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15 ECOLOGICAL RIGHTS FOUNDATION

16
17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA

19
20 ECOLOGICAL RIGHTS FOUNDATION, a
non-profit corporation,

21
22 Plaintiff,

23 v.

24 FEDERAL EMERGENCY MANAGEMENT
25 AGENCY, an agency of the Department of
Homeland Security,

26
27 Defendant.
28

Civil Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

**(Endangered Species Act, 16 U.S.C. §§
1531, *et seq.*)**

1 Ecological Rights Foundation (“EcoRights”) alleges as follows:

2 **INTRODUCTION**

3 1. With this action for declaratory and injunctive relief, Plaintiff challenges the failure of
4 defendant, Federal Emergency Management Agency (“FEMA”), to ensure, in consultation with
5 the Secretary of Commerce and the Secretary of the Interior, that the implementation of the
6 National Flood Insurance Program (“NFIP”) is not likely to jeopardize the continued existence of
7 threatened and endangered species in Monterey County, California, or destroy or adversely
8 modify designated critical habitat for those species. 16 U.S.C. § 1536(a)(2). Through the NFIP,
9 FEMA facilitates, influences, and even promotes and encourages human development in
10 Monterey County floodplains, thereby impairing habitat functions essential to the continued
11 survival and recovery of imperiled species listed as threatened and endangered under the
12 Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. However, FEMA has never
13 addressed these direct and significant impacts to the federally protected species, in consultation
14 with the National Marine Fisheries Service (“NMFS”) or the United States Fish and Wildlife
15 Service (“FWS”), as required by law, *see* 16 U.S.C. § 1536(a), to ensure that the NFIP does not
16 jeopardize the continued existence of these species or destroy or adversely modify their critical
17 habitat. Plaintiff also challenges FEMA’s failure to use its authorities to carry out programs to
18 conserve listed species. 16 U.S.C. § 1536(a)(1). Plaintiff’s claims arise under the ESA and its
19 implementing regulations, and Plaintiff brings this action pursuant to the ESA’s citizen suit
20 provisions. 16 U.S.C. § 1540(g).

21 **JURISDICTION**

22 2. This Court has jurisdiction over the claims set forth in this Complaint pursuant to 28
23 U.S.C. § 1331 (civil action arising under the laws of the United States), 28 U.S.C § 2201
24 (declaratory relief), 28 U.S.C § 2202 (injunctive relief), and 16 U.S.C. § 1540(g)(1) (ESA citizen
25 suit).

26 3. This Court has subject matter jurisdiction over violations of the ESA by FEMA
27 pursuant to 16 U.S.C. § 1540(g)(1), which authorizes citizens to bring suit to enjoin any person
28 that is in violation of the ESA. Plaintiff provided notice of intent to file suit under the ESA on

1 September 22, 2016, more than 60 days prior to filing this litigation.

2 4. This Court has personal jurisdiction over FEMA and its officials because FEMA is an
3 agency of the federal government operating within the United States. The regional office of
4 FEMA is located in the City of Oakland, Alameda County.

5 5. Plaintiff and its members are aggrieved by FEMA's lack of ESA consultation
6 concerning the numerous ongoing adverse impacts that the NFIP is causing to Listed Species and
7 their critical habitat. Plaintiff and its members visit Monterey County floodplains for wildlife
8 viewing, scientific observation, educational study, aesthetic enjoyment, spiritual contemplation,
9 and recreation, including kayaking, fishing, and photography. FEMA's lack of ESA section 7
10 consultation on Listed Species has caused and will in the future continue to cause an impairment
11 of the state of the ecosystem in Monterey County, and as a result, EcoRights' use of the area is
12 impaired and diminished.

13 **VENUE**

14 6. Venue in the United States District for the Northern District of California is proper
15 under 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to this
16 claim occurred in this district, the Plaintiff EcoRights resides in this district, and the Defendant
17 maintains an office in Oakland, California.

18 **INTRADISTRICT ASSIGNMENT**

19 7. Intradistrict assignment of this matter to the San Francisco Division of the Court is
20 appropriate pursuant to Civil Local Rule 3-2(d) because EcoRights' principal counsel resides in
21 San Francisco County, EcoRights' principal place of business is located in Garberville,
22 California and the office of the Deputy U.S. Attorney who will likely serve as at least one of
23 FEMA's counsel in this matter is located in the Federal Building in San Francisco County.

24 **THE PARTIES**

25 8. Ecological Rights Foundation ("EcoRights") is a non-profit, public benefit corporation,
26 organized under the laws of the State of California, devoted to furthering the rights of all people
27 to a clean, healthful and biologically diverse environment. To further its environmental advocacy

1 goals, EcoRights actively seeks federal and state agency implementation of state and federal
2 wildlife related laws, and as necessary, directly initiates enforcement actions on behalf of itself
3 and its members.

4 9. Defendant, FEMA, an agency of the Department of Homeland Security, is the agency
5 of the United States Government responsible for administering and implementing the National
6 Flood Insurance Program. Region IX of FEMA, which oversees the implementation of the NFIP
7 in California, is headquartered in Oakland, California.

8 **STATUTORY BACKGROUND**

9 **The Endangered Species Act**

10 10. The ESA is “the most comprehensive legislation for the preservation of endangered
11 species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180
12 (1978). To accomplish this purpose, the ESA includes both substantive and procedural
13 provisions that are designed to protect and recover imperiled species. To meet these obligations,
14 “endangered species [have] priority over the ‘primary missions’ of federal agencies.” *Id.* at 185.

15 11. ESA section 7 establishes an interagency consultation process to assist federal agencies
16 in complying with their duty to ensure against jeopardy to listed species or destruction or adverse
17 modification of critical habitat. An agency must initiate consultation under section 7 with either
18 NMFS (in the case of marine or anadromous species) or the FWS (for all other species)
19 whenever it takes an action that “may affect” a listed species. 50 C.F.R. § 402.14(a).
20 Regulations implementing section 7 broadly define the scope of “agency actions” subject to
21 consultation. *See* 50 C.F.R. § 402.02 (defining “agency action”). “Agency actions” are construed
22 broadly. *E.g.*, *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054–55 (9th Cir. 1985); *see also*
23 *Nat’l Wildlife Fed’n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151 (W.D. Wash.
24 2004) (holding various components of National Flood Insurance Program are discretionary
25 agency actions requiring section 7 consultation). The consultation process concludes when the
26 expert agency issues a biological opinion on the impacts of the agency action to listed species. In
27 a July 12, 2012 letter to FEMA regarding its intent to prepare an Environmental Impact

1 Statement for the NFIP, NMFS reiterated the point that ESA 7 consultation via FEMA is
2 required when a NFIP map change “may affect, either directly or indirectly, ESA listed species
3 or critical habitat.” Furthermore, it admonished that FEMA’s guidance on the matter is
4 “problematic as it incorrectly directs non-federal entities to consult with the federal services
5 directly,” resulting in difficulties for NMFS and FEMA, and delays for requestors. NMFS further
6 admonished that FEMA’s guidance should be changed to reflect the interagency consultation
7 requirements of the ESA.¹

8 12. Separately, ESA section 7(a)(1) obligates federal agencies to “utilize their authorities in
9 furtherance of the purposes of this chapter by carrying out programs for the conservation of
10 endangered species and threatened species listed” under the Act. 16 U.S.C. § 1536(a)(1). Like
11 the duty to avoid jeopardy, the conservation duty is discharged in consultation with FWS or
12 NMFS. *Id.*

13 13. ESA section 7(a)(2) further imposes a substantive duty on federal agencies to ensure
14 that any action authorized, funded, or carried out by such agency (*i.e.*, “agency action”) is not
15 likely to jeopardize the continued existence of any endangered species or threatened species or
16 result in the destruction or adverse modification of habitat of such species. 16 U.S.C. §
17 1536(a)(2).

18 **The National Flood Insurance Program**

19 14. Congress first established the NFIP with the passage of the National Flood Insurance
20 Act of 1968. 42 U.S.C. §§ 4012–4129. The NFIP was subsequently broadened and modified with
21 the passage of the Flood Disaster Protection Act of 1973, and amended again in 1994 with the
22 National Flood Insurance Reform Act.

23 15. The NFIP is a federal program administered and implemented by FEMA that enables
24 private property owners to purchase federal flood insurance. The NFIP is designed to provide an
25

26 ¹ Similarly, in a December 14, 2015 electronic mail communication, NMFS staff agreed that
27 issuance of a FEMA NFIP determination known as “a CLOMR-F” (which is explained in
28 paragraph 18 below) “is a federal action and FEMA must consult with us [under ESA section 7]
on that action.”

1 insurance alternative to disaster assistance to meet the escalating costs of repairing damage to
2 buildings and their contents caused by floods, as private flood insurance was generally
3 unavailable from the private-sector insurance companies for property located in flood prone
4 areas. 44 C.F.R. § 59.2(a). Under the NFIP, local communities become eligible for federal flood
5 insurance once they have adopted “adequate land use and control measures” consistent with
6 criteria developed by FEMA. 42 U.S.C. § 4012(c)(2); 44 C.F.R. § 59.22 (prerequisites for the
7 sale of flood insurance). FEMA develops, and from time to time is required to revise,
8 “comprehensive criteria” designed to encourage the adoption of land use measures that reduce
9 the amount of development exposed to floods, assist in reducing damage caused by floods, and
10 “otherwise improve the long range land management and use of flood-prone areas.” 42 U.S.C. §
11 4102(c). FEMA’s minimum criteria for local floodplain management are encoded in federal
12 regulations at 44 C.F.R. § 60.3. Although the statute authorizes FEMA to adopt regulations for
13 the general protection of the floodplain, the existing regulations are primarily designed to
14 minimize damage to structures and water systems during flood events, and eliminate the
15 possibility that structures will exacerbate floods by increasing flood levels. *Id.*; FEMA, National
16 Flood Insurance Program: Program Description at 2 (Aug. 1, 2002) (“Program Description”)
17 (“The emphasis on floodplain management requirements is directed toward reducing threats to
18 lives and the potential for damages to property in flood-prone areas.”). The criteria are not
19 designed or intended to protect aquatic habitat, imperiled species, or other environmental values.

20 16. FEMA oversees communities’ participation in and eligibility for the NFIP in an
21 ongoing manner. “FEMA monitors communities to ensure that they have adopted an ordinance
22 that meets or exceeds the minimum NFIP floodplain management criteria and to ensure that they
23 are effectively enforcing their ordinance.” Program Description at 12. FEMA conducts
24 community visits and contacts to ensure proper implementation of NFIP requirements. *Id.* A
25 community’s failure to implement and enforce NFIP minimums can result in probation or
26 suspension from the program, which would make federal flood insurance unavailable in that
27 community. 44 C.F.R. § 59.24. To monitor compliance, FEMA conducts community visits to

1 perform comprehensive assessments of local programs and provide technical assistance to local
2 officials. These community visits enable FEMA to ensure compliance with land-use regulations
3 to the minimum criteria standard. *Id.* Moreover, FEMA implements a Community Rating
4 System (CRS), a separate, voluntary program to encourage local floodplain management
5 regulation that exceeds the regulatory minimums. Under the CRS, floodplain management
6 regulation above NFIP minimums is rewarded with lower insurance rates for insureds. *See* 55
7 Fed. Reg. 28,291 (July 10, 1990); Program Description at 22 (noting that one goal of CRS is to
8 “protect natural and beneficial floodplain functions”).

9 17. FEMA further implements the NFIP through development and revision of maps and
10 other information that identify flood-prone areas. 42 U.S.C. § 4101. These maps, known as Flood
11 Insurance Rate Maps (FIRMs), identify various categories of flood hazard areas in which land
12 use and building criteria are to apply. *See* 44 C.F.R. § 64.3 (identifying different zones on
13 FIRMs). The maps are required to be reviewed at least once every five years to assess the need to
14 update the maps to accommodate new information. 42 U.S.C. § 4101(e). Individuals can request
15 and obtain from FEMA a Letter of Map Change (LOMC) if they can show an inaccuracy or
16 change in the map that affects the status of their property, which are “documents issued by
17 FEMA that revise or amend the flood hazard information shown on the FIRM without requiring
18 the FIRM to be physically revised and re-published.” FEMA Website,
19 <https://www.fema.gov/letter-map-changes>.

20 18. FEMA can issue a range of different types of LOMCs, including, but not limited to, a
21 Conditional Letter of Map Revision (“CLOMR”), a Conditional Letter of Map Revision Based
22 on Fill (“CLOMR-F”), a Letter of Map Revision (“LOMR”), a Letter of Map Revision Based on
23 Fill (“LOMR-F”), a Letter of Map Amendment (“LOMA”), and a Conditional Letter of Map
24 Amendment (“CLOMA”). A LOMA is an official amendment, by letter, to an effective NFIP
25 map. A LOMA establishes a property's location in relation to the Special Flood Hazard Area
26 (SFHA). LOMAs are usually issued because a property has been inadvertently mapped as being
27 in the floodplain, but is actually on natural high ground above the base flood elevation. FEMA

1 Website, <http://www.fema.gov/letter-map-amendment-loma>.

2 19. A CLOMA “is FEMA's comment on a proposed structure or group of structures that
3 would, upon construction, be located on existing natural ground above the base (1-percent-
4 annual-chance) flood elevation on a portion of a legally defined parcel of land that is partially
5 inundated by the base flood.” 44 C.F.R. §72.2.

6 20. A LOMR is FEMA's modification to an effective FIRM or Flood Boundary and
7 Floodway Map (FBFM) or both. LOMRs are generally based on the implementation of physical
8 measures that affect the hydrologic or hydraulic characteristics of a flooding source and thus
9 result in the modification of the existing regulatory floodway, the effective base flood elevations,
10 or the SFHA. The LOMR officially revises the FIRM or FBFM, and sometimes the Flood
11 Insurance Study (FIS) report, and, when appropriate, includes a description of the modifications.
12 The LOMR is generally accompanied by an annotated copy of the affected portions of the FIRM,
13 FBFM, or FIS report. *Id.*

14 21. The “regulatory floodway” is the channel of a river or other watercourse and the
15 adjacent land areas that must be reserved in order to discharge the base flood without
16 cumulatively increasing the water surface elevation more than a designated height. 44 C.F.R.
17 §59.1. Development in floodways is generally forbidden.

18 22. A LOMR-F “is FEMA's modification of the SFHA shown on the FIRM based on the
19 placement of fill outside the existing regulatory floodway.” 44 C.F.R. §72.2. A CLOMR “is
20 FEMA's comment on a proposed project that would, upon construction, affect the hydrologic or
21 hydraulic characteristics of a flooding source and thus result in the modification of the existing
22 regulatory floodway, the effective base flood elevations, or the SFHA.” *Id.*

23 23. A CLOMR-F “is FEMA’s comment on a proposed project that would, upon
24 construction, result in a modification of the SFHA through the placement of fill outside the
25 existing regulatory floodway.” *Id.*

26 24. Participation by a community in the NFIP is, technically, voluntary. However, as a
27 practical matter, failure to enroll in the NFIP can significantly affect current and future property

1 owners in the community’s floodplains and the availability of federal financial assistance in the
2 flood-prone areas of the community. For example, if a community chooses not to participate in
3 the NFIP, various types of federal assistance, such as mortgages from a federally insured or
4 regulated bank and Veterans Administration loans, are prohibited if the building used to secure
5 the assistance is in the 100-year floodplain. 42 U.S.C. § 4012a. The National Flood Insurance
6 Act also prohibits other federal agencies such as the Federal Housing Administration and the
7 Small Business Administration from making or guaranteeing a loan secured by a building in a
8 floodplain unless the flood insurance has been purchased. *Id.* Federal flood insurance cannot be
9 purchased for buildings in non-participating communities. *Id.* §§ 4202, 4106. As a result,
10 virtually all communities in the United States that have floodplains within their boundaries have
11 elected to participate in the NFIP.

12 25. Courts have consistently held that NFIP implementation is an agency action that
13 requires section 7 consultation where it may affect listed species. *Nat’l Wildlife Fed’n v. Fed.*
14 *Emergency Mgmt. Agency* (“NWF”), 345 F. Supp. 2d 1151, 1174 (W.D. Wash. 2004) (“FEMA’s
15 implementation of the NFIP . . . is a discretionary “agency action” for the purposes of Section
16 7(a)(2) of the ESA”); *Florida Key Deer v. Paulison*, 522 F. 3d 1133 (11th Cir. 2008) (affirming
17 that FEMA and the FWS failed to comply with section 7 of the ESA, with regard to FEMA’s
18 administration of NFIP in the Florida Keys); *Coalition for a Sustainable Delta v. FEMA*, 812 F.
19 Supp. 2d 1089, 1121-24;1125-26 (E.D. Cal. 2011) (FEMA’s ability to shape the floodplain
20 through map revision approvals evidenced FEMA’s ongoing implementation discretion, thus
21 constituting affirmative agency action under the ESA).

