



December 21, 2021

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### Sent Via Certified and Electronic Mail

**Re: Notice of Violations of the Endangered Species Act and National Environmental Policy Act in Relation to the Rio Grande Valley of Texas Levee Project**

Dear Secretaries Mayorkas and Haaland, Chair Mallory, Principal Deputy Director Williams, and Commissioner Magnus:

On behalf of the Center for Biological Diversity, we hereby provide notice, pursuant to Section 11(g)<sup>1</sup> of the Endangered Species Act<sup>2</sup> (“ESA”) that the Department of Homeland Security (“DHS”) and its component agency U.S. Customs and Border Protection (“CBP”) are in violation of Section 7(a)(2) of the ESA<sup>3</sup> for their failure to consult with U.S. Fish and Wildlife Service (“FWS”) in order to ensure that the approximate 13.4 mile Rio Grande Valley of Texas levee project (hereinafter “levee project”) does not jeopardize the continued existence of impacted threatened or endangered species, and is further in violation of Section 9(a)(1)(B) of the ESA for the likely “take” of threatened or endangered species caused by construction and related activities undertaken as part of the levee project. This letter also provides notice of

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<sup>1</sup> 16 U.S.C. § 1540(g).

<sup>2</sup> 16 U.S.C. § 1531 *et seq.*

<sup>3</sup> 16 U.S.C. § 1536(a)(2).

violations of the National Environmental Policy Act (“NEPA”),<sup>4</sup> although such notice is not required under law.

The Center for Biological Diversity (“Center”) is a non-profit, public interest environmental organization headquartered in Tucson, Arizona, with regional offices and numerous additional offices located throughout the United States, as well as in Baja California Sur, Mexico, dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.7 million members and on-line activists.

The Center has long advocated for better incorporation of environmental considerations into DHS border security planning and decisionmaking, and our ESA advocacy has resulted in the protection of numerous threatened and endangered species within the borderlands region, and the designation of hundreds of thousands of acres of their critical habitat.

The threshold for triggering an agency’s duties under the ESA and NEPA is low—if an agency takes an action that may have environmental impacts or that “may affect” a listed species or critical habitat, then NEPA must be conducted and ESA section 7 consultation is required.<sup>5</sup> DHS and CBP, however, have provided no evidence to the public or to the Center that it has initiated or completed the required environmental analyses under either of these laws. In fact, DHS asserts the levee project falls under the previously issued Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) waivers.<sup>6</sup> However, the statutory language of the waiver authority under IIRIRA refers only to the “*construction of the barriers and roads*” and makes no reference to levee and/or flood control purposes.<sup>7</sup> On October 5, 2021, the Center submitted a Freedom of Information Act (“FOIA”) request to the U.S. Army Corps of Engineers (“Corps”) for the Corps’ analysis for the current construction plan for the approximate 13.4 mile levee project. The Corps has acknowledged the request but said they must coordinate with other offices within the Corps and other Agencies, which will result in a delay in processing the request.

## **I. Legal Background**

### **A. The Endangered Species Act**

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>8</sup> Its fundamental purposes are “to provide a means whereby the

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<sup>4</sup> 42 U.S.C. § 4321 *et seq.*

<sup>5</sup> 50 C.F.R. § 402.14(a).

<sup>6</sup> *Border Wall Plan Pursuant to Presidential Proclamation 10142*, U.S. Department of Homeland Security at Sec. II (June 9, 2021), [https://www.dhs.gov/sites/default/files/publications/21\\_0611\\_dhs\\_security\\_border\\_wall\\_plan.pdf](https://www.dhs.gov/sites/default/files/publications/21_0611_dhs_security_border_wall_plan.pdf).

<sup>7</sup> Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1103 note), as amended (emphasis added).

<sup>8</sup> *TVA v. Hill*, 437 U.S. 153, 180 (1978).

ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . . .”<sup>9</sup> To achieve these objectives, the ESA directs the U.S. Fish and Wildlife Service (“FWS”) to determine which species of plants and animals are “threatened” and “endangered” and place them on the endangered species list.<sup>10</sup> An “endangered” or “threatened” species is one “in danger of extinction throughout all or a significant portion of its range,” or “likely to become endangered in the near future throughout all or a significant portion of its range,” respectively.<sup>11</sup>

Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only the species’ continued survival, but its ultimate recovery. One central protection, Section 7(a)(2), mandates that all federal agencies avoid actions that: (1) jeopardize listed species; or (2) destroy or adversely modify designated critical habitat.<sup>12</sup> Federal agency actions include those projects or programs “authorized, funded, or carried out by such agency.”<sup>13</sup> To comply with these Section 7(a)(2) safeguards, the federal agency taking action and FWS take part in a cooperative analysis of potential impacts to listed species and their designated critical habitat known as a consultation process.

First, the agency must obtain “a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area” from FWS.<sup>14</sup> If a species or critical habitat may be present, the agency must prepare a biological assessment to determine whether the proposed action “may affect” or “is not likely to adversely affect” any listed species or critical habitat.<sup>15</sup>

Federal agencies must initiate formal consultation with FWS when their actions “may affect” a listed species or designated critical habitat.<sup>16</sup> The standard for consultation is low: “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.”<sup>17</sup>

Through the formal consultation process, FWS prepares a “biological opinion” as to whether the action jeopardizes the species or destroys or adversely modifies critical habitat and, if so, suggests “reasonable and prudent alternatives.”<sup>18</sup> During the consultation process, both agencies must “use the best scientific and commercial data available.”<sup>19</sup>

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<sup>9</sup> 16 U.S.C. § 1531(b).

<sup>10</sup> *Id.* § 1533.

<sup>11</sup> *Id.* § 1532(6), (20).

<sup>12</sup> *Id.* § 1536(a)(2).

<sup>13</sup> *Id.*; 50 C.F.R. § 402.02.

<sup>14</sup> 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c)–(d).

<sup>15</sup> 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.12(f), 402.14(a), (b)(1).

<sup>16</sup> 50 C.F.R. § 402.14(a).

<sup>17</sup> *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011) (*quoting* 51 Fed. Reg. 19,949).

<sup>18</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>19</sup> *Id.* § 1536(a)(2); 50 C.F.R. §§ 402.14(d), (g)(8).

In addition to duties under Section 7(a)(2), federal agencies are required under ESA Section 7(a)(1) to “utilize their authority for the conservation [*i.e.* recovery] of endangered species and threatened species.”<sup>20</sup> As stated by the Ninth Circuit, agencies have an “affirmative obligation[] to conserve under section 7(a)(1).”<sup>21</sup>

Finally, Section 9 of the ESA prohibits the “taking” of any endangered species.<sup>22</sup> The ESA defines the term “take” broadly to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>23</sup> “Take” includes indirect as well as direct harm and need not be purposeful.<sup>24</sup> The ESA provides a limited exception to the prohibition on take under Section 9 for taking that is in compliance with an incidental take statement (“ITS”).<sup>25</sup> Any take of a listed species that is not in compliance with an ITS violates Section 9.<sup>26</sup>

## **B. National Environmental Policy Act**

NEPA was enacted with the ambitious objectives of “encouraging productive and enjoyable harmony between man and his environment . . . promoting efforts which will prevent or eliminate damage to the environment and biosphere and stimulating the health and welfare of man; and enriching the understanding of the ecological systems and natural resources important to the Nation . . . .”<sup>27</sup> In order to achieve these goals, NEPA contains several “action forcing” procedures, most significantly the mandate to prepare an environmental impact statement on major Federal actions “significantly affecting the quality of the human environment.”<sup>28</sup>

The Supreme Court has found that the preparation of an EIS promotes NEPA’s broad environmental objectives in two primary ways: “It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”<sup>29</sup> The Council on Environmental Quality (“CEQ”) was

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<sup>20</sup> 16 U.S.C. § 1536(a)(1); *see also* 16 U.S.C. § 1531(c)(1) (“It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species.”).

