

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**DISTRICT OF COLUMBIA
Office of the General Counsel
51 N Street, N.E., 6th Floor
Washington, DC 20002,**

Plaintiff,

v.

**FEDERAL EMERGENCY
MANAGEMENT AGENCY
Serve: Office of General Counsel
500 C Street S.W.
Washington, DC 20472,**

Defendant.

CIVIL ACTION NO.

**COMPLAINT and
PETITION FOR DECLARATORY RELIEF**

The plaintiff, the District of Columbia ("District"), by and through its undersigned counsel, alleges in support of its complaint and petition as follows:

PARTIES

1. The District is a municipal corporation.
2. The Federal Emergency Management Agency ("FEMA") is an agency of the United States government.

JURISDICTION

3. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346(a)(2) and other applicable provisions of law.

VENUE

4. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e) and 42 U.S.C. § 4104 and other applicable provisions of law.

FACTS

5. This action concerns a base flood elevation determination FEMA purports to have made for land located within the boundaries of the District.
6. In connection with its duties related to the National Flood Insurance Plan ("NFIP"), FEMA is charged by statute and regulations with developing and publishing Flood Insurance Rate Maps ("FIRMs") showing, among other things, areas that are likely to be flooded during a "100-year flood."
7. The 100-year flood, also referred to as a "base flood," is a theoretical flood of a scale that has a 1% chance of being equaled or exceeded in any given year.
8. Low and unprotected elevations that would be inundated by a base flood are referred to as Base Flood Elevations ("BFE").
9. Prior to the actions complained of herein, FEMA last issued FIRMs for the District prior to November 15, 1985.
10. At that time and since, the District has been largely protected from a 100-year flood by a series of levees that are in place or would be constructed in the event of threatened flooding.
11. FEMA issued a proposed rule reflecting a preliminary and approximate determination that a greater area of the District is prone to flooding during a 100-year flood than was previously reflected on the 1985 FIRMs, and that revised BFEs would be issued.

12. As a result of potential inaccuracies and significant data gaps in FEMA's preliminary and approximate determinations, as well as a joint recognition by the District, FEMA, and other federal entities such as the U.S. Department of Interior's National Park Service, of the significant potential impact on the National Mall and other District and Federal properties, there were extensive discussions between FEMA, the District, and others concerning these issues.
13. FEMA's preliminary and approximate determinations as to BFEs, if made final and reflected in FIRMs, would result in significant and costly regulations in accordance with the NFIP and could substantially impact numerous historic buildings, landmarks, and memorials in the District. All of these matters required consideration and review prior to issuance of revised FIRMs.
14. In response to a request from the District to extend the period for submission of appeals, comments, and protests, FEMA extended the period until March 26, 2008.
15. On March 7, 2008, the District timely filed an appeal of FEMA's proposed District BFEs by submitting voluminous and detailed comments to FEMA.
16. Without explanation and/or complying with the required appeal resolution process, on March 26, 2008, FEMA issued a Letter of Final Determination ("LOFD") reflecting revised BFEs.
17. On March 25, 2008, FEMA informed the District that it would issue the LOFD, but would continue to work with the District to avoid implementation of the modified BFEs.
18. If the LOFD is not rescinded or otherwise voided, the revised BFE would be reflected in FIRMs effective on or about September 26, 2008.

19. Without satisfying the statutorily required appeal resolution process related to the District's appeal filed on March 7, 2008, on April 17, 2008, FEMA published in the Federal Register its Final Rule of Final Flood Elevation Determinations for the District. It is this Final Rule which is challenged herein.
20. Following April 17, 2008, and despite the fact that it had issued a Final Rule in the Federal Register, FEMA continued to work with the District to reach an agreement allowing the District to study and improve the 17th Street levee and thereby avoid implementation of the revised BFE.
21. On April 25, 2008, the District sent a letter to FEMA documenting an agreement as to certain milestones designed to achieve necessary flood protection (the "Milestone Agreement"). A true and correct copy of the Milestone Agreement is attached as Exhibit "A." The Milestone Agreement also set forth a schedule of deliverables agreed to by the District and FEMA.
22. In a letter dated May 1, 2008, FEMA affirmed and ratified the Milestone Agreement. A true and correct copy of FEMA's May 1, 2008, letter is attached as Exhibit "B."
23. The deliverable scheduled for May 2008 in the Milestone Agreement was described as "Copy of Executed Contract for Levee Accreditation Alternatives." This executed contract was provided by the District to FEMA in a timely manner as required by the Milestone Agreement and therefore the May milestone was completed and satisfied.
24. The Milestone Agreement stated: "Upon completion of the May milestone, FEMA will rescind the March 25, 2008, Letter of Final Determination." However, FEMA has not yet issued written confirmation that the Letter of Final Determination is rescinded.