22 26. Specific NFIP activities that require ESA section 7 consultation include:

- 23 • FIRM Changes. *Delta, supra*, 812 F. Supp. 2d at 1123, 1132. (“although FEMA’s
24 individual mapping actions are taken in response to the actions of third parties,
25 each such mapping action is an ‘affirmative action’ that collectively has the
26 potential to encourage third parties to fill and/or build levees in the Delta
27 floodplain.”)

- 1 • Minimum Eligibility Criteria. *NWF, supra*, 345 F. Supp. 2d at 1174 (“FEMA
2 must consult on its minimum eligibility criteria because FEMA has discretion to
3 amend its regulations and because those regulations have an ongoing impact on
4 the use of floodplains.”)
- 5 • Community Rating System. *Id.* (“by offering discounts to communities that adopt
6 certain types of regulations, FEMA could encourage the adoption of salmon-
7 friendly measures in local communities. For these reasons, formal consultation is
8 required.”)
- 9 • FEMA’s Public Assistance Program, Individual and Households Program, and
10 Hazard Mitigation Grant Program. This program promotes the replacement of
11 damaged facilities and structures in their original locations, which are prone to
12 repeated damage from future flooding, and thus lead to repeated disturbance of
13 riparian and aquatic habitats important to ESA-listed species. 2013 South-Central
14 California Coast Steelhead Recovery Plan at 3-6.²

FACTUAL BACKGROUND

16 27. One of the major issues in floodplain management and flood protection in Monterey
17 County is the question of how much encroachment of human development should be allowed
18 into 100-year flood zones. The closer to rivers, streams and other waters that development is
19 sited, the higher a barrier to floodwaters will be erected, as greater limitations on the horizontal
20 expanse of a waterway will require a vertical increase in the water level to maintain a similar
21 water volume cross-section. FEMA standards require that development encroachment cannot
22 occur within an area that will impose a vertical increase of more than one foot, or increase water
23 velocity to a level that will become hazardous. 44 C.F.R. §§ 60.3(c)(10), 64.3, 60.22. Otherwise,
24 floodwaters will spill over into developed areas. Accordingly, to participate in the NFIP, the
25

26 ² 2013 SCCC Steelhead Recovery Plan, [http://www.westcoast.fisheries.noaa.gov/publications/
27 recovery_planning/salmon_steelhead/domains/south_central_southern_california/2013_scccs_re
28 coveryplan_final.pdf](http://www.westcoast.fisheries.noaa.gov/publications/recovery_planning/salmon_steelhead/domains/south_central_southern_california/2013_scccs_recoveryplan_final.pdf) (Dec. 2013).

1 County has adopted ordinances that regulate construction in the 100-year flood plains to limit
2 future flood damages. With the incentives and encouragement that the NFIP provides and that
3 the County allows in accord with NFIP requirements, extensive floodplain development has
4 occurred, continues to occur and will occur in the future within Monterey County. This
5 floodplain development has had, and will continue to have, adverse impacts to the Listed Species
6 and their critical habitat.

7 28. Implementation of the NFIP in Monterey County is a federal agency action that "may
8 affect" the Listed Species identified in the preceding section. Moreover, NMFS and FWS have
9 designated critical habitat in Monterey County for the Listed Species. Implementation of the
10 NFIP "may affect" this designated critical habitat.

11 29. Urban development is one of the chief causes of the decline of the Listed Species, and
12 remains a serious threat to these species' recovery. Congress enacted the NFIP, in part, in
13 response to the unavailability of private insurance for floodplain development. 42 U.S.C. §
14 4002(a)(2) ("The availability of Federal loans, grants, guarantees, insurance and other forms of
15 financial assistance are often determining factors in the utilization of land and the location and
16 construction of public and of private industrial, commercial, and residential facilities."). Since
17 loans and other financing for construction in floodplain areas is generally unavailable without
18 flood insurance, FEMA's provision of flood insurance is a major factor in development proceeds
19 in floodplains. FEMA's implementation of the NFIP has the result of encouraging development
20 in flood-prone areas, which include critical habitat for the Listed Species and are critically
21 important to the protection and recovery of the Listed Species. This development has adversely
22 modified and will continue to adversely modify the Listed Species' critical habitat in Monterey
23 County and will continue to jeopardize the Listed Species' survival and recovery. *See NWF*, 345
24 F. Supp. 2d at 1176 (noting "development is 'reasonably certain to occur' as a result of [NFIP
25 implementation]"); *see also Florida Key Deer*, 522 F.3d at 1144 ("FEMA has the authority in its
26 administration of the NFIP to prevent the indirect effects of its issuance of flood insurance by,
27

1 for example, tailoring the eligibility criteria that it develops to prevent jeopardy to listed species.
2 Therefore, its administration of the NFIP is a relevant cause of jeopardy to listed species.").

3 30. Species listed as endangered or threatened under the ESA are present in Monterey
4 County, including the tidewater goby (*Eucyclogobius newberryi*), South-Central California Coast
5 Steelhead ("SCCC Steelhead"), western snowy plover ("WSP") (*Charadrius nivosus nivosus*,
6 formerly *C. alexandrinus nivosus*), Yadon's piperia (*Piperia yadonii*), purple amole
7 (*Chlorogalum purpureum var. purpureum*), the central population of the California tiger
8 salamander ("CTS") (*Ambystoma californiense*), the California red-legged frog ("CRLF") (*Rana*
9 *draytonii*), vernal pool fairy shrimp ("VPFS") (*Branchinecta lynchi*), and the Monterey
10 spineflower (*Chorizanthe pungens var. pungens*) (collectively, "the Listed Species"). Monterey
11 County furthermore contains critical habitat for ESA-listed species designated by NMFS or
12 FWS. Each of these species, designated critical habitats for ESA-protected species, and areas
13 where these species otherwise reside is listed in the FWS IPaC Trust Resources Report for
14 Monterey County, available at <http://ecos.fws.gov/ipac>.

15 31. Monterey County has adopted floodplain regulations in order to continue participation
16 in the federal flood insurance program, as detailed further below. Flood zones within the County
17 containing designated critical habitat for threatened and/or endangered species or where
18 threatened and/or endangered species otherwise reside include, but may not be limited to,
19 tidelands, tidal waters, river/stream courses, wetlands, and/or flood plains within or adjacent to
20 the following waters:

21 Pajaro River

22 Elkhorn/Bennet Sloughs/Moss Landing

23 Old Salinas River

24 Tembladero Slough

25 Gabilan Creek

26 Salinas River

27 Nacimiento River

- 1 San Antonio River
- 2 Arroyo Seco
- 3 Reliz Creek
- 4 Paloma Creek
- 5 Piney Creek
- 6 Horse Creek
- 7 Lhano Grande Canyon
- 8 Lewis Creek
- 9 San Lorenzo Creek
- 10 Salinas River
- 11 Seal Rock Creek
- 12 Carmel River
- 13 Potrero Creek
- 14 Robertson Canyon Creek
- 15 Las Garzas Creek
- 16 Hitchcock Canyon Creek
- 17 Tularcitos Creek
- 18 Rana Creek
- 19 Aqua Mojo Creek
- 20 San Clemente Creek
- 21 Pine Creek
- 22 Cachagua Creek
- 23 Borondo Creek
- 24 James Creek
- 25 Big Creek
- 26 Pinch Creek
- 27 Robertson Creek

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- 1 San Carpoforo Creek
- 2 Dutra Creek
- 3 Big Sur River
- 4 Little Sur River
- 5 Bixby Creek
- 6 Malpas Creek
- 7 San Jose Creek

8 32. Additional locations within the County containing designated critical habitat for
 9 threatened and/or endangered species or where threatened and/or endangered species otherwise
 10 reside include Monterey County coastal beach areas (Pajaro River Mouth to Monterey, Pfeiffer
 11 Beach to Andrew Molera State Park) and the Pacific Ocean and adjoining shorelines.

12 33. EcoRights has performed an analysis of the extent of overlaps between the one hundred
 13 year floodplain, or SFHA, and designated critical habitat for Monterey County. As detailed in the
 14 chart below, this analysis determined that extensive overlaps exist between designated critical
 15 habitat and the FEMA-designated SFHA in Monterey County, involving at least the nine Listed
 16 Species.

18 Watershed/General Area	19 Sub-Unit or Tributaries	20 Threatened or Endangered Species with Critical Habitat in SFHA	21 Approximate Locations of ESA Critical Habitat Overlap With SFHA
22 Pajaro River	Pajaro River	Tidewater Goby	Pacific Ocean to Route 1
23 Pajaro River	Pajaro River	South Central CA Coast Steelhead	Pacific Ocean to San Benito County Border
24 Pajaro River	Pajaro River	Western Snowy Plover	Southern shore of mouth of Pajaro River
25 Elkhorn Slough	Bennet Slough	Tidewater Goby	North side of Elkhorn Slough
26 Elkhorn Slough	Shore and in Slough	Western Snowy Plover	(1) Various areas in strip along shore north of mouth of Elkhorn Slough; (2) approx. .5 sq mile area on north side of Elkhorn Slough, approx. .5 miles from Pacific Ocean.

1	Elkhorn Slough	Shore	Monterey Spineflower	Various areas in strip along shore north of mouth of Elkhorn Slough
2	Elkhorn Slough	Inner Channel/Tembladero Slough	South Central CA Coast Steelhead	Inner Channel at mouth of Elkhorn Slough
3	Elkhorn Slough	Elkhorn Slough	California Red-Legged Frog	Most of SFHA in Elkhorn, CA, along eastern side of Slough
4	Elkhorn Slough	Old Salinas River/Tembladero Slough/ Gabilan Creek watershed	South Central CA Coast Steelhead	From Pacific Ocean to upper Gabilan Creek
5	Elkhorn Slough to Salinas River	Shore	Western Snowy Plover	Overlap areas with SFHA on shore area from Elkhorn Slough south to Salinas River mouth
6	Elkhorn Slough to Salinas River	Shore	Monterey Spineflower	Overlap areas with SFHA on shore area from Elkhorn Slough south to Salinas River
7	Salinas River	Salinas River	South Central CA Coast Steelhead	Pacific Ocean to southern Monterey county border with San Luis Obispo county
8	Salinas River	Salinas River	Tidewater goby	River and SFHA from coast to approx. 3.6 miles upstream
9	Salinas River mouth to Monterey	Salinas River mouth to Monterey	Western Snowy Plover	Areas with SFHA on shore area from Salinas River to Monterey
10	Salinas River	Salinas River	Monterey Spineflower	(1) City of Marina (various locations, Fort Ord area); (2) southeast of Soledad
11	Salinas River	Nacimiento River	South Central CA Coast Steelhead	Salinas River to southern Monterey county border with San Luis Obispo county
12	Salinas River	San Antonio River	South Central CA Coast Steelhead	Salinas River to San Antonio Dam
13	Salinas River	Arroyo Seco	South Central CA Coast Steelhead	Salinas River to approx. .5 miles before confluence with Rocky Creek
14	Salinas River	Reliz Creek	South Central CA Coast Steelhead	Arroyo Seco to approx. 4.53 miles upstream.
15	Salinas River	Paloma Creek	South Central CA Coast Steelhead	Arroyo Seco to .4 miles after confluence with Piney Creek
16	Salinas River	Piney Creek	South Central CA Coast Steelhead	From Paloma Creek upstream .2 miles
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1	Salinas River	Horse Creek	South Central CA Coast Steelhead	Arroyo Seco to approx. .13 miles upstream
2	Salinas River	Lhano Grande Canyon (Approx. 3.5 miles north of King City)	Vernal Pool Fairy Shrimp	SFHA in Canyon, starting approx. 1.77 N/NW of Bitterwater Rd., continuing up Canyon approx. 2.06 miles to beginning of Pinalito Canyon
3				
4				
5	Salinas River	Lewis Creek	Vernal Pool Fairy Shrimp	Flood zone, from approx. confluence with San Lorenzo Creek to approx. 12 miles upstream.
6				
7	Salinas River	San Lorenzo Creek	Vernal Pool Fairy Shrimp	Flood zone, from approx. confluence with Lewis Creek to approx. 7.3 miles upstream.
8				
9	Salinas River	Salinas River	Vernal Pool Fairy Shrimp	Approx. .18 sq. miles in flood zone, Bradley, CA.
10	Salinas River	San Antonio River Tributaries	Purple Amole	In SFHA in number of unnamed tributaries/flood zones in and around Lockwood, CA
11				
12	Salinas River	San Antonio River Tributaries	Vernal Pool Fairy Shrimp	Number of unnamed tributaries/flood zones in and around Lockwood, CA
13				
14	Seal Rock Creek	Seal Rock Creek	Yadon's Piperia	Overlap area starting approx. .48 miles upstream from Coast
15				
16	Carmel River	Carmel River	California Red- Legged Frog	SFHA along and including Carmel River, from Pacific Ocean to approx. 1.24 miles above Los Padres Dam
17				
18	Carmel River	Carmel River	South Central CA Coast Steelhead	From ocean to approx. 1.24 miles above Los Padres dam
19	Carmel River	Potrero Creek	California Red- Legged Frog	Creek and flood zone from Carmel River to .11 miles upstream
20				
21	Carmel River	Potrero Creek	South Central CA Coast Steelhead	Creek from Carmel River to .11 miles upstream
22	Carmel River	Robertson Canyon Creek	California Red- Legged Frog	SFHA approx. first .03 miles of Robertson Canyon Creek
23				
24	Carmel River	Robertson Canyon Creek	South Central CA Coast Steelhead	Approx. first .03 miles of Robertson Canyon Creek
25	Carmel River	Las Garzas Creek	South Central CA Coast Steelhead	Approx. first .87 miles of creek from Carmel River
26				
27	Carmel River	Las Garzas Creek	California Red- Legged Frog	Approx. first .87 miles of creek / SFHA from Carmel River
28				

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1	Carmel River	Hitchcock Canyon Creek	California Red-Legged Frog	Approx. first .04 miles of creek/SFHA from Carmel River
2	Carmel River	Hitchcock Canyon Creek	South Central CA Coast Steelhead	Approx. first .04 miles of creek from Carmel River
3				
4	Carmel River	Tularcitos Creek	South Central CA Coast Steelhead	From Carmel River until approx. 1.4 miles after confluence with Rana Creek
5	Carmel River	Tularcitos Creek	California Red-Legged Frog	Approx. first 1.4 miles of creek/SFHA from Carmel River
6				
7	Carmel River	Rana Creek	South Central CA Coast Steelhead	Approx. first .45 miles of creek from Tularcitos Creek
8				
9	Carmel River	Aqua Mojo Creek	South Central CA Coast Steelhead	Approx. first 1.55 miles of creek from Rana Creek
10	Carmel River	San Clemente Creek	South Central CA Coast Steelhead	Approx. first .5 miles of creek from Carmel River
11				
12	Carmel River	San Clemente Creek	California Red-Legged Frog	Approx. first .5 miles of creek/SFHA from Carmel River
13	Carmel River	Pine Creek	California Red-Legged Frog	Approx. first .15 miles of creek/SFHA from Carmel River
14				
15	Carmel River	Pine Creek	South Central CA Coast Steelhead	Approx. first .15 miles of creek from Carmel River
16	Carmel River	Cachagua Creek	California Red-Legged Frog	Entire length of creek/SFHA until termination Pinch Creek
17				
18	Carmel River	Cachagua Creek	South Central CA Coast Steelhead	Entire length until termination Pinch Creek
19	Carmel River	Borondo Creek	South Central CA Coast Steelhead	Approx. first .06 miles of creek from Cachagua Creek
20				
21	Carmel River	Borondo Creek	California Red-Legged Frog	Approx. first .06 miles of creek/SFHA from Cachagua Creek
22	Carmel River	James Creek	California Red-Legged Frog	Approx. first .09 miles of creek/SFHA from Pinch Creek
23				
24	Carmel River	James Creek	South Central CA Coast Steelhead	Approx. first .09 miles of creek from Pinch Creek
25	Carmel River	Big Creek	South Central CA Coast Steelhead	Approx. first 1.44 miles of creek from Pinch Creek
26				
27	Carmel River	Big Creek	California Red-Legged Frog	Approx. first 1.44 miles of creek/SFHA from Pinch Creek
28				

