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AT SEATTLE
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WESTERN DISTRICT OF WASHINGTON
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09-CV-01044-CMP

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF MOUNT VERNON, a Washington
municipal corporation,)

Plaintiff,)

v.)

FEDERAL EMERGENCY MANAGEMENT
AGENCY, an agency of the United States,)

Defendant.)

No. **CV9 1044RAJ**

COMPLAINT FOR DECLARATORY
JUDGMENT AND AFFIRMATIVE
RELIEF PURSUANT TO 5 U.S.C. 701-
706

Plaintiff City of Mount Vernon, by and through its undersigned counsel, Kevin Rogerson, City Attorney, and Foster Pepper PLLC, Special Assistant City Attorneys, brings the following Complaint for declaratory judgment against the FEDERAL EMERGENCY MANAGEMENT AGENCY ("FEMA"), and in support thereof states as follows:

I. PARTIES

1. Mount Vernon is a municipal corporation organized pursuant to the laws of the State of Washington.

2. FEMA is an agency of the United States.

COMPLAINT FOR DECLARATORY JUDGMENT
AND AFFIRMATIVE RELIEF - 1

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II. JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction under 5 U.S.C. §§ 701-706, 28 U.S.C. § 1332, and 28 U.S.C. § 2201.

4. Venue is proper in this Court under 28 U.S.C. § 2201 and 5 U.S.C. § 703 because the events giving rise to Plaintiff's claims occurred in this judicial district.

III. FACTS

A. Background on the Parties and the CLOMR Submittals and Request

5. Mount Vernon is located on the Skagit River in Washington. The Skagit River overflows periodically, causing great loss and substantial expense to government and private interests. Overflows causing substantial loss have occurred with alarming regularity in Mount Vernon. The Skagit River has exceeded maximum safe channel capacity at least 17 times within the past one hundred years resulting in enormous property losses and threats to human life and safety. According to the United States Army Corps of Engineers, in November 1990, flood peaked at 9.4 feet above flood stage in the City of Mount Vernon. In November 1995, flood peaked at 9.3 feet above flood stage in the City of Mount Vernon. The last substantial overflow occurred in 2006.

6. Beginning shortly after 2006, officials and private citizens in Mount Vernon began a Mount Vernon Downtown Flood Protection Project ("Project"). The Project is designed to update information used by FEMA since at least 1985, and to provide protection for many of Mount Vernon's public and private structures and much of its infrastructure, including its sewage treatment plant; other critical infrastructure such as the County Superior Court and District Court; sections of Interstate Five and the BNSF mainline track; and, the Regional Multi-Modal Transportation Center. All of these buildings and this infrastructure are at risk from Skagit River overflows. And the health, safety and welfare of Mount Vernon's citizens, as well as its

1 economic health, depend in substantial measure upon the Project and its related scientific and
2 engineering efforts.

3 7. From the very inception of the Project, Mount Vernon has worked closely with
4 FEMA. This closeness in part relates to FEMA's expertise, in part because FEMA acts as
5 coordinator for various agencies including but not limited to the United States Army Corps of
6 Engineers, and because FEMA plays a crucial role in approving maps on which insurance rates
7 and other administrative matters are based.

8 8. FEMA assisted Mount Vernon in several respects in the 2006-2008 time frame,
9 including representing to City consultants the need for the use of expert hydrologists. Those
10 consultants undertook a series of studies and use of specific hydraulic and hydrologic
11 computations and modeling, at FEMA's suggestion and at great cost to Mount Vernon, and by
12 providing formal and informal feedback on the progress of the Project.

13 9. For the Project to be recognized by FEMA as meeting minimum design,
14 operation, and maintenance standards consistent with the level of protection needed under
15 FEMA regulations based on the most current and conservative technical hydraulic and
16 hydrologic analysis (and, prior to investing millions of dollars toward final design and
17 construction of the Project), the City must obtain a CLOMR from FEMA. A CLOMR is a
18 Conditional Letter of Map Revision, controlled administratively by FEMA through a series of
19 regulations found at 44 C.F.R. Part 65 and Part 72. FEMA regulations require a party like
20 Mount Vernon that seeks a CLOMR to pay a fee and submit technical information supporting the
21 map revision. Once that is done, FEMA rules permit only a specified set of responses by FEMA:
22 approval, disapproval, conditional approval, or requests for further technical information.