25. The District has complied with all requirements necessary to the bringing of this action, has complied with the Milestone Agreement, and has fulfilled all other conditions precedent, if any.

COUNT I

Declaratory Relief under 28 U.S.C. § 2201

Violation of the Administrative Procedure Act, 5 U.S.C. § 551

Violation of the Flood Disaster Protection Act, 42 U.S.C. § 4104

26. The District incorporates by reference the allegations contained in paragraphs 1 through 25.
27. On January 10, 2008, the District requested a 90 day extension to the period during which it could file comments constituting its appeal.
28. On January 11, 2008, FEMA granted the District's request by providing an extension for a period of 83 days, or until March 26, 2008.
29. On March 7, 2008, the District timely appealed FEMA's proposed flood elevation determinations and/or FIRMs with information indicating that FEMA's proposed flood elevation determinations and/or FIRMs contained factual, legal, and procedural infirmities.
30. In its appeal, the District identified information that would result in more correct estimates of base flood elevations and thus more accurate FIRMs. The District also noted that the proposed FIRMs were issued in a manner which did not comply with applicable law.
31. Without properly considering or ruling upon the District's appeal, on March 26, 2008, FEMA issued final flood elevation determination and FIRMs.
32. FEMA's decision to issue such final flood elevations and/or FIRMs without first addressing the information contained in the District's appeal was arbitrary and capricious,

unsupported by substantial evidence, contrary to law and otherwise an abuse of discretion.

COUNT II

**Declaratory Relief under 28 U.S.C. § 2201
Violation of the Administrative Procedure Act, 5 U.S.C. § 551**

33. The District incorporates by reference the allegations contained in paragraphs 1 through 25.
34. FEMA's decision to issue its final flood determinations and/or FIRMs, without first addressing the information contained in the District's appeal and resolving the factual and legal infirmities, was arbitrary and capricious, contrary to law, unsupported by substantial evidence and otherwise an abuse of discretion.

COUNT III

**Declaratory Relief under 22 U.S.C. § 28 U.S.C. § 2201
Violation of the National Environmental Policy Act, 42 U.S.C. § 4321
and Administrative Procedure Act, 5 U.S.C. § 551**

35. The District incorporates by reference the allegations contained in paragraphs 1 through 25.
36. The National Environmental Policy Act ("NEPA") emphasizes the importance of comprehensive environmental analysis to ensure that federal agencies carefully examine the environmental consequences of their actions before they take such actions. The statute also ensures that the public is made aware of the environmental effects of the agencies' decisions, and is allowed to participate in the process of preparing environmental reviews.
37. NEPA is applicable to FEMA's actions complained of herein.
38. Under NEPA, an agency is required to prepare and circulate for review and comment an "environmental impact statement" ("EIS") before undertaking "legislation and other

major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). Depending on the action taken, NEPA may require other or different actions. For example, an agency may prepare an environmental assessment (“EA”) to decide whether the environmental impact of a proposed action warrants the preparation of an EIS. An EA must provide sufficient evidence and analysis to determine whether an EIS or a finding of no significant impact (“FONSI”) should be prepared. If an agency decides not to prepare an EIS, it must provide a convincing statement why a project’s impacts are insignificant. If substantial questions are raised about whether a project may have a significant effect on the environment, an EIS must be prepared.

39. Under NEPA, major federal actions include actions that will have a significant impact on the environment, including those that will result in an “extensive change in land use,” 44 C.F.R. § 10.8(b)(2)(i), a “land use change which is incompatible with the existing or planned use of the surrounding area,” 44 C.F.R. § 10.8(b)(2)(ii), an impact that is likely to be controversial, 44 C.F.R. § 10.8(b)(2)(iv), and an effect on property listed on the National Register of Historic Places, 44 C.F.R. § 10.8(b)(2)(vii).
40. Even where an action is categorically excluded from NEPA compliance, an environmental assessment must be prepared in extraordinary circumstances, including, the “[p]resence of ... cultural, historical, or other protected resources,” within an area affected by the federal agency action. 44 C.F.R. § 10.8(d)(3)(v).
41. For each proposal that is determined to be categorically excluded, FEMA must prepare and maintain an administrative record. 44 C.F.R. § 10.5(a)(4).
42. FEMA’s decision to promulgate a final rule, establishing BFEs and modified BFEs for the District, will cause significant and reasonably foreseeable direct, indirect, and

cumulative environmental and related economic impacts on the environment, including those that will result in an extensive change in land use, a land use change which is incompatible with the existing or planned use of the surrounding area, an impact that is likely to be controversial, and an affect on property listed on the National Register of Historic Places. Thus, NEPA is applicable to FEMA's actions set forth herein and no categorical exclusions from NEPA were applicable.