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1	Carmel River	Big Creek	California Tiger Salamander	Approx. first 1.44 miles of creek/SFHA from Pinch Creek
2	Carmel River	Pinch Creek	California Tiger Salamander	Approx. .35 mile stretch of creek /SFHA starting approx. .1 miles downstream of confluence with Big Creek until approx. .13 miles after confluence with Robertson Creek
3				
4				
5				
6	Carmel River	Pinch Creek	California Red-Legged Frog	From confluence with Cachagua Creek to confluence with Robertson Creek, creek/SFHA
7				
8	Carmel River	Pinch Creek	South Central CA Coast Steelhead	Creek from confluence with Cachagua Creek to approx..25 miles after confluence with Robertson Creek
9				
10	Carmel River	Robertson Creek	California Red-Legged Frog	Approx. first 1.08 miles of creek/SFHA from confluence with Pinch Creek
11				
12	Carmel River	Robertson Creek	California Tiger Salamander	Approx. first .88 miles of creek/SFHA from confluence with Pinch Creek
13				
14	Carmel River	Robertson Creek	South Central CA Coast Steelhead	Approx. first 1.08 miles of creek from confluence with Pinch Creek
15	Big Sur	San Carpoforo Creek	South Central CA Coast Steelhead	Border of Monterey/San Luis Obispo counties, to approx. .91 miles after confluence with Dutra Creek
16				
17	Big Sur	Dutra Creek	South Central CA Coast Steelhead	Approx. .35 miles after confluence with San Carpoforo Creek
18				
19	Big Sur	Pfeiffer Beach	California Red-Legged Frog	(1) SFHA from Pfeiffer Beach to approx. .5 miles eastward inland; (2) strip of land along shore along Pfeiffer Beach
20				
21	Big Sur	Pfeiffer Beach to far south end of Andrew Molera State Park	California Red-Legged Frog	Strip of land along shore of Pacific Ocean
22				
23	Big Sur	Big Sur River	South Central CA Coast Steelhead	From Pacific Ocean to approx. 8 miles upstream
24	Big Sur	Big Sur River	California Red-Legged Frog	From Pacific Ocean to approx. 8 miles upstream, river/SFHA
25				
26	Big Sur	Point Sur	California Red-Legged Frog	(1) Various areas from Point Sur south approx. 1.2 miles; (2) Small area along shore approx. .5 miles north of Point Sur
27				
28				

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1	Big Sur	Point Sur	Western Snowy Plover	Small area along shore approx. .5 miles north of Point Sur
2	Big Sur	Little Sur River	South Central CA Coast Steelhead	From Pacific Ocean to approx. 1.27 miles upstream
3				
4	Big Sur	Bixby Creek	South Central CA Coast Steelhead	From Pacific Ocean to approx. .2 miles inland
5	Big Sur	Malpaso Creek	South Central CA Coast Steelhead	From Pacific Ocean to Highway 1
6				
7	Big Sur	San Jose Creek	South Central CA Coast Steelhead	From Pacific Ocean to approx. .5 miles inland
8				
9	Big Sur	San Jose Creek	California Red-Legged Frog	Creek / SFHA from Pacific Ocean to approx. .5 miles inland

10 34. Both the areas described in the above chart and the list of waters/areas above are
11 nonexclusive lists. FEMA has in its possession maps and information concerning the exact
12 location of all flood hazards it has considered and mapped within Monterey County. As detailed
13 further below, FEMA has a duty to initiate ESA section 7 consultation as to the effect of its
14 implementation of the NFIP in Monterey County on the listed species and critical habitat
15 described by the FWS IPaC Report in the areas identified in the above chart and in any other
16 areas where FEMA has information identifying such areas as locations both inhabited by ESA-
17 listed species and as being flood-prone areas affected by FEMA's NFIP administration.

18 **NFIP Adverse Impacts On Tidewater Goby**

19 35. The tidewater goby (*Eucyclogobius newberryi*) is a small fish that inhabits coastal
20 brackish waters and requires for its survival and recovery properly functioning habitat, which
21 includes healthy stream channels and adjoining wetlands, flood plains, and estuaries, some of
22 which lie within Special Flood Hazard Areas of Monterey County. The tidewater goby is listed
23 as endangered. As FWS has found in its critical habitat determinations, “[c]oastal development
24 projects that result in the loss or alteration of coastal wetland habitat,” “alterations of water flows
25 upstream of coastal lagoons and estuaries that negatively impact the species’ breeding and
26 foraging activities,” and “channelization of the rivers where the species occurs” are some of the
27 key threats to the species. 78 Fed. Reg. 8745, 8750 (Feb. 6, 2013). As the Tidewater Goby
28

1 Recovery Plan states, “Coastal development projects that modify or destroy coastal brackish-
2 water habitat are the major factor adversely affecting the tidewater goby.” Tidewater Goby
3 Recovery Plan at 16 [available at: https://ecos.fws.gov/docs/recovery_plan/051207.pdf (Dec. 7,
4 2006)]. Construction of manmade barriers along the coast destroys the tidewater goby’s sandbar
5 habitat. Proposed Rules for Reclassifying Tidewater Goby, 79 Fed. Reg. 14153, 14344 (March
6 13, 2014). The formation of sandbars at the mouth of lagoons in Monterey County occurs in the
7 late spring as freshwater flows into the lagoon decline and allow the ocean to build up the
8 sandbar through wave action on the beach. *Id.* at 14344. Artificial breaching of sandbars reverses
9 this freshening process and leads to stratified salinity conditions and warm, oxygen-poor bottom
10 conditions that are unsuitable for the tidewater goby. *Id.* Tidewater gobies also depend upon
11 calm backwaters as refuges against storm flows and/or draining of small lagoons when the
12 sandbar is opened in winter. *Id.*

13 36. The tidewater goby also requires lagoons with adequate sediment for burrow
14 construction and spawning. *Id.* Manmade barriers along the coast may decrease the amount of
15 sediment that is carried over to lagoons and thus available for burrow construction and spawning.
16 *Id.*

17 37. Manmade barriers also prevent migration of the tidewater goby to new colonies and
18 habitats. *Id.* High freshwater flows into lagoons and estuaries typically carry tidewater gobies
19 into the ocean and allow them to move up or down the coast with longshore currents and into
20 adjacent lagoons. *Id.* at 14345. Artificial barriers interfere with this process and prevent the
21 species from reproducing, colonizing, and thriving. *Id.* Furthermore, isolation caused by
22 manmade barriers harms the tidewater goby by preventing migration between populations,
23 leading to low levels of genetic diversity that make populations vulnerable to extinction. *Id.*

24 38. FEMA’s NFIP has incentivized and facilitated and continues to incentivize and
25 facilitate development that directly and indirectly creates manmade barriers to the movement of
26 tidewater gobies into areas of their traditional habitat and/or interferes with the natural
27 movement of sand in a fashion that has adversely impacted the natural building and breaching of
28

1 sandbar barriers at the mouths of Monterey County rivers inhabited by tidewater goby, including
2 the placement of fill, the construction of buildings, roads, driveways, culverts, revetments, and
3 structures to armor coastal shorefronts and river and stream banks such as retaining walls and
4 seawalls.

5 39. Degradation of water quality resulting from development also negatively impacts the
6 tidewater goby's various aquatic habitats. *Id.* Many drainages to coastal lagoons are
7 contaminated with polluted storm water runoff (chemicals and soil) from developed areas.
8 Tidewater Goby Recovery Plan at 21. Floodplain development incentivized and facilitated by the
9 NFIP is increasing the volume and contamination levels of storm water runoff into tidewater
10 goby habitat.

11 40. Monterey County contains three designated critical habitat areas for listed tidewater
12 goby that are being degraded by floodplain development encouraged by FEMA's NFIP: the
13 Pajaro River, Bennett Slough, and the Salinas River. The chart provided beginning on page 13
14 details the approximate locations of these areas. A visual example of one of the clear overlaps of
15 tidewater goby designated critical habitat and the SFHA is provided through a comparison of a
16 map from the Federal Register notice designating tidewater goby critical habitat with the
17 effective FIRM panel for the mouth of the Salinas River (*See Attachments 1-2*).

18 **NFIP Adverse Impacts On South-Central California Coast Steelhead**

19 41. The SCCC Steelhead is a Distinct Population Segment that includes "all naturally
20 spawned populations of steelhead in streams from the Pajaro River (inclusive) to, but not
21 including the Santa Maria River, California." 71 Fed. Reg. 848. The SCCC Steelhead is listed as
22 threatened, and requires for its survival and recovery properly functioning habitat, which
23 includes healthy functioning riparian ecosystems including the 100-year floodplain of rivers,
24 streams and tidal waters in Monterey County.

25 42. As NMFS found in its decision listing SCCC Steelhead as a threatened species,
26 urbanization is one of the key factors causing declines of steelhead, due to the resulting "loss,
27 degradation, simplification, and fragmentation of habitat." 71 Fed. Reg. 856. NMFS has made
28

1 similar findings in its critical habitat determinations that urbanization is one of the “activities that
2 threaten the physical and biological features essential to listed salmon and steelhead.” 70 Fed.
3 Reg. 52522. As NMFS has further indicated, “the quality of aquatic habitat [for SCCC
4 Steelhead] within stream channels is intrinsically related to the adjacent riparian zones and
5 floodplain Human activities that occur outside the stream can modify or destroy physical
6 and biological features of the stream.” *Id.* Habitat modifications promoted by FEMA’s NFIP
7 may affect steelhead critical habitat and require ESA section 7 consultation for this reason. *See,*
8 *e.g.*, 70 Fed. Reg. at 52532.

9 43. SCCC Steelhead designated critical habitat includes most rivers and streams in
10 Monterey County, including the entire extent of the Pajaro and Salinas rivers in Monterey
11 County, and most of the Carmel River. A large extent of this designated critical habitat is within
12 the SFHA, as detailed in the chart on pages 13-18. A visual example of one of the clear overlaps
13 of SCCC Steelhead designated critical habitat and the SFHA is provided through a comparison
14 of a map of critical habitat in the Carmel Valley basin from the NMFS Federal Register notice
15 designating SCCC Steelhead critical habitat with the effective FEMA FIRM panel for confluence
16 of the lowest section of the Carmel River with the Pacific Ocean. (*See* Attachments 3-4).

17 44. Much of the designated SCCC Steelhead habitat in Monterey County is being degraded
18 by floodplain development encouraged by FEMA’s NFIP. For example, as detailed in the SCCC
19 Steelhead Recovery Plan, in the Carmel River valley, “Watershed developments have increased
20 erosion and fine sedimentation, particularly in the lower mainstem of the Carmel River, but also
21 within some tributaries, and have contributed to habitat degradation of spawning and rearing
22 habitats.” SCCC Steelhead Recovery Plan at 10-10.

23 45. As further detailed by the SCCC Steelhead Recovery Plan, the NFIP has clear negative
24 impacts on SCCC Steelhead:

25 [..][T]he National Flood Insurance Program regulations allow for development in
26 the margins of active waterways if they are protected against 100-year flood events,
27 and do not raise the water elevations within the active channel (floodway) more than
28 one foot during such flood events. This standard does not adequately reflect the
dynamic, mobile nature of watercourses in SCCC Steelhead Recovery Planning Area,
and the critical role that margins of active waterways (riparian areas) play in the

1 maintenance of aquatic habitats. In addition, FEMA programs for repairing flood
 2 related damages (Public Assistance Program, Individual and Households Program,
 3 and Hazard Mitigation Grant Program) promote the replacement of damaged
 4 facilities and structures in their original locations, which are prone to repeated
 5 damage from future flooding, and thus lead to repeated disturbance of riparian and
 6 aquatic habitats important to migrating, spawning, or rearing steelhead. 2013 SCCC
 7 Steelhead Recovery Plan at 3-6.³

8 46. The 2016 5-year review by NMFS of the SCCC Steelhead DPS reaffirms that these
 9 findings remain accurate.⁴ 2016 5-Year Review of SCCC Steelhead at 38.

10 47. High-quality SCCC Steelhead freshwater stream habitat is characterized by well-
 11 developed riparian vegetation creating canopy that provides extensive shading of stream courses.
 12 This is important for maintaining the low water temperatures that SCCC Steelhead need. Well-
 13 developed mature riparian vegetation, including adjacent wetlands vegetation, also helps anchor
 14 streambanks and reduce streamflow velocity by decreasing the rapidity of storm water runoff
 15 into stream channels. This helps prevent erosion during high flow events. High erosion rates can
 16 promote the deposition of silt in streams that inhibit successful SCCC Steelhead spawning.

17 48. Adjacent wetlands vegetation in riparian corridors also serves as an important source of
 18 a healthy benthic macroinvertebrate community—the food source for SCCC Steelhead. Well-
 19 developed mature riparian vegetation also provides the source of large wood pieces that fall into
 20 stream courses and become lodged in streams, which tend to create deeper pools where
 21 reservoirs of cool water can be found and which provide other benefits as discussed below.

22 49. High-quality SCCC Steelhead freshwater stream habitat is further characterized by
 23 good channel heterogeneity, including densely-spaced hydraulic units (*i.e.*, pool and riffle
 24 sequences) and planform (*i.e.*, the stream's longitudinal configuration). Channels tend to be
 25 sinuous, *i.e.*, meandering in such streams. This sinuosity, combined with the presence of
 26 boulders and other obstructions in the streams (such as fallen large wood pieces as mentioned
 27 above) creates significant velocity refugia, *i.e.*, areas of shelter within the stream course from

28 ³SCCC Steelhead Recovery Plan, http://www.westcoast.fisheries.noaa.gov/publications/recovery_planning/salmon_steelhead/domains/south_central_southern_california/2013_scccs_recoveryplan_final.pdf (Dec. 2013).

⁴5-Year Review of SCCC Steelhead DPS, www.westcoast.fisheries.noaa.gov/publications/status_reviews/salmon_steelhead/2016/2016_sccc-steelhead.pdf (2016).

1 higher flow velocities. Such refugia are beneficial for steelhead for several reasons: they provide
2 areas to rest and escape very high velocity flows in storm events, areas to spawn and not have
3 redds (nests where eggs are deposited and incubated) scoured by high flows, and areas to feed.
4 Channel meander tends to create point bars, which are the inside portions of the streambed's
5 curves. These point bars push faster flowing water to the other side of the creek which in turn
6 tends to create undercut banks on these opposite streambanks. Undercut banks, *i.e.*, areas where
7 the toe of the bank is side-cut deeper than the overhanging bank, are areas where steelhead can
8 hide from predators and escape high velocity flows.

9 50. Well-developed pool and riffle complexes are further beneficial. The existence of
10 riffles ensures good oxygenation of waters and meeting of steelhead demands for sufficient
11 dissolved oxygen water column values. Pools adjacent to riffle tails are advantageous steelhead
12 feeding areas. Such streams further have substrate that is high in cobbles and gravels necessary
13 for successful SCCC Steelhead spawning. Natural stream courses in good undisturbed condition
14 typically also are characterized by backwater or side channel areas adjoining low flow channels
15 (*i.e.*, the thalweg, the continuous, lowest elevation channel feature confining low flows to a well
16 bordered, small area) into which higher flows will spill and spread. Such backwater and side
17 channel areas in good natural condition will have lower flows than the main channel and
18 conditions conducive for SCCC refuge and feeding, and perhaps even spawning.

19 51. FEMA's NFIP has incentivized and continues to incentivize various sorts of
20 development that are adversely modifying these characteristics in numerous miles of SCCC
21 Steelhead freshwater habitat throughout Monterey County. The NFIP has incentivized
22 development projects that have included the placing of fill material in backwater and side
23 channel areas adjoining SCCC steelhead streams, including riprap and other streambank
24 armoring to protect buildings from erosion related damage, as well as the construction of various
25 other structures such as roads, driveways, culverts, pilings that have adversely affected
26 backwater and side channel areas. The NFIP has further incentivized development projects that
27 have facilitated channelization of steelhead streams, reducing beneficial channel heterogeneity

1 and creating more homogeneous channels that are less conducive to steelhead spawning, rearing,
2 and survival. The NFIP has further incentivized development projects that have caused the loss
3 of riparian vegetation, including adjacent wetland vegetation and the benefits associated with
4 such riparian vegetation discussed above. The NFIP has further incentivized development
5 projects that have increased the velocity of runoff into SCCC Steelhead streams and the levels of
6 pollutants in such storm water runoff by bringing hardscaping to areas close to such streams in a
7 fashion that has significantly increased the runoff coefficient from land adjoining the streams and
8 development that is a source of pollutant loading in storm water runoff. This increased storm
9 water runoff has increased stream velocity in a manner that has promoted erosion and siltation in
10 steelhead streams. Such erosion and siltation has tended to smother steelhead redds, reduce
11 channel heterogeneity, decrease the amount of cobble and gravel substrate available to steelhead
12 compared to substrate characterized by sand and silt, and degrade riparian vegetation (resulting
13 in less shade canopy and less steelhead refugia in these streams). The elevated pollutant levels in
14 storm water further degrade water quality in a fashion harmful to SCCC Steelhead.

