floodplains, impairing essential habitat functions of  
4 imperiled chinook salmon. However, FEMA has never consulted with the National Marine  
5 Fisheries Service (“NMFS”) to ensure that this program does not jeopardize listed chinook, as  
6 required by law. Plaintiffs also challenge FEMA’s failure to utilize its authorities to carry out  
7 programs to conserve listed species. 16 U.S.C. § 1536(a)(1). Plaintiffs’ claim arises under and  
8 alleges violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, and its  
9 implementing regulations. This action is brought pursuant to the citizen suit provisions of the  
10 ESA. 16 U.S.C. § 1540(g).

11 2. Plaintiffs are the National Wildlife Federation and Public Employees for Environmental  
12 Responsibility (collectively “NWF”).

13 3. Plaintiffs seek a declaration that FEMA has violated the ESA by failing to consult with the  
14 Secretary to insure that its implementation of the NFIP in Puget Sound does not jeopardize listed  
15 Puget Sound chinook salmon. Plaintiffs also seek a declaration that FEMA has failed to use its  
16 authorities to develop and implement a program to conserve Puget Sound chinook salmon.

17 Plaintiffs seek an injunction curtailing FEMA’s issuance and authorization of flood insurance  
18 policies for new developments within the geographic boundaries of the Puget Sound chinook  
19 salmon evolutionarily significant unit (“ESU”) until FEMA completes consultation with the  
20 Secretary and insures that continued implementation of the NFIP does not jeopardize listed  
21 chinook salmon. Lastly, plaintiffs seek an award of reasonable attorneys’ fees and costs  
22 associated in bringing this action.

23 4. On July 1, 2003, plaintiffs sent FEMA a 60-day notice of intent to sue for violations of the  
24

1 ESA, as required by 16 U.S.C. § 1540(g)(2)(C). A copy of the notice is attached as Exhibit A.

2 PARTIES

3 5. The Plaintiffs in this action include:

4 A. National Wildlife Federation (“NWF”), the nation’s largest conservation advocacy  
5 and education organization. Founded in 1936, NWF is a non-profit organization with its  
6 headquarters in Reston, Virginia. NWF has nine regional offices, including the Northwestern  
7 Natural Resource Center in Seattle, Washington. NWF’s mission is to educate, inspire, and  
8 assist individuals and organizations of diverse cultures to conserve wildlife and other natural  
9 resources and to protect the Earth’s environment in order to achieve a peaceful, equitable, and  
10 sustainable future. NWF and its over 4.5 million members and supporters are dedicated to  
11 protecting and restoring Pacific Northwest salmon runs, including Puget Sound chinook salmon and  
12 the habitat upon which the species depends.

13 B. Public Employees for Environmental Responsibility (“PEER”) is a national nonprofit  
14 corporation based in Washington, D.C with chapters throughout the United States, including  
15 Washington State. PEER works to hold federal, state, and local governments accountable to  
16 their statutory environmental mandates and to practice scientific integrity in their actions.

17 6. Plaintiffs and their members use and enjoy Puget Sound floodplain areas and the chinook  
18 salmon that inhabit them for recreational, scientific, conservation and aesthetic purposes.

19 Plaintiffs and their members derive, or, but for the threatened status of Puget Sound chinook  
20 salmon, would derive, recreational, scientific, conservation and aesthetic benefits from the  
21 existence of native chinook salmon and their properly functioning habitat through wildlife  
22 observation, study, photography, education and recreational and commercial fishing within Puget  
23 Sound and its watersheds.

24 7. The plaintiffs and their respective members have been, are being, and, unless the relief

1 prayed for herein is granted, will continue to be adversely affected by the failure of FEMA to  
2 comply with the ESA, the purpose of which is to protect threatened species and their habitat.  
3 FEMA's failure to carry out statutorily mandated consultation under ESA further impairs  
4 Plaintiffs' procedural interests in the conservation and recovery of threatened chinook salmon.  
5 Plaintiffs have no adequate remedy at law.

6 8. Defendant Federal Emergency Management Agency ("FEMA") is a federal agency that  
7 administers the National Flood Insurance Program ("NFIP"). FEMA is now housed within the  
8 newly created Department of Homeland Security. Region 10 of FEMA, which oversees  
9 implementation of the NFIP in Washington state, is based in Bothell, Washington.

#### 10 JURISDICTION AND VENUE

11 9. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question  
12 jurisdiction), § 2201 (declaratory relief), § 2202 (injunctive relief), and 16 U.S.C. §  
13 1540(g)(1)(A) (ESA citizen suit).