23 10. At all times pertinent hereto, FEMA worked with Mount Vernon's experts.
24 FEMA ultimately represented by their responses, under the established timelines and deadlines
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1 set forth by their regulations and Mount Vernon's confirmations, that Mount Vernon had timely
2 submitted all technical data FEMA needed or required.

3 11. Mount Vernon properly submitted its CLOMR application. The City was advised
4 by FEMA staff that a response would be forthcoming but that FEMA needed an additional 30-
5 day review period because of the complexity of the proposed Project and that within the
6 additional time permitted by FEMA regulations would present its findings.

7 12. By response dated June 23, 2009, FEMA advised Mount Vernon that it would
8 delay any determinations related to Mount Vernon's CLOMR application until further
9 information was received from other projects in other jurisdictions. No time limit was given for
10 this response.

11 13. By response dated June 23, 2009, FEMA advised Mount Vernon that it would
12 delay any determination related to Mount Vernon's CLOMR application until an ongoing flood
13 insurance study (which began in 1997 and has no established completion date) is completed. No
14 time limit was given for this determination.

15 14. By response dated June 23, 2009, FEMA advised Mount Vernon that it would
16 delay any determination related to Mount Vernon's CLOMR application until an ongoing study
17 by the United States Army Corps of Engineers (to study the entire Skagit River and provide a
18 comprehensive flood management plan for the entire floodplain) is completed. This study,
19 which began in 1997, currently does not have adequate funding; has produced no finished results
20 to date; has not identified any recommended flood projects; has not begun designs, acquired
21 permits or received project funding.

22 15. By response dated June 23, 2009, FEMA advised Mount Vernon that it would
23 delay any determination related to Mount Vernon's CLOMR application until Mount Vernon
24 works with other communities to submit one comprehensive Conditional Letter of Map Revision
25 that includes *all* existing and proposed flood protection projects for the Skagit River.
26

1 16. By response dated June 23, 2009, FEMA advised that those responses set forth in
2 paragraphs 12-15 of this Complaint were "steps" that must be taken before FEMA would process
3 and further review the City's CLOMR request. Based upon experience and knowledge of other
4 unrelated projects in other locales on the Skagit River, this indefinite suspension causes Mount
5 Vernon's Project to be subject to an unwritten, standard-less and unlawful moratorium which is
6 expected to last many years.

7 17. Mount Vernon has a right to have *its* CLOMR request addressed on its merits
8 alone, and cannot be dependent upon the diligence, quality or level of technical expertise of other
9 jurisdictions for a protracted and undefined period of time. Mount Vernon cannot be dependent
10 upon the mere *possibility* of future flood projects that are remote and speculative. By way of
11 example, one study cited by FEMA is not yet completed; has been ongoing for twelve years; has
12 produced no recommended measures; and, is not currently funded for completion.

13 18. Mount Vernon has requested reconsideration of FEMA's action.

14 **IV. CAUSES OF ACTION**

15 **First Cause of Action: Declaratory Judgment for Mount Vernon**

16 19. Plaintiff incorporates all prior paragraphs as though restated in full herein.

17 20. FEMA's June 23, 2009 letter, putting Mount Vernon's Project into indefinite
18 abeyance, violates FEMA rules. That letter announces a new, unspoken and unpublished "rule"
19 (adopted without notice and comment) that FEMA will address CLOMR applications only on a
20 systemwide or regional basis. Such a rule would be unlawful due to failure to follow procedures
21 required by law, and would further be inconsistent with the fee-for-service rules currently in
22 place. In short, acting in reasonable reliance upon existing FEMA rules, Mount Vernon paid for
23 and was entitled to receive a determination specific to its CLOMR application.

1 21. A controversy exists between Mount Vernon and FEMA as to whether Mount
2 Vernon is entitled to have its CLOMR application decided upon the technical information
3 requested, which technical information FEMA has already ruled to be sufficient for its purposes.

4 **Second Cause of Action: Judicial Review Pursuant to 5 U.S.C. § 703-706**

5 22. Plaintiff incorporates all prior paragraphs as though restated in full herein.

6 23. Agency action is required by law to be prompt and within time periods required
7 by law. FEMA has failed to follow these requirements, some of them found in FEMA's own
8 rules, and its action should be reversed and action consistent with FEMA rules ordered pursuant
9 to 5 U.S.C. § 706(1).