15 **NFIP Adverse Impacts On Western Snowy Plover**

16 52. The Western Snowy Plover is a small bird that the FWS listed as threatened on March
17 5, 1993. 58 Fed. Reg. 12864 (Mar. 5, 1993). WSP habitat includes coastal beach areas, beaches
18 at river/creek mouths, and estuaries. FWS has designated four critical habitat units for the WSP
19 in Monterey County: Jetty Road to Aptos (partially in Monterey County), Elkhorn Slough
20 Mudflats, Monterey to Moss Landing, and Point Sur Beach. 77 Fed. Reg. 36727, 36765-66 (June
21 19, 2012). Areas of each of these units lie within the SFHA, as detailed in the chart. A visual
22 example of clear overlaps of WSP designated critical habitat and the SFHA is provided through a
23 comparison of a map of critical habitat for Jetty Road to Aptos/Elkhorn Slough Mudflats from
24 the Federal Register notice revising the designation of WSP critical habitat with the effective
25 FIRM panel for that area. (*See Attachments 5-6*).

26 53. As FWS found in its decision designating WSP critical habitat, development is a key
27 threat to the Jetty Road to Aptos, Elkhorn Slough Mudflats, and Monterey to Moss Landing
28

1 units, each of which is an important WSP breeding area. 77 Fed. Reg. 36765-66. As the FWS
2 WSP Recovery Plan details, harms to WSP brought by development include:

3 Construction of homes, resorts, and parking lots on coastal sand dunes
4 constitutes irrevocable loss of habitat for western snowy plovers [...]. In
5 addition to causing direct loss of habitat, there are additional potential adverse
6 impacts to western snowy plovers from urban development []. Increased
7 development increases human use of the beach, thereby increasing disturbance
8 to nesting plovers. When urban areas interface with natural habitat areas, the
9 value of breeding and wintering habitat to native species may be diminished by
10 increased levels of illumination at night (e.g., building and parking lot lights);
11 increased sound and vibration levels; and pollution drift (e.g., pesticides) []
12 raking removes habitat features for both plovers and their prey, and precludes
13 nests from being established. Also, construction of residential development in or
14 near western snowy plover habitat attracts predators, including domestic cats.

15 WSP Recovery Plan at 34.⁵

16 54. FEMA's NFIP has incentivized and facilitated and continues to incentivize and
17 facilitate this type of construction activity, as such construction activity occurs within areas
18 mapped by FEMA as being within flood prone areas eligible for national flood insurance.

19 **NFIP Adverse Impacts On Yadon's piperia**

20 55. Yadon's piperia is a slender perennial herb in the orchid family that is endemic to
21 Monterey County. FWS has listed the plant as endangered. 63 Fed. Reg. 43,100 (Aug. 12, 1998).
22 FWS has designated 8 units of critical habitat for Yadon's piperia in Monterey County. At least
23 one of these overlaps with the SFHA, which FWS has titled sub-unit 6c, located along Seal Rock
24 Creek on the Monterey Peninsula. 72 Fed. Reg. 60410, 60425 (Oct. 24, 2007). As underscored
25 by the 5-year status review for the plant published by FWS in 2009, "Habitat loss and alteration
26 resulting from previous, current, and proposed developments continue to pose substantial threats
27 to *Piperia yadonii*." 6 Yadon's *Piperia* 5-Year Review at 7. A visual example of overlaps of
28 designated critical habitat of Yadon's piperia and the SFHA is provided through a comparison of

29 ⁵ WSP Recovery Plan, [https://www.fws.gov/arcata/es/birds/WSP/documents/RecoveryPlan
30 WebRelease_09242007/WSP_Final_RP_10-1-07.pdf](https://www.fws.gov/arcata/es/birds/WSP/documents/RecoveryPlanWebRelease_09242007/WSP_Final_RP_10-1-07.pdf) (Aug. 13, 2007).

31 ⁶ Yadon's *Piperia* 5-Year Review, https://ecos.fws.gov/docs/five_year_review/doc2575.pdf
32 (2009).

1 a map from the Federal Register notice designating critical habitat with the effective FIRM panel
2 for that area.⁷ (*See* Attachments 7-8).

3 56. Harmful influences from surrounding development that the FEMA NFIP has facilitated
4 and incentivized and continues to facilitate and incentivize include drifting of pesticides from
5 landscaped areas associated with development, trampling by humans brought close to the plants'
6 habitat by development, dumping of yard waste, and cutting of vegetation for fire control. *Id.*
7 Habitat fragmentation caused by such development that reduces native vegetation to "islands"
8 among roads, residences, and golf courses also threatens Yadon's piperia. 5 Year Plan at 7.
9 Fragmentation caused by NFIP facilitated development prevents gene flow between populations
10 because pollinators are less likely to successfully move through residential and commercial areas
11 to reach islands of native vegetation and because wind-dispersed seeds are less likely to land in
12 areas suitable for germination than seeds carried by pollinators. 5 Year Plan at 7; Designation of
13 Critical Habitat for *Piperia yadonii*, 72 Fed. Reg. 60410, 60411 (Oct. 24, 2007). This is
14 especially harmful in the case of Yadon's piperia because its blooming season is brief,
15 individuals that flower in one year may not flower the next, and a portion of the population may
16 be completely dormant in any given year. 5 Year Plan at 1. Fragmentation of native plants'
17 habitats caused by development that has been incentivized and facilitated by and is being
18 incentivized and facilitated by the FEMA NFIP may also allow the rise of non-native species that
19 compete with native species for survival. 72 Fed. Reg. 60410, 60423.

20 **NFIP Adverse Impacts On Purple Amole**

21 57. The purple amole is a low growing lily that FWS has listed as threatened.
22 Determination of Threatened Status for *Chlorogalum purpureum*, 65 Fed. Reg. 14878 (Mar. 20,
23 2000). FWS has designated one critical habitat unit for the plant in Monterey County, on private
24 property east of Fort Hunter Liggett near Lockwood, California. 65 Fed. Reg. 14878, 14878. As
25 FWS found in its critical habitat determinations for the plant, key threats to the plant include
26

27 ⁷ Subunit 6c partially overlaps with the SFHA that borders Seal Rock Creek in the middle of the
28 FIRM panel.

1 “alteration of lands” and “direct loss of plants due to construction.” 67 Fed. Reg. 65414, 65425
2 (Oct. 24, 2002). The unit in Monterey County partially overlaps with the SFHA, as detailed in
3 the chart on page 15. A visual example of overlaps of designated critical habitat of purple amole
4 and the SFHA is provided through a comparison a map of critical habitat for purple amole from
5 the Federal Register notice designating critical habitat with the effective FIRM panel for that
6 area. (*See* Attachments 9-10).

7 58. The elements of critical habitat for the purple amole include well-drained, red clay soils
8 with a large component of gravel and pebbles on the upper soil surface. 67 Fed. Reg. 65414,
9 65425. The purple amole also thrives in plant communities that support associated pollinators
10 and predator-prey species, including grassland, blue oak woodland or oak savannahs, and open
11 areas within shrubland communities. *Id.* Development that the FEMA NFIP has facilitated and
12 incentivized and continues to facilitate and incentivize disturbs the soil in these ecosystems and
13 eliminates the open areas required for the purple amole and other associated plants and animals
14 to flourish. *Id.* The health and proximity of associated plants and animals is vital because the
15 purple amole depends upon the presence of pollinators for its survival. *Id.* There must also be
16 little cover of other species which compete for resources available for growth and reproduction
17 in order for the purple amole to thrive. *Id.* In upsetting natural ecosystems, development that the
18 FEMA NFIP has facilitated and incentivized and continues to facilitate and incentivize may
19 allow invasive, non-native species to cover species such as the purple amole and compete with
20 native species for survival. *Id.* For this reason, exotic plant invasions are particularly likely in
21 habitats disturbed by human activities. Bjerknes, *et al.*, Effects of an Exotic Plant and Habitat
22 Disturbance on Pollinator Visitation and Reproduction in a Boreal Forest Herb, *Am. J. Botany*
23 (2006) (*Available at* <http://www.amjbot.org/content/93/6/868.full.pdf+html>).

24 **NFIP Adverse Impacts On California Tiger Salamander**

25 59. FWS has listed the California tiger salamander as threatened. 69 Fed. Reg. 47212 (Aug.
26 4, 2004). The FWS has designated as CTS critical habitat an area inhabited by CTS named “Unit
27 3, Haystack Hill Unit,” located in the upper reaches of the Carmel River watershed. This Unit 3
28

1 area partially overlaps with the SFHA. As NMFS has found in its critical habitat determinations,
2 key threats to Unit 3 include “erosion and sedimentation” and “disturbance activities associated
3 with development that may alter the hydrologic functioning of the aquatic habitat.” 70 Fed. Reg.
4 49830, 49403 (Aug. 23, 2005). The overlap of the SFHA and Unit 3 is detailed in the chart on
5 pages 13-18. A visual example of overlaps of designated critical habitat of the CTS and the
6 SFHA is provided through a comparison of a map of critical habitat for the CTS from the Federal
7 Register notice of designation of critical habitat with one of the effective FIRM panels for that
8 area.⁸ (*See Attachments 11-12*).

9 60. FEMA’s NFIP has incentivized and facilitated and continues to incentivize and
10 facilitate development, including the placement of fill, the construction of buildings, roads,
11 driveways, culverts, and revetments, which is having the adverse effects described above,
12 including filling in wetlands and aquatic habitat or altering them such that they no longer have
13 the hydrology necessary to support CTS (as when water flows are cut off to areas or where they
14 are altered in such a fashion that they no longer retain water or support the aquatic/wetland
15 vegetation that provides proper habitat function).

16 **NFIP Adverse Impacts On California Red-Legged Frog**

17 61. FWS has listed the California red-legged frog as threatened. 72 Fed. Reg. 12816 (Mar.
18 17, 2010). The FWS has designated a number of CRLF critical habitat units in Monterey County,
19 at least three of which overlap with the SFHA, which are units MNT-1 (Elkhorn Slough), MNT-
20 2 (Carmel River), and MNT-3 (Big Sur Coast). The overlaps of the SFHA and CRLF habitat are
21 further detailed in the chart on pages 11-14. A visual example of overlaps of designated critical
22 habitat of the CLRF and the SFHA is provided through a comparison of a general map of units
23 MNT-1, MNT-2, and MNT-3 from the Federal Register notice designating CRLF critical habitat
24 with the effective FIRM panel for the mouth of the Carmel River (in MNT-2). (*See Attachments*
25

26
27 ⁸ The overlap occurs near where Carmel Valley Road enters the critical habitat on the map of
28 critical habitat for the CTS from the Federal Register notice designation of critical habitat, which
is on the lower left corner of the FIRM panel for that area.

1 13-14). As the FWS CRLF Recovery Plan has stated, “Current and future urbanization poses a
2 significant threat to the California red-legged frog.” CRLF Recovery Plan at 17.⁹ Declining
3 populations of CRLF are attributed to many factors associated with development and
4 urbanization, including degradation and loss of habitat, degradation of water quality, cover of
5 non-native plants, use of pesticides, introduction of predators, impoundments, and water
6 diversions. CRLF Species Information.¹⁰ The fragmentation of existing habitat and colonization
7 by nonnative species may represent the most significant threats posed by development. *Id.*
8 Juveniles disperse from breeding sites to habitats that provide sheltering vegetation and scattered
9 wetlands or streams, including forested areas, nonnative grasslands, croplands, and pastures. 72.
10 Fed. Reg. 12816, 12818. They are unable to disperse through urbanized or suburban areas,
11 suburban developments, or areas separated from breeding habitat by impassible barriers such as
12 highways and freeways. *Id.* Passable roadways that are heavily used by vehicles also result in a
13 high rate of mortality. *Id.*

14 62. Adults require dense, shrubby, or riparian vegetation associated with deep (greater than
15 2½ feet) still or slow moving water. CRLF Species Information. The frogs thrive when they live
16 in deep-water pools with a dense cover of overhanging willows and surrounding cattails to
17 protect from predators and dessication. *Id.* Well-vegetated areas within the riparian corridor may
18 also provide sheltering habitat during the winter. *Id.* Development paves over native habitat in
19 aquatic and riparian areas and uproots the vegetation required for the frogs to survive. *Id.*
20 Developments that involve diversion or impoundment of water also threaten the frogs. *Id.*
21 Impoundment and diversion of water may lead to loss of breeding sites at pools and backwaters
22 within streams and creeks, ponds, marshes, springs, sag ponds, dune ponds and lagoons or loss of
23 deeper water habitat required for adults to thrive. *Id.*

24
25
26 ⁹ CRLF Recovery Plan, http://ecos.fws.gov/docs/recovery_plan/020528.pdf (May 28, 2002).

27 ¹⁰ CRLF Species Information, https://www.fws.gov/sacramento/ES_Species/Accounts/Amp
28 [hibians-Reptiles/es_ca-red-legged-frog.htm](https://www.fws.gov/sacramento/ES_Species/Accounts/Amp) (Last updated Sept. 16, 2016).

1 63. Decreases in water quality associated with development also harm CRLF. *Id.* When
 2 eggs are exposed to salinity levels greater than 4.5 parts per thousand, 100 percent mortality
 3 occurs. CRLF Recovery Plan at 15. Larvae die when exposed to salinity levels greater than 7.0
 4 parts per thousand. *Id.* Early embryos of the frogs are tolerant of temperatures only between 9
 5 and 21 degrees Celsius. *Id.*

6 64. FEMA’s NFIP has incentivized and facilitated and continues to incentivize and
 7 facilitate development, including the placement of fill, the construction of buildings, roads,
 8 driveways, culverts, revetments, and structures to armor river and stream banks such as retaining
 9 walls, which is having the adverse effects described above.

10 **NFIP Adverse Impacts On Vernal Pool Fairy Shrimp**

11 65. Vernal pool fairy shrimp are small freshwater crustaceans that FWS has listed as
 12 threatened. 59 Fed. Reg. 48136 (Sept. 19, 1994). The FWS has designated a number of units of
 13 VPFS critical habitat within Monterey County, at least three of which overlap with the SFHA.
 14 These overlaps include Unit 28 (northeast of Kings City), Unit 29A (around Lockwood), and
 15 Unit 29B (around Bradley), all within the greater Salinas River watershed. 71 Fed. Reg. 7174
 16 and 7176. The chart on pages 13-18 details the approximate locations of these overlaps. A visual
 17 example of overlaps of designated critical habitat of the VPFS and the SFHA is provided through
 18 a comparison of a map from the FWS Federal Register notice designating VPFS critical habitat
 19 that includes Unit 29A with the effective FIRM panel for part of the area of Unit 29A.¹¹ (*See*
 20 Attachments 15-16). As FWS concluded in its five-year status review of the VPFS, “the loss and
 21 modification of vernal pool habitat continues to be the primary threat to the vernal pool fairy
 22 shrimp.”¹² VPFS Five-Year Status Review at 35. Even where the VPFS has appropriate habitat,
 23 “loss of vernal pool habitat is expected to continue as urban boundaries expand further.” *Id.* This
 24 is expected even in protected areas, since the “urbanization of lands surrounding conserved areas
 25

26 _____
 27 ¹¹ On the map of the FIRM panel, Jolon Road corresponds to the black line (road) between the
 northwest and southeast sections of Unit 29A on the FWS map of critical habitat.

28 ¹² VPFS 5-Year Review, https://ecos.fws.gov/docs/five_year_review/doc1150.pdf (Sept. 2007).

1 results in the fragmentation of protected habitats, likely preventing dispersal of the shrimp within
2 and between populations, as well as causing increased edge effects to pool complexes.” *Id.*

3 66. FEMA’s NFIP has incentivized and facilitated and continues to incentivize and
4 facilitate development, including the placement of fill, the construction of buildings, roads,
5 driveways, culverts, and revetments, which is having the adverse effects described above,
6 including filling in vernal pools or altering them such that they no longer have the hydrology
7 necessary to support VPFS (as when water flows are cut off to these pools or where they are
8 altered in such a fashion as to no longer retain water).