14 10. Venue is properly vested in this court under 28 U.S.C. § 1391(e) because a substantial part  
15 of the events or omissions giving rise to this claim occurred in this district and because the  
16 plaintiffs National Wildlife Federation and Washington Public Employees for Environmental  
17 Responsibility reside in this district.

#### 18 FACTUAL AND STATUTORY BACKGROUND

##### 19 The National Flood Insurance Program

20 11. The National Flood Insurance Program ("NFIP") is a federal program administered by  
21 FEMA that enables property owners to acquire insurance for properties located within flood-  
22 prone areas. Established in 1968 with the passage of the National Flood Insurance Act, the NFIP  
23 is designed to ameliorate heavy expenditures of federal disaster relief by authorizing flood  
24 insurance that would otherwise be prohibitively costly or unavailable. 42 U.S.C. § 4001.

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1 12. Recognizing the limitations of traditional flood-control techniques, Congress conditioned  
2 eligibility for the NFIP on local community adoption of land-use and control regulations. 42  
3 U.S.C. § 4002(b)(3). For purposes of the NFIP, a “community” is defined as “any state, area, or  
4 political subdivision...which has the authority to adopt and enforce floodplain management  
5 ordinances for the area under its jurisdiction.” 44 C.F.R. § 59.1. Communities become  
6 participants in the NFIP by adopting regulations in accordance with FEMA standards. These  
7 standards are intended to encourage development design that will reduce flood damage to  
8 properties built within floodplains.

9 13. Property owners are eligible for federal flood insurance only in those communities enrolled  
10 in the NFIP. 42 U.S.C. § 4012(c)(2); 44 C.F.R. § 59.22. The NFIP is unavailable to residents in  
11 communities that fail to adopt or enforce land-use regulations meeting these criteria minimums.  
12 42 U.S.C. § 4022(a)(1); 44 C.F.R. § 60.1. FEMA certifies community participation in the NFIP  
13 via an application and ongoing oversight process. 44 C.F.R. §§ 59.22, 59.24.

14 14. FEMA maintains an ongoing regulatory relationship with NFIP communities to ensure that  
15 the goals of the program are being carried out. For example, FEMA places on probation and  
16 may suspend communities from the NFIP for failure to enforce minimum land-use regulations.  
17 44 C.F.R. § 59.24. To monitor compliance, FEMA conducts community visits to perform  
18 comprehensive assessments of local programs and provide technical assistance to local officials.  
19 These community visits enable FEMA to ensure compliance with land-use regulations to the  
20 minimum criteria standard. Id.

21 15. FEMA further interacts with local communities through dissemination of information and  
22 development and revision of maps to identify flood-prone areas. 42 U.S.C. § 4101. FEMA  
23 maps, known as Flood Insurance Rate Maps (“FIRMs”), identify categories of flood hazard areas  
24

1 and their associated risk premiums. 44 C.F.R. § 64.3. FEMA is required to update the FIRMs at  
2 least every five years and may make adjustments in response to new information provided by  
3 property owners. 44 C.F.R. Pt. 72. However, such updates are often not initiated or completed,  
4 meaning that many maps are inaccurate or out of date.

5 16. Following FEMA certification of a community for NFIP eligibility, individual property  
6 owners acquire federal flood insurance through two mechanisms. First, FEMA may enter into  
7 agreements with private insurance providers who then issue federal flood insurance policies to  
8 applicants. 44 C.F.R. § 62.23. Private insurers are referred to as “write your own” (“WYO”)  
9 companies. FEMA-approved WYO providers collect premiums from NFIP participants, retain  
10 proceeds to cover business costs and submit remaining moneys to the U.S. treasury. See  
11 generally, 44 C.F.R. Pt. 62, App. A. FEMA is required to conduct triennial review of WYO  
12 companies’ practices, and renews contact agreements on an annual basis. 44 C.F.R. Pt. 62, App.  
13 B. Alternatively, FEMA may issue insurance directly to property owners. See 44 C.F.R. §§  
14 62.1, 62.3.

15 17. Though participation in the NFIP is technically voluntary, virtually every flood-prone  
16 locale in the United States applies for eligibility and participates in the program. The reason is  
17 straightforward: failure to enroll in the NFIP can seriously diminish opportunities and property  
18 values for community residents. For example, the National Flood Insurance Act states that other  
19 federal agencies such as the Federal Housing Administration and the Small Business  
20 Administration may not provide loans to property owners in non-NFIP communities. 42 U.S.C.  
21 § 4012(a). Additionally, without NFIP participation, mortgages from federally insured or  
22 regulated banks as well as Veterans Administration loans are unavailable where applicants  
23 secure assistance based on property or structures located within floodplain areas. Id.