<sup>21</sup> *Pyramid Lake Paiute Tribe v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1416-17 (9th Cir. 1990)

<sup>22</sup> 16 U.S.C. §1538(a).

<sup>23</sup> *Id.* § 1532(19) (emphasis added).

<sup>24</sup> *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 (1995).

<sup>25</sup> *See* 16 U.S.C. § 1536 (o)(2).

<sup>26</sup> *See Arizona Cattle Growers’ Ass’n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1239 (9th Cir. 2001).

<sup>27</sup> 42 U.S.C. § 4321.

<sup>28</sup> *Robertson v. Methow Valley Citizen Council*, 490 U.S. 332, 348 (1989); 42 U.S.C. § 4332 (2)(C).

<sup>29</sup> *Methow Valley Citizens Council*, 490 U.S. at 349.

created to administer NEPA and has promulgated NEPA regulations, which are binding on all federal agencies.<sup>30</sup>

### **C. Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act**

DHS and its component agency CBP are domestic agencies charged with securing the borders and carrying out immigration functions. Within CBP, the U.S. Border Patrol's mission is to prevent unlawful entry across approximately 7,000 miles of Mexican and Canadian international borders and 2,000 miles of coastal borders surrounding Florida and Puerto Rico.

Under section 102 of IIRIRA and amendments to that provision, Congress has periodically directed DHS to build fencing on the southern border.<sup>31</sup> DHS has fulfilled these border fencing mandates.

Enacted in 2005 as an unrelated legislative rider to the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005," the REAL ID Act amended IIRIRA section 102(c) to provide the DHS Secretary with authority "to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious *construction of the barriers and roads* under this section."<sup>32</sup>

In its current form, IIRIRA section 102(c) provides:

**(c) Waiver.—**

**(1) In general.--**Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this Section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

**(2) Federal court review.—**

**(A) In general.--**The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

**(B) Time for filing of complaint.--**Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date

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<sup>30</sup> See 42 U.S.C. §§ 4342, 4344; 40 C.F.R. §§ 1500–1508.

<sup>31</sup> 8 U.S.C. § 1103 note; Secure Fence Act, P.L. 109-367 (enacted Oct. 26, 2016); 2008 Consolidated Appropriations Act, P.L. 110-161, div. E (enacted Dec. 26, 2007).

<sup>32</sup> P.L. 109-13, div. B (emphasis added).

of the action or decision made by the Secretary of Homeland Security.  
A claim shall be barred unless it is filed within the time specified.

**(C) Ability to seek appellate review.**--An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

## **II. Factual Background**

### **A. Past Construction of Border Barriers, Including in Hidalgo County, Texas, and Use of the Waiver Authority Under IIRIRA Section 102(c)**

On January 25, 2017, President Donald J. Trump issued Executive Order No. 13767, entitled “Border Security and Immigration Enforcement Improvement” (“Executive Order”), which directed DHS to construct a “secure, contiguous, and impassable physical barrier” along the entirety of the nearly 2,000 mile-long U.S.-Mexico border. After the Executive Order, the DHS Secretary issued numerous waivers.

In 2018 and 2019, Secretary Kirstjen M. Nielsen and Acting Secretary Kevin K. McAleenan issued four Determinations<sup>33</sup> in the Federal Register purporting to invoke IIRIRA Section 102(c) which purports to waive the application of NEPA, the ESA and numerous other laws for the proposed construction of the Rio Grande Valley Sector Project, which would result in approximately 24.6 miles of new border wall construction in Cameron and Hidalgo Counties, in south Texas.

The new border wall construction, “where no barriers currently exist,”<sup>34</sup> consists of 18-foot tall bollard fencing atop vertical concrete river levees, bounded by a 150-foot-wide “enforcement zone” on the river facing side of the barrier that will be cleared of vegetation. The wall will also be accompanied by road construction for law enforcement and private property owners, and installation of 24-7 stadium-style, high-intensity lighting, cameras, and sensors.