9 **NFIP Adverse Impacts On Monterey Spineflower**

10 67. The Monterey spineflower is a low-growing herb in the buckwheat family that the FWS
11 has listed as threatened. 59 Fed. Reg. 5499 (Feb. 4, 1994). The FWS has designated as critical
12 habitat for the plant at least two coastal units in Monterey County that likely partially overlap
13 with the SFHA: Unit 2, Moss Landing (coastal area north and south) and Unit 3, Marina (just
14 south of Salinas River mouth to Monterey). Two other units designated by FWS that are inland
15 overlap with the SFHA: Unit 8, Fort Ord, and Unit 9, Soledad (area in Salinas River floodplain
16 south of Soledad). 73 Fed. Reg. 1525, 1534-36 (Jan. 9, 2008). The chart on pages 11-14 details
17 the approximate locations of these overlaps. A visual example of overlaps of designated critical
18 habitat of the Monterey spineflower and the SFHA is provided through a comparison of a map of
19 Unit 9 from the FWS Federal Register notice designating Monterey spineflower critical habitat
20 with the effective FEMA FIRM panel for the Soledad area. (*See* Attachments 17-18).

21 68. As FWS found in its critical habitat determinations, known occurrences of the
22 Monterey spineflower “are threatened by direct and indirect effects from habitat fragmentation
23 and loss and edge effects resulting from urban development.” 73 Fed. Reg. 1525, 1532. Threats
24 to the habitat of the Monterey spineflower include, specifically: industrial and recreational
25 development, road development, human and equestrian recreational use, and dune stabilization
26 as a result of the introduction of non-native species. 59 Fed. Reg. 5499, 5505. Studies indicate
27 that a high diversity of pollinators resulting from exposure, proximity to the coast, and the

1 structure, composition, and density of the surrounding vegetation are important to the survival of
2 the Monterey spineflower. Murphy 2003b at 28–63, cited in 71 Fed. Reg. 75189, 75191 (Dec.14,
3 2006). This is attributed to the fact that the Monterey spineflower does not develop an extensive
4 seed bank, which means that it relies on the previous year’s seed set as opposed to a large seed
5 bank that remains viable for decades like some other species. *Id.* Thus, development that
6 destroys the vegetation home to pollinators is costly for the Monterey spineflower. *Id.* Even one
7 year wherein pollination is threatened is costly for the entire species. *Id.*

8 69. In encouraging development in areas home to the Monterey spineflower and its
9 pollinators, the NFIP has threatened and continues to threaten the persistence of the species. The
10 placement of fill and construction of buildings, roads, driveways, culverts, and revetments paves
11 over valuable, increasingly rare habitat home to Monterey spineflower and associated plants and
12 animals. The health and proximity of associated plants and animals is crucial for the survival of
13 plants such as the Monterey spineflower because they depend upon the presence of pollinators
14 for reproduction. *Id.* There must also be little cover of other species that compete for resources
15 available for growth and reproduction in order for the species to thrive. *Id.* Development allows
16 invasive, non-native species to cover native species such as the Monterey spineflower. *Id.* Exotic
17 invasions are particularly likely in habitats disturbed by human activities and have devastating
18 effects upon the pollination and, thus, reproduction of native species. Bjerknes, *et al.*

19 **FEMA VIOLATIONS OF THE ENDANGERED SPECIES ACT**

20 70. Since implementation of the NFIP “may affect” designated critical habitat discussed
21 above, FEMA’s implementation of the NFIP in Monterey County is subject to the strict
22 substantive and procedural standards imposed by ESA’s section 7.

23 71. FEMA’s discretionary management of the NFIP in Monterey County constitutes an
24 agency action requiring ESA section 7 consultation. To date, however, FEMA has failed to
25 consult pursuant to ESA section 7 with NMFS or FWS over FEMA’s adoption of or amendments
26 to the Monterey County FIS/FIRM, establishment of minimum eligibility requirements,
27 community rating system, issuance of LOMCs, or issuance of financial assistance pursuant to the

1 FEMA Public Assistance Program, Individual and Households Program, and Hazard Mitigation
2 Grant Program. Likewise, FEMA has failed to fulfill its substantive ESA section 7(a)(2) duties
3 with respect to these NFIP activities.

4 72. Moreover, FEMA has also failed to utilize its authority to implement the NFIP in a
5 manner promoting the conservation of the Listed Species in Monterey County, in violation of its
6 substantive duties under ESA section 7(a)(1).

7 **FEMA Violation of Procedural Requirements of ESA Section 7(a)(2)**

8 **FEMA Completed the Monterey Countywide FIRM and FIS Without ESA Section 7**
9 **Consultation.**

10 73. In 1974, FEMA issued the first NFIP maps for certain Monterey County communities.
11 FEMA, Flood Insurance Study, Monterey County, California and Incorporated Areas, April 2,
12 2009 ("FIS") at 112-113. On October 2, 2008, FEMA issued Letter(s) of Final Determination
13 ("LFD") for Monterey County, which is a letter from FEMA to the Chief Executive Office of a
14 community that states that the new/updated FIRM will become effective in six months and
15 notifies the community that they must adopt a compliant floodplain management ordinance. Six
16 months after issuance of the LFD, the Monterey County FIRM became effective on April 2,
17 2009.¹³ The SFHA overlaps extensively with designated critical habitat for the Listed Species in
18 Monterey County, yet at no point during the process of developing the effective FIRM or FIS did
19 FEMA conduct any section 7 consultation as required by the ESA.

20 **FEMA Approved Monterey's Floodplain Ordinances Without ESA Section 7**
21 **Consultation.**

22 74. Following FEMA's issuance of the new (effective) FIRM and FIS in April 2009,
23 Monterey County was required to adopt or amend floodplain management regulations to reflect
24 the changes in the new FIRM and FIS report. Monterey County adopted revised floodplain
25

26 _____
27 ¹³ FEMA issued a preliminary Monterey countywide FIRM and FIS on November 13, 2015.
28 FEMA has failed to conduct any Section 7 consultation on the preliminary Monterey County
FIRM or FIS as required by the ESA.

1 ordinances, located at Chapter 16.16 of the Monterey County Code, on October 6, 2009, through
2 Order Number 5139, § 1, with an effective date of November 6, 2009. Monterey County also
3 adopted additional floodplain regulations for land use in the Carmel Valley floodplain, located at
4 Chapter 21.64 of the Monterey County Code, added by Order Number 5135, § 134, dated July 7,
5 2009.

6 75. FEMA subsequently approved Monterey County's revised floodplain ordinances.

7 76. FEMA had and continues to have a duty to initiate ESA section 7 consultation
8 concerning its approval of Monterey County's revised floodplain ordinances to garner an
9 evaluation by NMFS and FWS of the impact of these floodplain ordinances and FEMA's
10 approval of these ordinances on the Listed Species and their critical habitat. However, FEMA
11 has not requested any ESA section 7 consultation concerning its approval of Monterey County's
12 revised floodplain ordinances.

13 **FEMA Has Implemented the Community Rating System in Monterey County Without**
14 **ESA Section 7 Consultation.**

15 77. As FEMA is aware, it has approved Monterey's participation in the Community Rating
16 System (CRS) without undertaking any ESA section 7 consultation in violation of the ESA. *See*
17 *NWF*, 345 F. Supp. 2d 1151, 1174 (W.D. Wash. 2004) ("by offering discounts to communities
18 that adopt certain types of regulations, FEMA could encourage the adoption of salmon-friendly
19 measures in local communities. For these reasons, formal consultation is required.")

20 **FEMA Approved LOMCs in Critical Habitat Without ESA Section 7 Consultation.**

21 78. FEMA has approved at least twenty LOMCs that are located within designated critical
22 habitat, as detailed in the chart below, without ESA section 7 consultation in violation of the
23 ESA. For example, FEMA approved a LOMR-F numbered 14-09-1033A-060195 in Carmel-by-
24 the-Sea on March 27, 2014 which removed property that is in CRLF critical habitat from the
25 SFHA.
26
27
28

Watershed/General Area	Sub-Unit or Tributaries	Threatened or Endangered Species with Critical Habitat in SFHA	Approximate Locations of ESA Critical Habitat Overlap With SFHA
Pajaro River	Pajaro River	Tidewater Goby	Pacific Ocean to Route 1
Pajaro River	Pajaro River	South Central CA Coast Steelhead	Pacific Ocean to San Benito County Border
Pajaro River	Pajaro River	Western Snowy Plover	Southern shore of mouth of Pajaro River
Elkhorn Slough	Bennet Slough	Tidewater Goby	North side of Elkhorn Slough
Elkhorn Slough	Shore and in Slough	Western Snowy Plover	(1) Various areas in strip along shore north of mouth of Elkhorn Slough; (2) approx. .5 sq mile area on north side of Elkhorn Slough, approx. .5 miles from Pacific Ocean.
Elkhorn Slough	Shore	Monterey Spineflower	Various areas in strip along shore north of mouth of Elkhorn Slough
Elkhorn Slough	Inner Channel/Tembladero Slough	South Central CA Coast Steelhead	Inner Channel at mouth of Elkhorn Slough
Elkhorn Slough	Elkhorn Slough	California Red-Legged Frog	Most of SFHA in Elkhorn, CA, along eastern side of Slough
Elkhorn Slough	Old Salinas River/Tembladero Slough/ Gabilan Creek watershed	South Central CA Coast Steelhead	From Pacific Ocean to upper Gabilan Creek
Elkhorn Slough to Salinas River	Shore	Western Snowy Plover	Overlap areas with SFHA on shore area from Elkhorn Slough south to Salinas River mouth
Elkhorn Slough to Salinas River	Shore	Monterey Spineflower	Overlap areas with SFHA on shore area from Elkhorn Slough south to Salinas River
Salinas River	Salinas River	South Central CA Coast Steelhead	Pacific Ocean to southern Monterey county border with San Luis Obispo county
Salinas River	Salinas River	Tidewater goby	River and SFHA from coast to approx. 3.6 miles upstream
Salinas River mouth to Monterey	Salinas River mouth to Monterey	Western Snowy Plover	Areas with SFHA on shore area from Salinas River to Monterey
Salinas River	Salinas River	Monterey Spineflower	(1) City of Marina (various locations, Fort Ord area); (2) southeast of Soledad

1	Salinas River	Nacimiento River	South Central CA Coast Steelhead	Salinas River to southern Monterey county border with San Luis Obispo county
2				
3	Salinas River	San Antonio River	South Central CA Coast Steelhead	Salinas River to San Antonio Dam
4				
5	Salinas River	Arroyo Seco	South Central CA Coast Steelhead	Salinas River to approx. .5 miles before confluence with Rocky Creek
6				
7	Salinas River	Reliz Creek	South Central CA Coast Steelhead	Arroyo Seco to approx. 4.53 miles upstream.
8				
9	Salinas River	Paloma Creek	South Central CA Coast Steelhead	Arroyo Seco to .4 miles after confluence with Piney Creek
10				
11	Salinas River	Piney Creek	South Central CA Coast Steelhead	From Paloma Creek upstream .2 miles
12				
13	Salinas River	Horse Creek	South Central CA Coast Steelhead	Arroyo Seco to approx. .13 miles upstream
14				
15	Salinas River	Lhano Grande Canyon (Approx. 3.5 miles north of King City)	Vernal Pool Fairy Shrimp	SFHA in Canyon, starting approx. 1.77 N/NW of Bitterwater Rd., continuing up Canyon approx. 2.06 miles to beginning of Pinalito Canyon
16				
17	Salinas River	Lewis Creek	Vernal Pool Fairy Shrimp	Flood zone, from approx. confluence with San Lorenzo Creek to approx. 12 miles upstream.
18				
19	Salinas River	San Lorenzo Creek	Vernal Pool Fairy Shrimp	Flood zone, from approx. confluence with Lewis Creek to approx. 7.3 miles upstream.
20				
21	Salinas River	Salinas River	Vernal Pool Fairy Shrimp	Approx. .18 sq. miles in flood zone, Bradley, CA.
22				
23	Salinas River	San Antonio River Tributaries	Purple Amole	In SFHA in number of unamed tributaries/flood zones in and around Lockwood, CA
24				
25	Salinas River	San Antonio River Tributaries	Vernal Pool Fairy Shrimp	Number of unamed tributaries/flood zones in and around Lockwood, CA
26				
27	Seal Rock Creek	Seal Rock Creek	Yadon's Piperia	Overlap area starting approx. .48 miles upstream from Coast
28				
	Carmel River	Carmel River	California Red- Legged Frog	SFHA along and including Carmel River, from Pacific Ocean to approx. 1.24 miles above Los Padres Dam
	Carmel River	Carmel River	South Central CA Coast	From ocean to approx. 1.24 miles above Los Padres dam

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		Steelhead	
1			
2	Carmel River	Potrero Creek	California Red-Legged Frog
3			Creek and flood zone from Carmel River to .11 miles upstream
4	Carmel River	Potrero Creek	South Central CA Coast Steelhead
5			Creek from Carmel River to .11 miles upstream
6	Carmel River	Robertson Canyon Creek	California Red-Legged Frog
7			SFHA approx. first .03 miles of Robertson Canyon Creek
8	Carmel River	Robertson Canyon Creek	South Central CA Coast Steelhead
9			Approx. first .03 miles of Robertson Canyon Creek
10	Carmel River	Las Garzas Creek	South Central CA Coast Steelhead
11			Approx. first .87 miles of creek from Carmel River
12	Carmel River	Las Garzas Creek	California Red-Legged Frog
13			Approx. first .87 miles of creek / SFHA from Carmel River
14	Carmel River	Hitchcock Canyon Creek	California Red-Legged Frog
15			Approx. first .04 miles of creek/SFHA from Carmel River
16	Carmel River	Hitchcock Canyon Creek	South Central CA Coast Steelhead
17			Approx. first .04 miles of creek from Carmel River
18	Carmel River	Tularcitos Creek	South Central CA Coast Steelhead
19			From Carmel River until approx. 1.4 miles after confluence with Rana Creek
20	Carmel River	Tularcitos Creek	California Red-Legged Frog
21			Approx. first 1.4 miles of creek/SFHA from Carmel River
22	Carmel River	Rana Creek	South Central CA Coast Steelhead
23			Approx. first .45 miles of creek from Tularcitos Creek
24	Carmel River	Aqua Mojo Creek	South Central CA Coast Steelhead
25			Approx. first 1.55 miles of creek from Rana Creek
26	Carmel River	San Clemente Creek	South Central CA Coast Steelhead
27			Approx. first .5 miles of creek from Carmel River
28	Carmel River	San Clemente Creek	California Red-Legged Frog
			Approx. first .5 miles of creek/SFHA from Carmel River
	Carmel River	Pine Creek	California Red-Legged Frog
			Approx. first .15 miles of creek/SFHA from Carmel River
	Carmel River	Pine Creek	South Central CA Coast Steelhead
			Approx. first .15 miles of creek from Carmel River
	Carmel River	Cachagua Creek	California Red-Legged Frog
			Entire length of creek/SFHA until termination Pinch Creek

1	Carmel River	Cachagua Creek	South Central CA Coast Steelhead	Entire length until termination Pinch Creek
2	Carmel River	Borondo Creek	South Central CA Coast Steelhead	Approx. first .06 miles of creek from Cachagua Creek
3				
4	Carmel River	Borondo Creek	California Red-Legged Frog	Approx. first .06 miles of creek/SFHA from Cachagua Creek
5	Carmel River	James Creek	California Red-Legged Frog	Approx. first .09 miles of creek/SFHA from Pinch Creek
6				
7	Carmel River	James Creek	South Central CA Coast Steelhead	Approx. first .09 miles of creek from Pinch Creek
8	Carmel River	Big Creek	South Central CA Coast Steelhead	Approx. first 1.44 miles of creek from Pinch Creek
9				
10	Carmel River	Big Creek	California Red-Legged Frog	Approx. first 1.44 miles of creek/SFHA from Pinch Creek
11				
12	Carmel River	Big Creek	California Tiger Salamander	Approx. first 1.44 miles of creek/SFHA from Pinch Creek
13	Carmel River	Pinch Creek	California Tiger Salamander	Approx. .35 mile stretch of creek /SFHA starting approx. .1 miles downstream of confluence with Big Creek until approx. .13 miles after confluence with Robertson Creek
14				
15				
16				
17	Carmel River	Pinch Creek	California Red-Legged Frog	From confluence with Cachagua Creek to confluence with Robertson Creek, creek/SFHA
18				
19	Carmel River	Pinch Creek	South Central CA Coast Steelhead	Creek from confluence with Cachagua Creek to approx..25 miles after confluence with Robertson Creek
20				
21	Carmel River	Robertson Creek	California Red-Legged Frog	Approx. first 1.08 miles of creek/SFHA from confluence with Pinch Creek
22				
23	Carmel River	Robertson Creek	California Tiger Salamander	Approx. first .88 miles of creek/SFHA from confluence with Pinch Creek
24	Carmel River	Robertson Creek	South Central CA Coast Steelhead	Approx. first 1.08 miles of creek from confluence with Pinch Creek
25				
26	Big Sur	San Carpoforo Creek	South Central CA Coast Steelhead	Border of Monterey/San Luis Obispo counties, to approx. .91 miles after confluence with Dutra Creek
27				
28				