10 24. FEMA is not free to disregard its own rules, fail to explain them, or to change
11 policies or practices without following appropriate procedures or providing sufficient
12 explanations as required by law. Failure to follow its own rules, failure to explain deviations
13 from FEMA rules, and the adoption of policies inconsistent with existing practices is arbitrary,
14 capricious, an abuse of discretion, and failure to follow procedures required by law, reviewable
15 by this Court pursuant to 5 U.S.C. § 706(2).

16 25. Plaintiff has no other plain, speedy or adequate remedy at law.

17 **V. PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff respectfully requests the following relief:

19 1. Enter judgment in favor of Plaintiff declaring that FEMA must follow its own
20 rules, and not adopt new rules without notice, comment or publication, and that Plaintiff is
21 entitled to a ruling on its CLOMR request within the time frames required by law;

22 2. Enter judgment in favor of Plaintiff under the Administrative Procedures Act,
23 requiring timely action, prohibiting arbitrary and capricious action, and requiring FEMA to
24 follow procedures required by law;

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3. Enter judgment awarding Plaintiff its costs and disbursements in this action, pursuant to U.S.C. 2412, any other applicable statute, and court rule; and

4. For such other and further relief as this Court deems just and proper.

DATED this 23rd day of July, 2009.

MOUNT VERNON CITY ATTORNEY
Kevin Rogerson, WSBA #31664, and
City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273-0809

FOSTER PEPPER PLLC



P. Stephen DiJulio, WSBA #7139
Milton G. Rowland, WSBA #15625
Foster Pepper PLLC
1111 Third Ave., Suite 3400
Seattle, WA 98101

Attorneys for Plaintiff, City of Mount Vernon

CERTIFICATE OF SERVICE

I, Janet Shafi, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on July 23, 2009, I caused the following documents:

1. City of Mount Vernon's Summons in a Civil Action;
2. Civil Cover Sheet for Federal Court;
3. City of Mount Vernon's Complaint for Declaratory Judgment and Affirmative Relief Pursuant to 5 U.S.C. 701-706; and this
4. Declaration of Service

to be served upon the following individuals:

<p>Eric Holder, Attorney General U.S. Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001</p> <p><input checked="" type="checkbox"/> VIA CERTIFIED MAIL <input type="checkbox"/> VIA HAND DELIVERY <input type="checkbox"/> VIA FACSIMILE: <input type="checkbox"/> VIA E-MAIL:</p>	<p>W. Craig Fugate Federal Emergency Management Agency 500 C Street S.W. Washington, D.C. 20472</p> <p><input checked="" type="checkbox"/> VIA CERTIFIED MAIL <input type="checkbox"/> VIA HAND DELIVERY <input type="checkbox"/> VIA FACSIMILE: <input type="checkbox"/> VIA E-MAIL:</p>
<p>U.S. Attorney's Office 700 Stewart St. Suite 5220 Seattle, WA 98101-1271</p> <p><input type="checkbox"/> VIA FIRST CLASS MAIL <input checked="" type="checkbox"/> VIA PROCESS SERVER <input type="checkbox"/> VIA FACSIMILE: <input type="checkbox"/> VIA E-MAIL:</p>	<p>Federal Emergency Management Agency Federal Regional Center 130 228th St. SW Bothell, WA 98021-8627</p> <p><input type="checkbox"/> VIA FIRST CLASS MAIL <input checked="" type="checkbox"/> VIA PROCESS SERVER <input type="checkbox"/> VIA FACSIMILE: <input type="checkbox"/> VIA E-MAIL:</p>

COMPLAINT FOR DECLARATORY JUDGMENT
AND AFFIRMATIVE RELIEF - 8

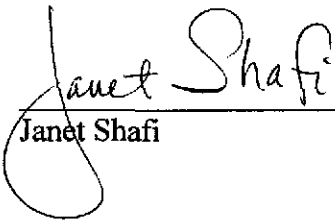
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Clerk's Office
U.S. District Court
Western District of Washington
700 Stewart St
Seattle, WA 98101

VIA FIRST CLASS MAIL
 VIA PROCESS SERVICE
 VIA FACSIMILE:
 VIA E-MAIL:

Dated this 23rd day of July, 2009.



Janet Shafi

COMPLAINT FOR DECLARATORY JUDGMENT
AND AFFIRMATIVE RELIEF - 9

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