43. FEMA violated NEPA and the Administrative Procedure Act ("APA") by one of more of the following: failing to prepare an EA; failing to prepare an EIS; and apparently deciding that the Final Rule is categorically excluded from the requirements of NEPA. Such decision making was arbitrary and capricious, unsupported by substantial evidence, an abuse of discretion, and otherwise not in accordance with law, and in violation of NEPA and the APA .

COUNT IV

Violation of the Endangered Species Act, 16 U.S.C. § 1531 and Administrative Procedure Act, 5 U.S.C. § 551

44. The District incorporates by reference the allegations contained in paragraphs 1 through 25.
45. The purpose of the Endangered Species Act ("ESA") is to protect and recover threatened and endangered species and the ecosystems on which they depend. To that end, Section 7 of the ESA prohibits federal agencies from taking any actions that are likely to jeopardize the survival and recovery of a listed species or adversely modify its critical habitat.
46. The ESA applies to all actions in which there is discretionary Federal involvement or control, including, upon information and belief, the actions of FEMA set forth herein.

47. To assist federal agencies in fulfilling this duty to avoid jeopardy, consultation with the Secretary is required for proposed agency actions that may affect a listed species, including but not limited to the Hay's Spring Amphipod. Such proposed agency actions that may affect a listed species include FEMA's ongoing implementation of the NFIP. Accordingly, the formal consultation requirements under Section 7 of the ESA were necessary. Despite this, upon information and belief, no such consultation occurred with respect to FEMA's actions set forth herein.
48. Endangered and/or threatened species are known to occur in the District of Columbia and, upon information and belief, such species may be impacted by FEMA's actions set forth herein.
49. If FEMA did not initiate consultation under the ESA with the Secretary, its failure to do so would be arbitrary, capricious, an abuse of discretion and not otherwise in accordance with law and in violation of ESA and the APA.

COUNT V
Declaratory Relief under 28 U.S.C. § 2201
Violation of Administrative Procedure Act, 5 U.S.C. § 551
Rescission of Letter of Final Determination

50. The District incorporates by reference the allegations contained in paragraphs 1 through 26.
51. In the Milestone Agreement, FEMA agreed that its March 26, 2008, Letter of Final Determination would be rescinded upon delivery in May 2008 by the District of a "Copy of Executed Contract for Levee Accreditation Alternatives."
52. On May 14, 2008, the District fulfilled its May 2008 obligations in accordance with the Milestone Agreement by providing a copy of an executed contract for levee accreditation alternatives.

53. In accordance with the Milestone Agreement, this Court should declare that the May 26, 2008, Letter of Final Determination was effectively rescinded by FEMA effective as of May 14, 2008, and that the Letter was arbitrary and capricious, contrary to law, unsupported by substantial evidence and otherwise an abuse of discretion.

PRAYER FOR RELIEF

WHEREFORE, the District respectfully requests that the Court issue a declaratory judgment under 28 U.S.C. § 2201, that FEMA's Final Rule of Final Flood Elevation Determinations for the District published in the Federal Register on April 17, 2008 ("Final Rule"), was and is rescinded by FEMA and therefore is of no legal force or effect. In the alternative, the District requests that this Court:

- A. Vacate and rescind FEMA's Final Rule and remand it to FEMA for further rule making;
- B. Issue a declaratory judgment under 28 U.S.C. § 2201, that FEMA's Final Rule is a major federal action that may have a significant impact on the human environment;
- C. Issue a declaratory judgment under 28 U.S.C. § 2201, that FEMA's Final Rule violated and is violating NEPA and the APA;
- D. Issue a declaratory judgment under 28 U.S.C. § 2201, that FEMA has violated the ESA and APA by failing to consult with the Secretary to ensure that its Final Rule does not jeopardize listed species within the district;
- E. Order FEMA to prepare a full EIS for any decision establishing Base Flood Elevations or modified Base Flood Elevations for the District of Columbia;

F. Order FEMA to consult with the Secretary prior to any decision establishing Base Flood Elevations or modified Base Flood Elevations for the District of Columbia; and

G. Grant such further, other, or different relief as the District may hereinafter request or as the Court may find just and equitable.

Dated: June 16, 2008

Respectfully submitted,

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District of Columbia

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* DC Bar Application pending. Member of Massachusetts Bar in good standing. Authorized by the Office of the Attorney General for the District of Columbia to provide legal services pursuant to Rules of the United States District Court for the District of Columbia Local Rules 83.2(d) and 83.2(e).