1	Big Sur	Dutra Creek	South Central CA Coast Steelhead	Approx. .35 miles after confluence with San Carpofo Creek
2	Big Sur	Pfeiffer Beach	California Red-Legged Frog	(1) SFHA from Pfeiffer Beach to approx. .5 miles eastward inland; (2) strip of land along shore along Pfeiffer Beach
3				
4				
5	Big Sur	Pfeiffer Beach to far south end of Andrew Molera State Park	California Red-Legged Frog	Strip of land along shore of Pacific Ocean
6	Big Sur	Big Sur River	South Central CA Coast Steelhead	From Pacific Ocean to approx. 8 miles upstream
7				
8	Big Sur	Big Sur River	California Red-Legged Frog	From Pacific Ocean to approx. 8 miles upstream, river/SFHA
9				
10	Big Sur	Point Sur	California Red-Legged Frog	(1) Various areas from Point Sur south approx. 1.2 miles; (2) Small area along shore approx. .5 miles north of Point Sur
11				
12	Big Sur	Point Sur	Western Snowy Plover	Small area along shore approx. .5 miles north of Point Sur
13				
14	Big Sur	Little Sur River	South Central CA Coast Steelhead	From Pacific Ocean to approx. 1.27 miles upstream
15	Big Sur	Bixby Creek	South Central CA Coast Steelhead	From Pacific Ocean to approx. .2 miles inland
16				
17	Big Sur	Malpaso Creek	South Central CA Coast Steelhead	From Pacific Ocean to Highway 1
18	Big Sur	San Jose Creek	South Central CA Coast Steelhead	From Pacific Ocean to approx. .5 miles inland
19				
20	Big Sur	San Jose Creek	California Red-Legged Frog	Creek / SFHA from Pacific Ocean to approx. .5 miles inland
21				

22 79. FEMA has issued CLOMR-Fs, CLOMRs, or CLOMAs in areas of critical habitat for
23 the Listed Species in Monterey County without undertaking ESA section 7 consultation. FEMA
24 is well aware of where it has issued CLOMR-Fs, CLOMRs, or CLOMAs in Monterey County
25 and this notice letter, among other sources of information available to FEMA, has made FEMA
26 well aware of where critical habitat is located within Monterey County. The development in such
27 critical habitat facilitated by FEMA-issued CLOMR-Fs, CLOMRs, or CLOMAs has adversely

1 modified critical habitat for the Listed Species.

2 **The Monterey Countywide NFIP Implementation Violated ESA Section 7(a)(2) Substantive**
 3 **Duties.**

4 80. In addition to ESA section 7(a)(2)'s procedural requirements that mandate that each
 5 federal agency formally consult with the appropriate wildlife service if a proposed action may
 6 adversely affect a listed species, a federal agency also has an independent ESA section 7(a)(2)
 7 substantive duty to ensure that any action authorized, funded, or carried out by the agency is not
 8 likely to (1) jeopardize the continued existence of any threatened or endangered species or (2)
 9 result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C.
 10 § 1536(a)(2). FEMA is violating its substantive ESA section 7(a)(2) duties by implementing the
 11 NFIP in Monterey County in a fashion that is facilitating the adverse modification of critical
 12 habitat for the Listed Species and it is jeopardizing the continued existence of the Listed Species
 13 as described above.

14 **FEMA's NFIP Implementation in Monterey County Is Violating ESA Section 7(a)(1).**

15 81. ESA section 7(a)(1) imposes an affirmative duty on FEMA to use its authorities to
 16 further the ESA's purposes by carrying out programs for the "conservation" of the Listed
 17 Species. 16 U.S.C. § 1536(a)(1). FEMA is violating its ESA section 7(a)(1) duties by
 18 implementing the NFIP in a fashion that includes no measures to promote the conservation of the
 19 Listed Species in Monterey County or improve the habitat for such species. Instead, the only
 20 actions taken by FEMA in implementing the NFIP that have affected the Listed Species have
 21 affected these species adversely.

22 82. Since FEMA's ongoing implementation of the NFIP within Monterey County is a
 23 federal agency action that may affect the Listed Species, FEMA must remedy its continuing
 24 failure to comply with the ESA by immediately requesting ESA section 7 consultation with
 25 NMFS and FWS.

26 **FIRST CLAIM FOR RELIEF**

27 **FEMA Procedural Violation of 16 U.S.C. § 1536(a)(2)**

28 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1 **Request for Declaratory Relief and Injunction to Compel FEMA**
2 **to Comply with 16 U.S.C. § 1536(a)(2)**

3 83. EcoRights reasserts and realleges the preceding paragraphs above.

4 84. The ESA requires that federal agencies ensure that agency actions are not likely to
5 jeopardize the continued existence of endangered or threatened species or destroy or adversely
6 modify designated critical habitat, and requires an interagency consultation process to ensure that
7 agencies fulfill these mandates. 16 U.S.C. § 1536(a)(2).

8 85. FEMA has violated these procedural requirements of the ESA and its implementing
9 regulations by its failure to initiate and complete consultation with NMFS and FWS to ensure
10 that its ongoing administration of the NFIP, an action that may affect listed species in Monterey
11 County, does not jeopardize such federally protected species or destroy or adversely modify
12 designated critical habitat.

13 **SECOND CLAIM FOR RELIEF**

14 **FEMA Substantive Violation of 16 U.S.C. § 1536(a)(2)**

15 **Request for Declaratory Relief and Injunction to Compel FEMA**
16 **to Comply with 16 U.S.C. § 1536(a)(2)**

17 86. EcoRights reasserts and realleges the preceding paragraphs above.

18 87. The ESA requires that for any proposed action that may adversely affect a listed
19 species, a federal agency has an independent ESA section 7(a)(2) substantive duty to ensure that
20 any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the
21 continued existence of any threatened or endangered species or (2) result in the destruction or
22 adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2).

23 88. FEMA has violated its substantive ESA section 7(a)(2) duties by implementing the
24 NFIP in Monterey County in a fashion that is facilitating the adverse modification of critical
25 habitat for the Listed Species and thereby jeopardizing the continued existence of the Listed
26 Species.

27 **THIRD CLAIM FOR RELIEF**

28 **FEMA Violation of 16 U.S.C. § 1536(a)(1)**

**Request for Declaratory Relief and Injunction to Compel FEMA
to comply with 16 U.S.C. § 1536(a)(1)**

89. EcoRights reasserts and realleges the preceding paragraphs above.

90. The ESA requires that FEMA, in consultation with NMFS and FWS, use its authorities in furtherance of the purposes of the ESA by developing and carrying out programs for the conservation of threatened and endangered species. 16 U.S.C. § 1536(a)(1).

91. FEMA has violated the requirements of the ESA by its failure to develop and carry out programs for the conservation of federally listed species in Monterey County in consultation with NMFS and FWS.

PRAYER FOR RELIEF

WHEREFORE, EcoRights seeks the following relief:

- a. Declare that FEMA has violated procedural requirements of the ESA by failing to ensure, in consultation with NMFS and FWS, that its action of implementing the NFIP does not jeopardize listed species or destroy or adversely modify designated critical habitat in Monterey County;
- b. Declare that FEMA has violated substantive requirements of the ESA by failing to ensure that implementation of the NFIP in Monterey County is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of the critical habitat of listed species;
- c. Declare that FEMA has violated the ESA by failing to use its authorities to develop or carry out programs, in consultation with NMFS and FWS, to conserve federally listed species in Monterey County;
- d. Issue an injunction requiring FEMA to comply with the ESA through completion of the consultation process with NMFS and FWS, and to adhere to all requirements imposed by the ESA, and curtailing FEMA's issuance and/or authorization of NFIP actions that promote new development through the NFIP within the geographic range of listed species in Monterey County until FEMA complies with the ESA;

- e. An award of attorney's fees and costs to EcoRights; and,
- f. Such other and further relief as this Court deems just and proper.

DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

Based on EcoRights' knowledge to date, pursuant to Civil Local Rule 3-15, the undersigned certifies that, as of this date, other than the named parties, there is no such interest to report.

Respectfully Submitted,

Dated: December 5, 2016

By:

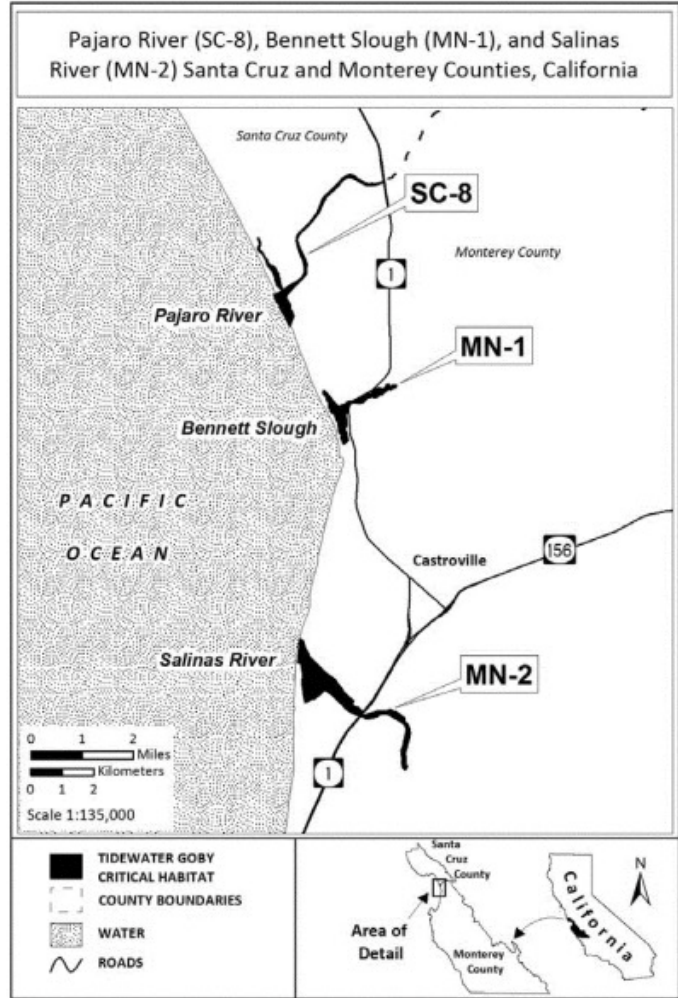
Christopher a. sproul

Christopher Sproul

Counsel for Ecological Rights Foundation

Attachment 1

8808 Federal Register / Vol. 78, No. 25 / Wednesday, February 6, 2013 / Rules and Regulations



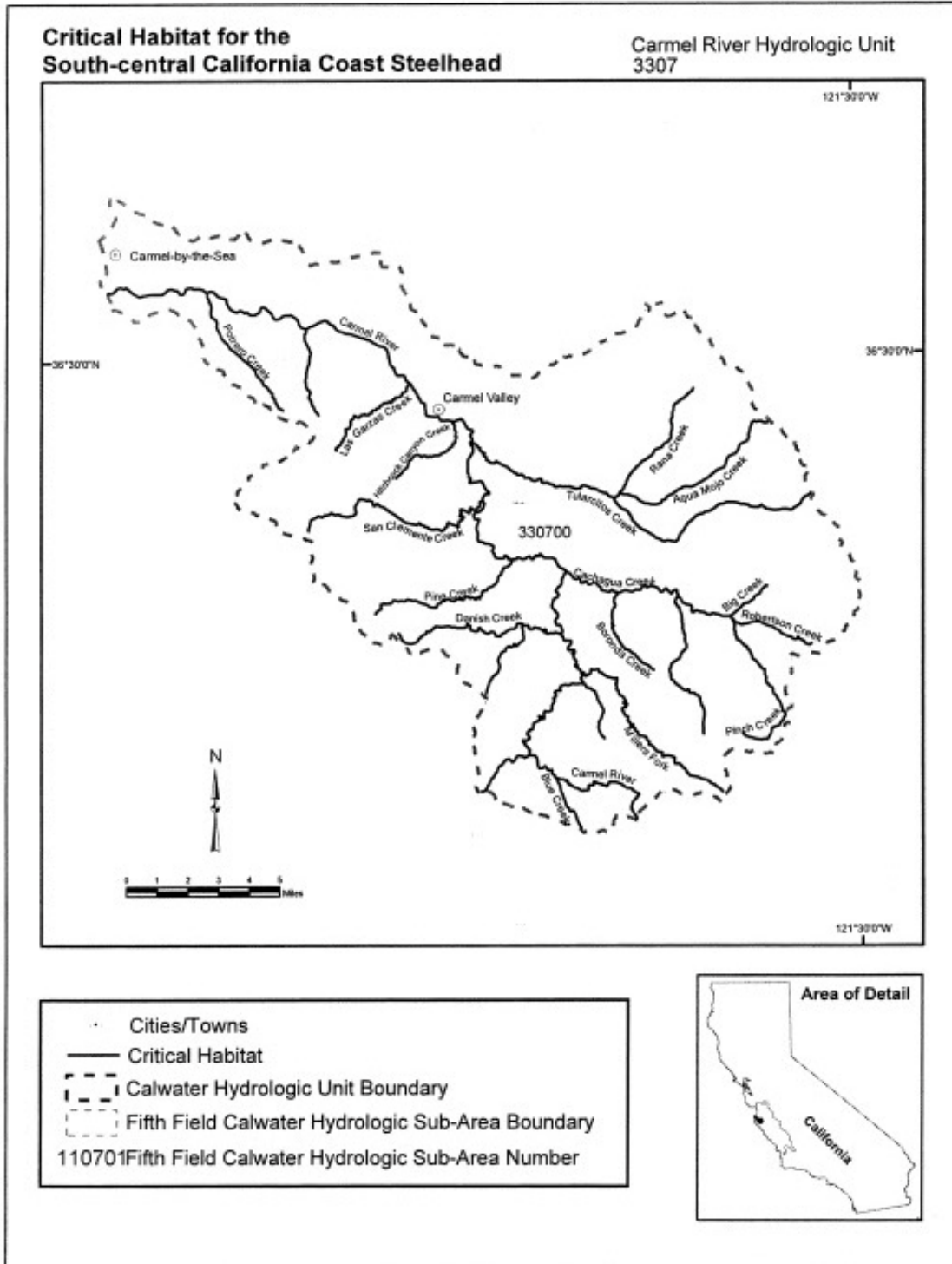
(37) Unit MN 1: Bennett Slough, Monterey County, California. Map of Units SC 8, MN 1, and MN 2 is provided at paragraph (36) of this entry.

(38) Unit MN 2: Salinas River, Monterey County, California. Map of Units SC 8, MN 1, and MN 2 is provided at paragraph (36) of this entry.