1 18. The enabling statute calls for FEMA’s periodic reevaluation of the minimum land-use  
2 criteria, in part to reduce the amount of development exposed to floods and “improve the long-  
3 range land management and use of flood-prone areas.” 42 U.S.C. § 4102(c). Current minimum  
4 criteria codified in 44 C.F.R. § 60.3 focus on limiting property losses and effective structural  
5 design; the criteria do not contemplate floodplain ecosystem or species protection.

6 19. FEMA is granted broad discretion to implement programs consistent with environmental  
7 protection. See, e.g., 44 C.F.R. § 10.4(a) (requiring FEMA to implement flood insurance  
8 program “in a manner consistent with national environmental priorities”); see also Exec. Order  
9 No. 11988 (May 24, 1977) (requiring federal agencies to “restore and preserve the natural and  
10 beneficial values served by floodplains in carrying out [their] responsibilities”). In fact, the  
11 NFIP implementing statute itself calls for FEMA to “consult” with other federal agencies to  
12 make certain that the NFIP is “mutually consistent” with other agency programs and goals. 42  
13 U.S.C. § 4024. Such programs and goals include compliance with the objectives and  
14 requirements of the Endangered Species Act.

15 The Endangered Species Act

16 20. The purpose of the Endangered Species Act is unequivocal: to conserve threatened and  
17 endangered species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b);  
18 Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). To that end, Section 7 of the ESA  
19 prohibits federal agencies from taking any actions that are likely to jeopardize the survival and  
20 recovery of a listed species or adversely modify its critical habitat:

21 Each Federal agency shall, in consultation with and with the assistance of the Secretary,  
22 insure that any action authorized, funded, or carried out by such agency . . . is not likely  
23 to jeopardize the continued existence of any endangered species or threatened species or  
24 result in the destruction or adverse modification of habitat of such species which is  
determined by the Secretary . . . to be critical . . . .

1 16 U.S.C. § 1536(a)(2). Accordingly, the Supreme Court has declared that “endangered species  
2 [have] priority over the ‘primary missions’ of federal agencies.” Hill, 437 U.S. at 185.

3 21. To assist federal agencies in fulfilling this duty to avoid jeopardy, consultation with the  
4 Secretary is required for proposed “agency actions” that “may affect” a listed species. Id.; 50  
5 C.F.R. § 402.14(a). ESA implementing regulations define “agency action” broadly,  
6 encompassing “all activities or programs of any kind authorized, funded, or carried out, in whole  
7 or in part, by Federal agencies.” 50 C.F.R. § 402.02 (defining “action”). Similarly, the threshold  
8 for determining whether the agency action “may affect” a listed species is low. See 51 Fed. Reg.  
9 19,926, 19,949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an  
10 undetermined character, triggers the formal consultation requirement...”)

11 22. Courts have likewise interpreted a wide range of federal agency activities as triggering the  
12 consultation requirement. The Ninth Circuit Court of Appeals has reasoned that even if an  
13 agency action is part of an ongoing program, where that agency retains discretion over how to  
14 proceed, the formal consultation requirement stands. See Pacific Rivers Council v. Thomas, 30  
15 F.3d 1050, 1054-55 (1994) (holding that ESA consultation was required for ongoing  
16 implementation of national forest management plans); see also Connor v. Burford, 868 F.2d  
17 1441, 1453 (9th Cir. 1988).

18 23. The U.S. District Court for the Southern District of Florida interpreted the ongoing  
19 implementation of the NFIP by FEMA as an agency action triggering formal consultation  
20 requirements under Section 7. See Florida Key Deer v. Stickney, 864 F. Supp. 1222 (S.D. Fla.  
21 1994). The Key Deer court reasoned that implementation of the NFIP by FEMA facilitated and  
22 encouraged new development that harmed the Key Deer, a highly imperiled species listed under  
23 the ESA.



1 24. For agency actions that may affect listed species, the responsible federal agency must  
2 initiate consultation and provide to the appropriate expert agency, in this case National Marine  
3 Fisheries Services (“NMFS”), a “biological assessment” regarding the effects of the proposed  
4 action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). This action initiates the formal  
5 consultation process, which is not concluded until the expert agency issues a final biological  
6 opinion that demonstrates that the proposed action will not jeopardize the species in question.