(39) Unit SLO 1: Arroyo de la Cruz, San Luis Obispo County, California. Map of Unit SLO 1, SLO 2, SLO 3, SLO 4, and SLO 5 follows:

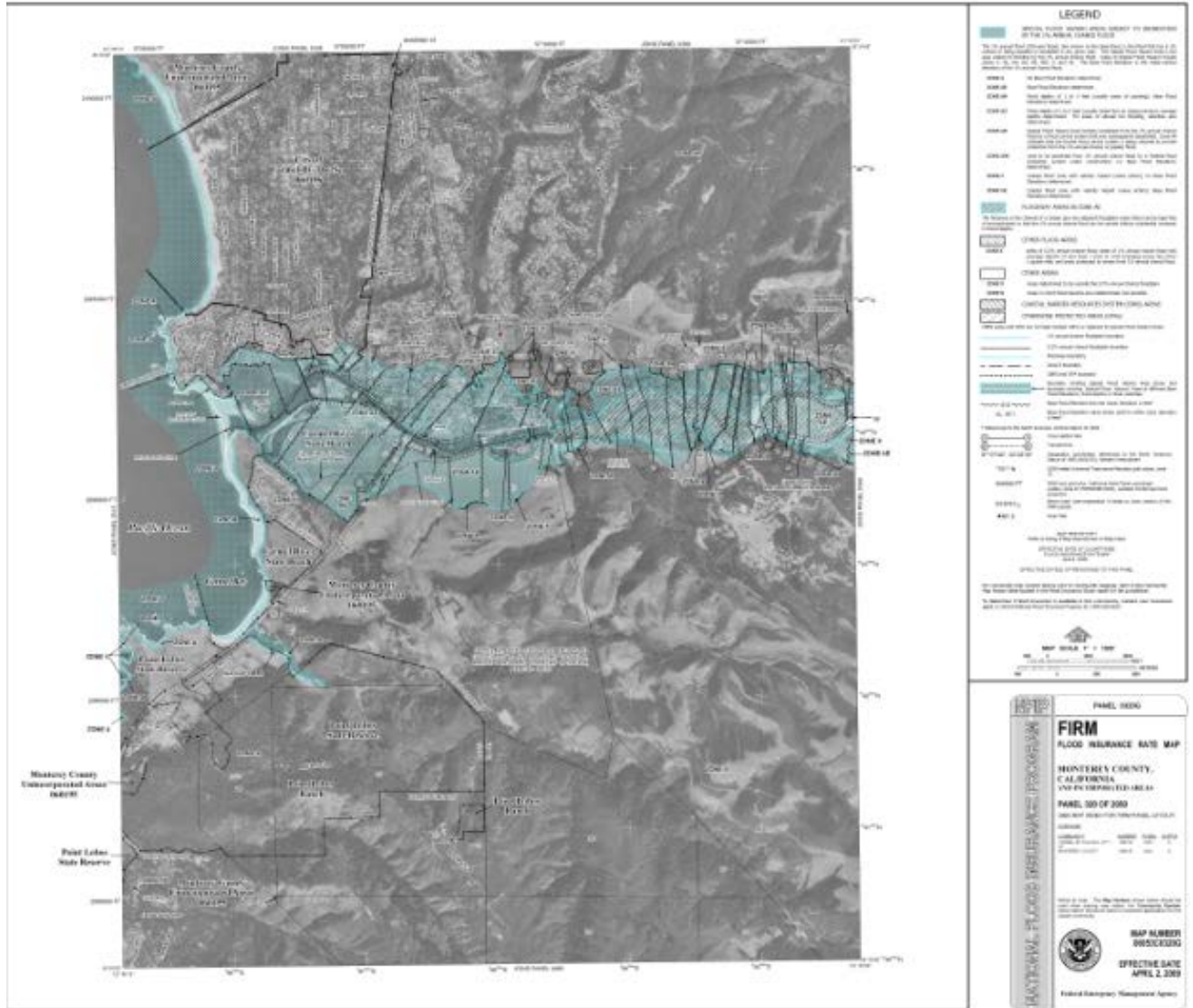
Attachment 3

52576 Federal Register / Vol. 70, No. 170 / Friday, September 2, 2005 / Rules and Regulations



Attachment 4

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Attachment 5

Federal Register / Vol. 77, No. 118 / Tuesday, June 19, 2012 / Rules and Regulations 36841

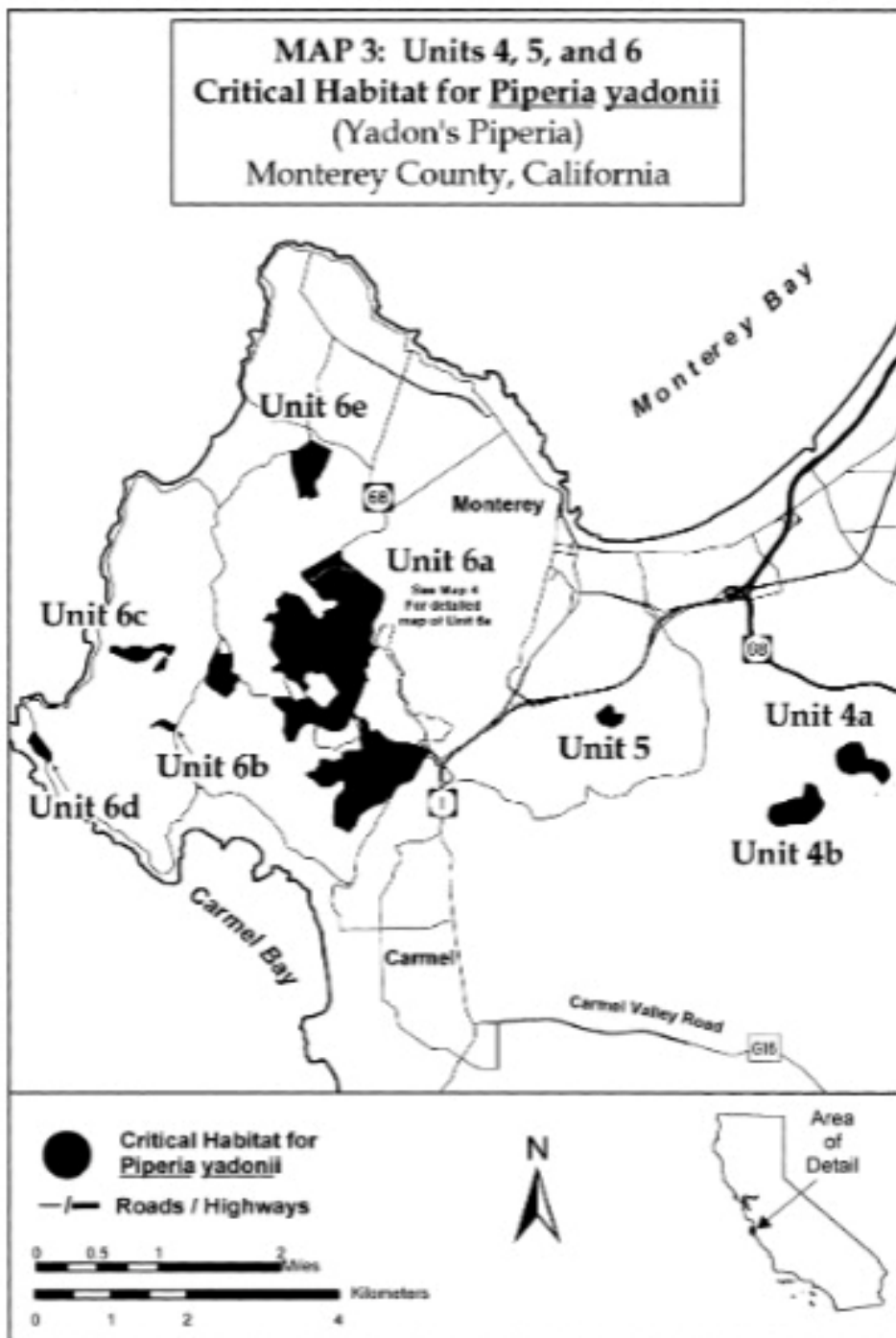
(54) Unit CA 20: Jetty Road to Aptos, California. Map of Units CA 20 and CA 21 follows: Santa Cruz and Monterey Counties,



(55) Unit CA 21: Elkhorn Slough Mudflats, Monterey County, California. Map of Units CA 20 and CA 21 is provided at paragraph 54.

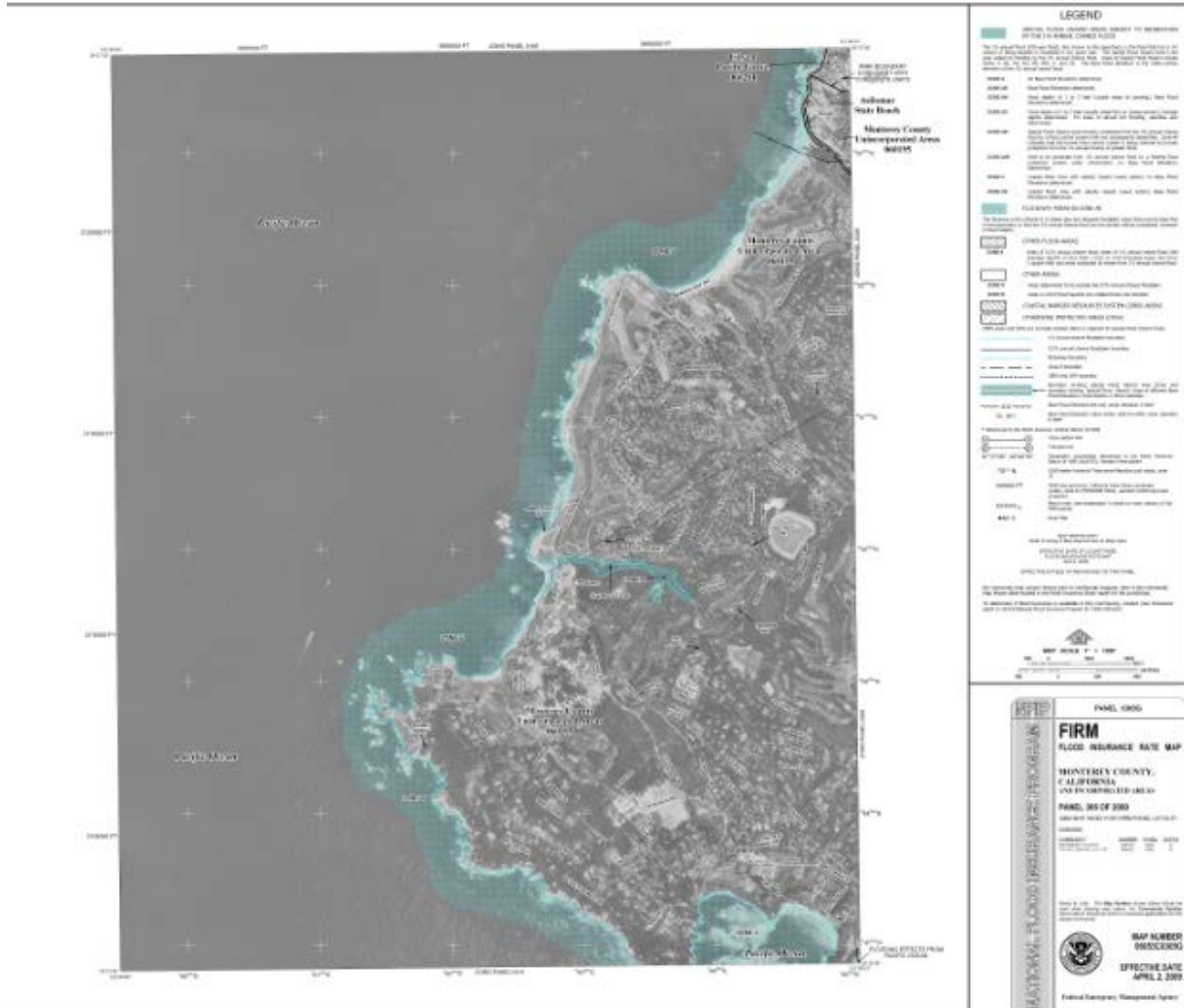
Attachment 7

60446 Federal Register / Vol. 72, No. 205 / Wednesday, October 24, 2007 / Rules and Regulations



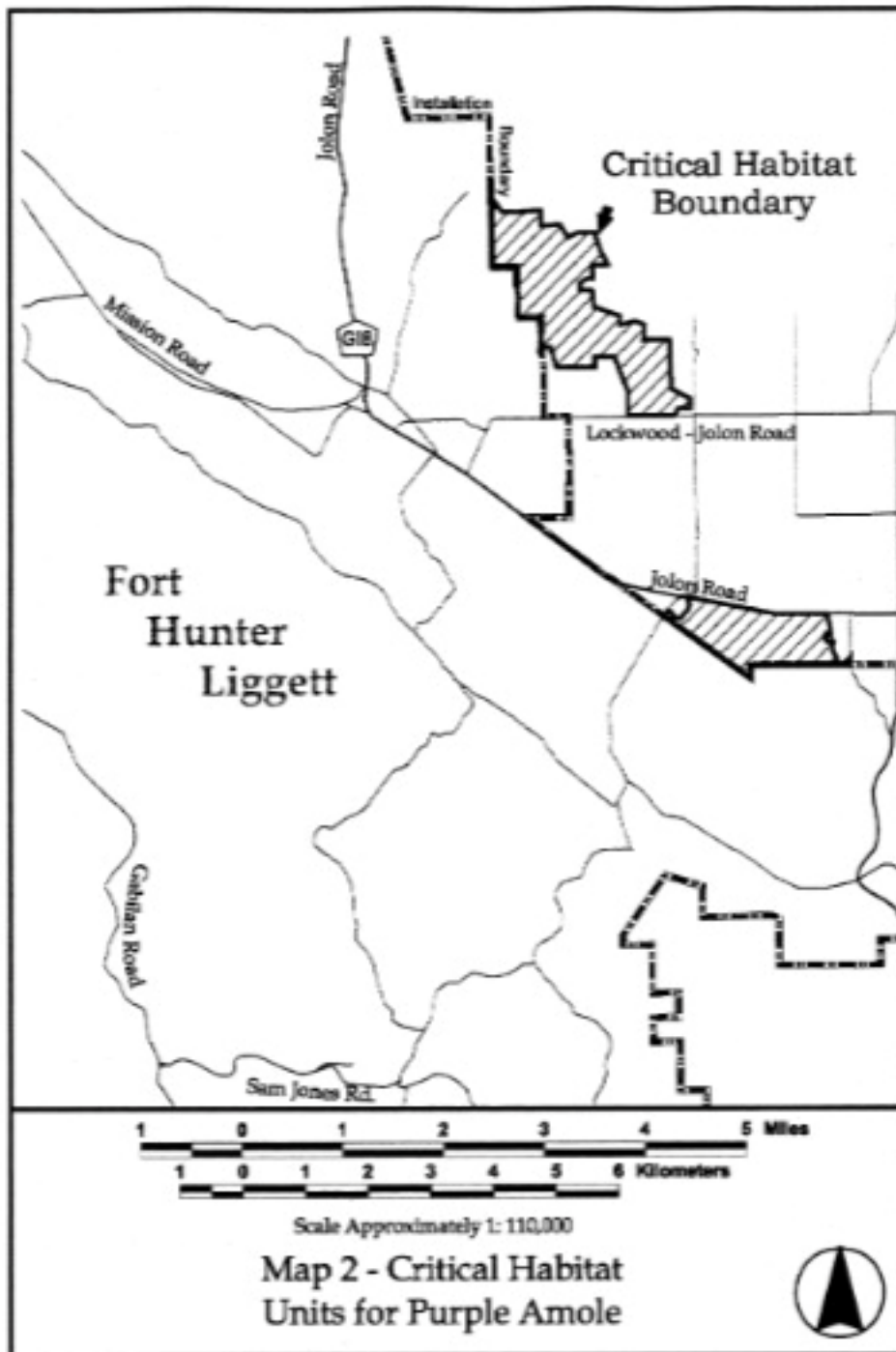
Attachment 8

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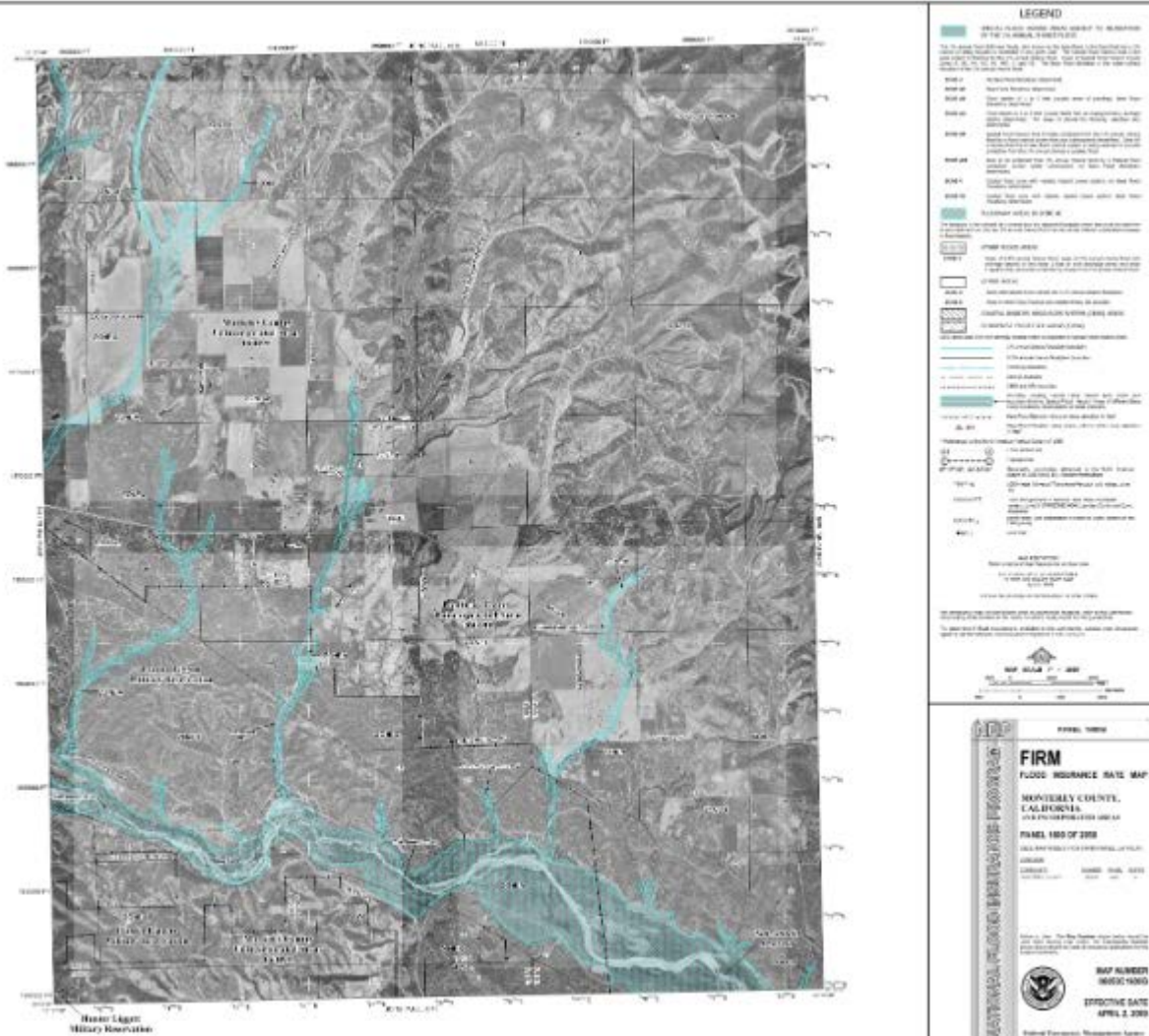
Attachment 9

65440 Federal Register / Vol. 67, No. 206 / Thursday, October 24, 2002 / Rules and Regulations



BILLING CODE 4310-55-C

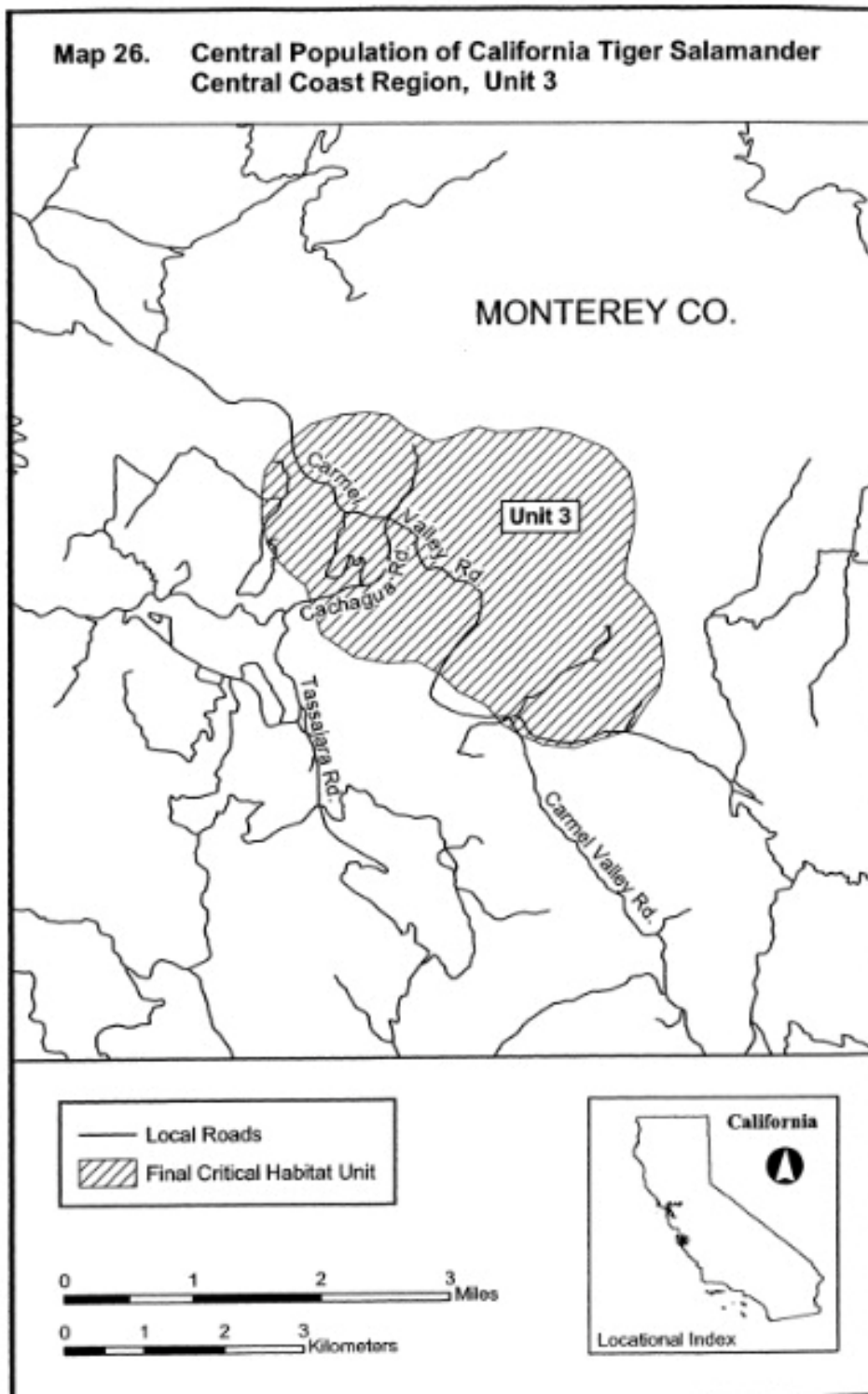
Attachment 10



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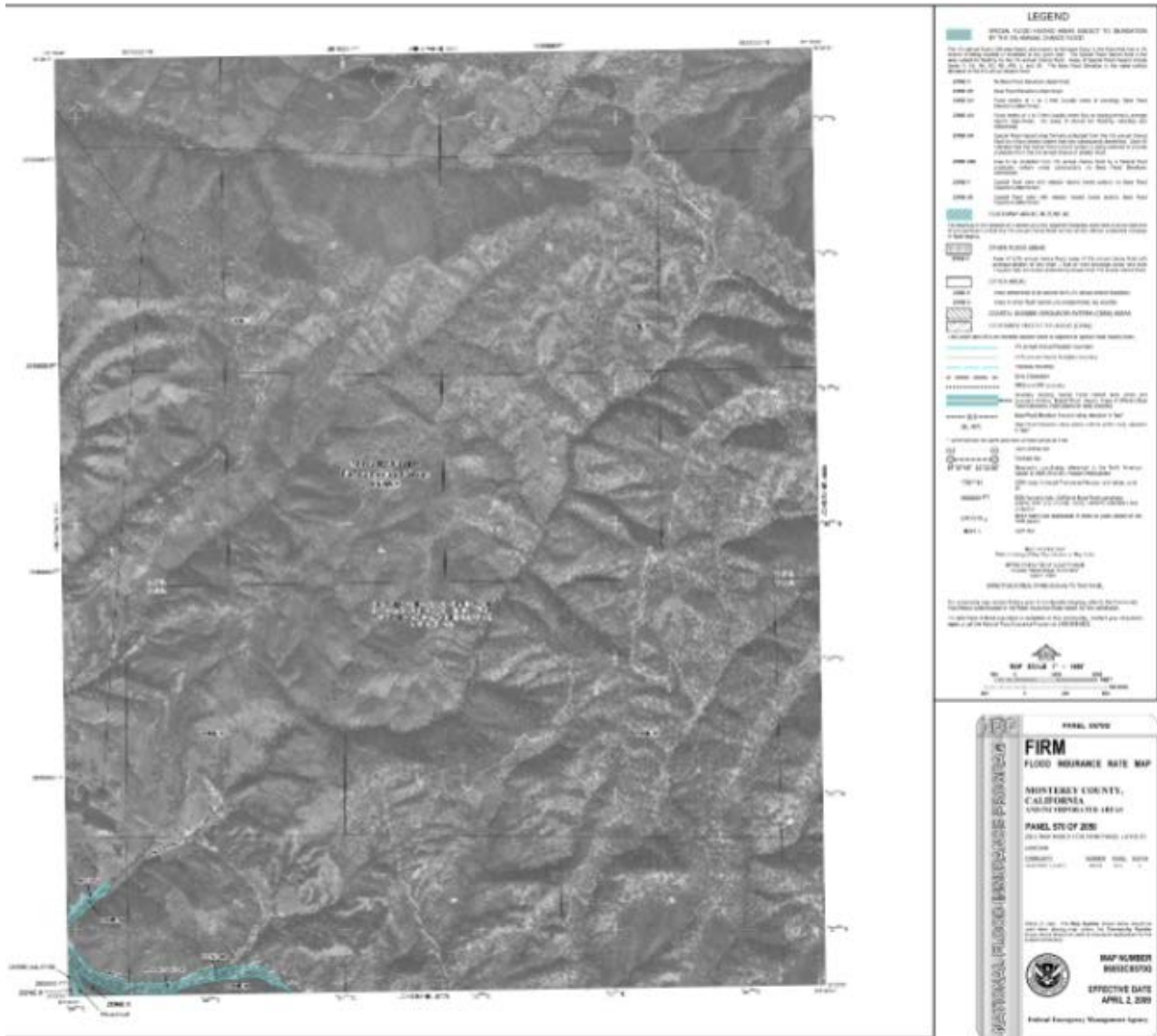
Attachment 11

49456 Federal Register / Vol. 70, No. 162 / Tuesday, August 23, 2005 / Rules and Regulations



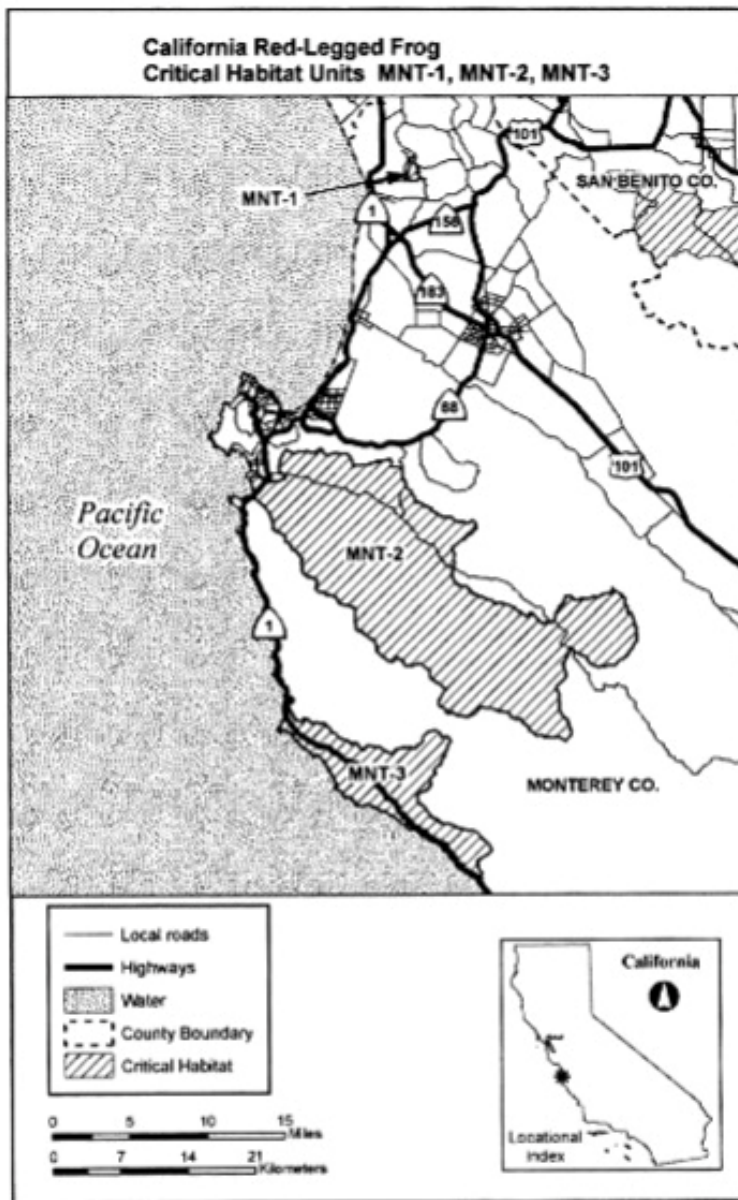
Attachment 12

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Attachment 13

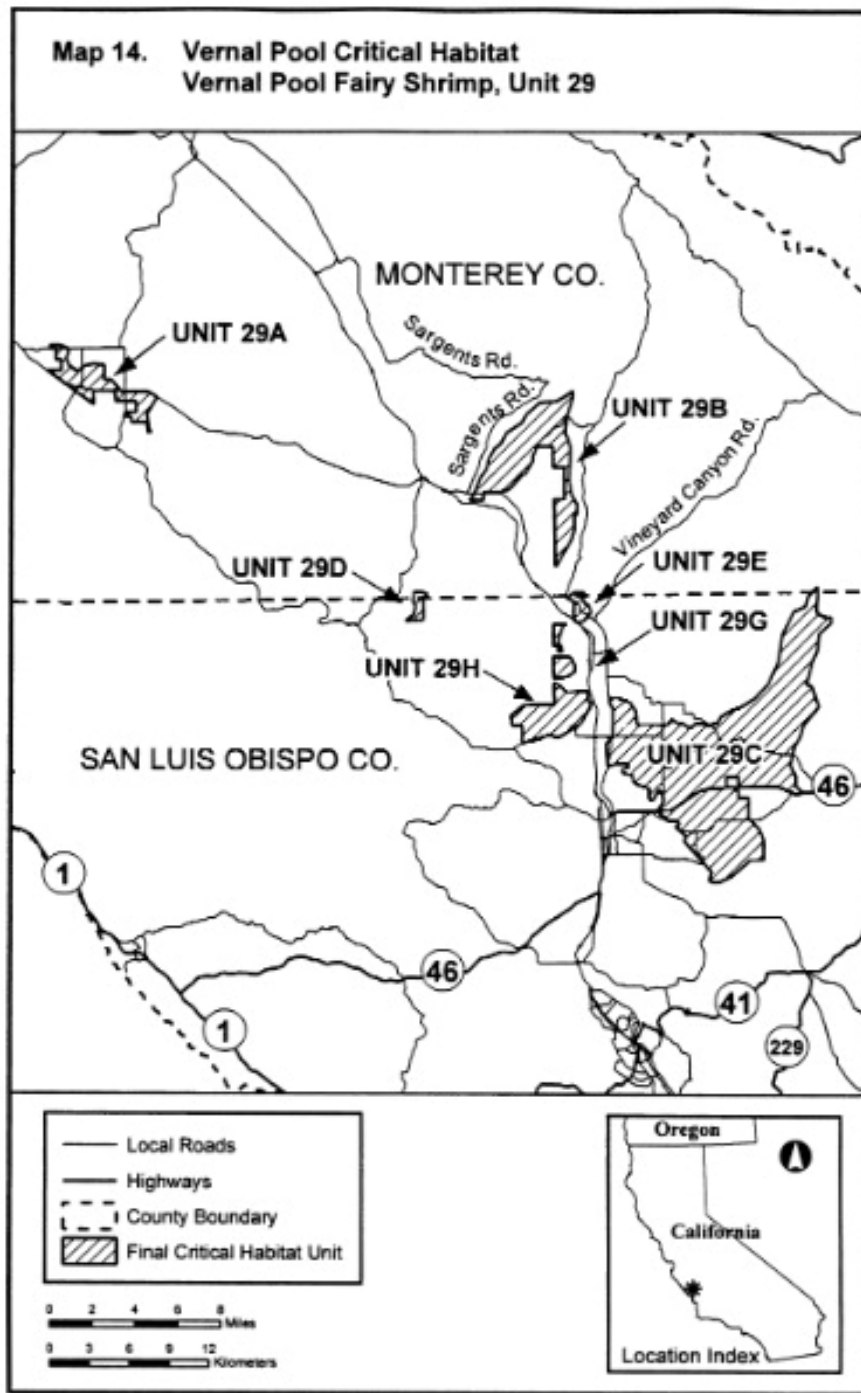
12930 Federal Register / Vol. 75, No. 51 / Wednesday, March 17, 2010 / Rules and Regulations



BILLING CODE 4310-55-C

Attachment 15

7176 Federal Register / Vol. 71, No. 28 / Friday, February 10, 2006 / Rules and Regulations



Attachment 17