7 25. Federal agency actions that may affect listed species cannot proceed until the conclusion of  
8 the Section 7 process. See Thomas v. Peterson, 753 F.2d 754, 764; Pacific Coast Federation of  
9 Fishermens’ Associations v. Bureau of Reclamation, 138 F. Supp.2d 1228, 1248 (N.D. Cal.  
10 2001) (enjoining irrigation water deliveries at Klamath project pending completion of ESA  
11 consultation).

12 26. Separately, Section 7 requires federal agencies to “utilize their authorities in furtherance of  
13 the purposes of this chapter by carrying out programs for the conservation of endangered species  
14 and threatened species.” 16 U.S.C. § 1536(a)(1); Sierra Club v. Glickman, 156 F.3d 606  
15 (5th Cir. 1998). As with §7(a)(2), the duties imposed by § 7(a)(1) are discharged “in  
16 consultation with and with the assistance of” NMFS.

17 Puget Sound Chinook Salmon

18 27. Puget Sound chinook salmon hatch in rivers and streams that flow into Puget Sound, and  
19 spend anywhere from a few months to a few years feeding in freshwater environments. Where  
20 available, juvenile salmon spend significant portions of their freshwater residence in floodplain  
21 environments and secondary channels where long-term survival and growth are often superior to  
22 that in mainstem systems. These connected, river-adjacent areas are especially important for  
23 refuge during high flows. Following their freshwater residence, chinook migrate through the salt  
24

1 waters of Puget Sound to the Gulf of Alaska where they remain for four to five years. Using  
2 their homing instincts, chinook then return to their natal freshwater streams to spawn and die,  
3 beginning the cycle anew.

4 28. Urban and rural development in many places in Puget Sound has replaced intact  
5 floodplains and naturally migrating rivers with channelized, simplified drainage systems. Flood-  
6 control measures such as dredging, dikes and dams work to separate the deep-water portions of  
7 rivers from their adjacent floodplains, lessening the supply of large woody debris, organic  
8 matter, shade, and dissolved nutrients to the system. Without these inputs, estuarine and riverine  
9 environments lack refuge, suitable water quality, and food sources essential to salmon survival.

10 29. The sweeping extent of floodplain loss is one of the most pervasive and unregulated forms  
11 of habitat degradation in the Pacific Northwest. As a result of these and other habitat-degrading  
12 human activities, Puget Sound chinook salmon populations have declined drastically over the  
13 past few decades. Nine of the 31 historic chinook sub-populations in Puget Sound have become  
14 extinct. Continued ongoing development in already degraded floodplain areas continues to  
15 impact salmon habitat through the addition of impervious surfaces, introduction of pollutants and  
16 toxics, hydrologic alterations, and impaired water quality and quantity.

17 30. In response to severe population declines, NMFS listed the Puget Sound chinook salmon  
18 evolutionarily significant unit (“ESU”) as “threatened” under the Endangered Species Act on  
19 March 24, 1999. 64 Fed. Reg. 14,308. The Puget Sound ESU includes all naturally spawned  
20 populations of chinook from rivers and streams flowing into Puget Sound including the Straits of  
21 Juan De Fuca from the Elwha River, eastward, and including rivers and streams flowing into  
22 Hood Canal, South Sound, North Sound and the Strait of Georgia in Washington. Id.

23 31. In the listing decision, NMFS cited “widespread habitat modification” as a significant  
24

1 factor contributing to the species' decline. Id. at 14,310. To that end, NMFS urged limits on  
2 "wetland and floodplain alteration" among other habitat improvements in all ESUs. Id. at  
3 14,327. Within the Puget Sound ESU, NMFS specifically noted that "[b]lockages by dams,  
4 water diversions, and shifts in flow regime due to hydroelectric development and flood control  
5 projects are major habitat problems in several basins." Id. at 14319. Moreover, in its designation  
6 of chinook salmon "critical habitat" in February 2000, NMFS cautions that "the widespread ESA  
7 listings underscore that both urban and rural communities could face significant changes in how  
8 they approach such diverse activities as: planning, zoning, and construction/development;  
9 erosion and sediment control; [and] floodplain management..." 65 Fed. Reg. 7764, 7776  
10 (February 16, 2000) (emphasis added).

11 The NFIP in Puget Sound

12 32. In Puget Sound, approximately 100 local communities within the geographic boundaries of  
13 the range of the Puget Sound chinook ESU participate in the NFIP. A list of NFIP communities  
14 that overlap with the geographic range of the Puget Sound chinook is attached as Exhibit B.  
15 FEMA's administration of the NFIP in relation to chinook salmon remains essentially unchanged  
16 despite the species' listing as threatened in March, 1999. In the years since the chinook listing,  
17 FEMA has issued hundreds and perhaps thousands of new individual flood insurance policies for  
18 new structures within floodplains utilized by and relied upon by chinook salmon in Puget Sound.  
19 It also continues to implement other elements of the program, such as revising maps, assuring  
20 and assisting with community compliance, and reviewing local regulations, all without adequate  
21 consideration of potential impacts to salmon.

22 33. In 1998, NMFS Assistant Regional Administrator Elizabeth Gaar wrote a letter to FEMA's  
23 Washington state Regional Environmental Office Jean Chaney regarding Section 7 consultation.  
24

1 In the letter, NMFS pointed out that “we are aware that the National Flood Insurance Program  
2 (NFIP), as currently implemented by FEMA, could result in increased development in flood-  
3 prone areas with consequent impairment of floodplain functions of salmon bearing waters.”

4 NMFS urged FEMA to discuss Section 7 consultation on this and other of its programs that may  
5 affect listed salmonids. However, no such consultation has ever been initiated by FEMA.

6 34. FEMA’s administration of the NFIP is a federal agency action. Implementation of the  
7 NFIP in Puget Sound includes, but is not limited to: certifying community eligibility, monitoring  
8 and assisting community compliance and enforcement with land-use criteria standards, providing  
9 federal flood insurance directly or authorizing insurance through private insurers, establishing  
10 and updating minimum land-use criteria, and revising flood-hazard maps.

11 35. FEMA’s implementation of the NFIP “may affect” threatened Puget Sound chinook  
12 salmon. The NFIP has widespread participation throughout Puget Sound and involves  
13 disincentives for non-participation. FEMA’s implementation of the NFIP provides incentives  
14 and disincentives relative to construction of new structures in floodplains and where, how, and  
15 when development in flood-prone areas occurs. Without FEMA’s implementation of the NFIP,  
16 some structures in floodplains would not be built, purchased, or sold. The floodplain  
17 development induced or affected by FEMA’s action, in turn, has impaired chinook salmon  
18 survival and will continue to affect the likelihood of species conservation and recovery.

19 36. Accordingly, FEMA’s implementation of the NFIP within the range of the Puget Sound  
20 chinook salmon ESU is a federal action that may affect listed chinook and thus, requires  
21 consultation under Section 7. Since the date of ESA listing, FEMA has not engaged in  
22 consultation with the Secretary to insure that its actions do not jeopardize Puget Sound chinook  
23 salmon.

1 37. Further, FEMA has not utilized its authority to develop and/or carry out programs to  
2 conserve listed species, in consultation with NMFS, consistent with the ESA's goals, as required  
3 by ESA § 7(a)(1).

4 CLAIMS FOR RELIEF

5 FIRST CLAIM FOR RELIEF  
6 VIOLATION OF 16 U.S.C. § 1536(a)(2)

7 38. Plaintiffs incorporate by reference all preceding paragraphs.

8 39. The ESA requires that federal agencies insure that their actions are not likely to jeopardize  
9 the continued existence of endangered or threatened species, and requires an interagency  
10 consultation process to ensure that this mandate is fulfilled. 16 U.S.C. § 1536(a)(2).

11 40. FEMA has violated the requirements of ESA and its implementing regulations by its failure  
12 to initiate and/or complete consultation with NOAA Fisheries to ensure that the administration of  
13 the NFIP, an action that may affect listed Puget Sound chinook salmon, does not jeopardize  
14 listed Puget Sound chinook salmon.

15 SECOND CLAIM FOR RELIEF  
16 VIOLATION OF ESA 16 U.S.C. § 1536(a)(1)

17 41. Plaintiffs incorporate by reference all preceding paragraphs.

18 42. The ESA requires that federal agencies, in consultation with NMFS, utilize their authorities  
19 in furtherance of the purposes of the ESA by developing and carrying out programs for the  
20 conservation of threatened Puget Sound chinook salmon. 16 U.S.C. § 1536(a)(1).

21 43. FEMA has violated the requirements of ESA by its failure to develop and/or carry out  
22 programs for the conservation of Puget Sound chinook salmon in consultation with NOAA  
23 Fisheries.

24 RELIEF REQUESTED

25 WHEREFORE, plaintiffs respectfully request that this Court:

26 COMPLAINT FOR DECLARATORY AND  
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(Civ. No. )



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