### **B. Current Status of Construction of Border Barriers in Rio Grande Valley Along the Southern Border**

On January 20, 2021, President Joseph R. Biden issued Proclamation 10142, entitled “Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction” (“Proclamation”), which directed the Secretary of Defense and the Secretary of Homeland Security to “pause work on each

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<sup>33</sup> 83 Fed. Reg. 51,472 (Oct. 11, 2018); 84 Fed. Reg. 45,787 (Aug. 30, 2019); 84 Fed. Reg. 52,118 (Oct. 1, 2019); and 84 Fed. Reg. 58,400 (Oct. 31, 2019).

<sup>34</sup> *New Levee Wall System Panel Installation Begins in Rio Grande Valley*, CBP (Nov. 1, 2019), <https://www.cbp.gov/newsroom/national-media-release/new-levee-wall-system-panel-installation-begins-rio-grande-valley>.

construction project on the southern border wall.”<sup>35</sup> The Proclamation allows an exception to the pause “for urgent measures needed to avert immediate physical dangers.”<sup>36</sup>

On April 30, 2021, DHS announced steps to repair the holes in the Rio Grande Valley’s Flood Barrier System, which occurred during the Trump administration’s efforts to build border levee wall.<sup>37</sup> DHS stated it would “quickly repair” the flood barrier system and noted “[t]his work will not involve expanding the border barrier.”<sup>38</sup>

On May 12, 2021, the U.S. Army Corps of Engineers stated:

In support of CBP’s border infrastructure program, USACE has resumed DHS-funded design & construction support on approx. 13.4 miles of levee in the Rio Grande Valley that were partially excavated or at various levels of construction when work on the wall was paused for review.<sup>39</sup>

To be clear, wall construction remains paused to extent permitted by law. Per DHS, we’ve started critical work to repair the Rio Grande Valley’s flood levee, which was excavated to make way for border wall. This remediation work will not involve expanding border barrier.<sup>40</sup>

On June 9, 2021, DHS stated “while remaining consistent with President Biden’s commitment that ‘no more American taxpayer dollars [should] be diverted to construct a border wall’”<sup>41</sup> that there was an exception to the pause including in the Rio Grande Valley of Texas where it will “construct and/or remediate approximately 13.4 miles of compromised levee.”<sup>42</sup> DHS noted it would not engage in any environmental review as it was relying on the previously issued waivers under IIRIRA<sup>43</sup> and the levee work would be funded from the FY 2021 appropriations for border barrier funding.<sup>44</sup>

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<sup>35</sup> 86 Fed. Reg. 7,225, Sec. 1(a)(i) (Jan. 20, 2021).

<sup>36</sup> *Id.* at Sec. 1(b).

<sup>37</sup> *DHS Announces Steps to Protect Border Communities from Wall Construction*, DHS (Apr. 30, 2021), <https://www.dhs.gov/news/2021/04/30/dhs-announces-steps-protect-border-communities-wall-construction>.

<sup>38</sup> *Id.*

<sup>39</sup> U.S. Army Corps of Engineers Headquarters (@USACEHQ), Twitter (May 12, 2021, 7:21 PM), <https://twitter.com/USACEHQ/status/1392620915687571456>.

<sup>40</sup> U.S. Army Corps of Engineers Headquarters (@USACEHQ), Twitter (May 12, 2021, 8:24 PM), <https://twitter.com/USACEHQ/status/1392636847612911617>.

<sup>41</sup> *Border Wall Plan Pursuant to Presidential Proclamation 10142*, U.S. Department of Homeland Security at Sec. I (June 9, 2021), [https://www.dhs.gov/sites/default/files/publications/21\\_0611\\_dhs\\_security\\_border\\_wall\\_plan.pdf](https://www.dhs.gov/sites/default/files/publications/21_0611_dhs_security_border_wall_plan.pdf) (emphasis added).

<sup>42</sup> *Id.* at Sec. II.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at Sec. IV.

On July 16, 2021, in an email to Border Report, a spokesperson for the U.S. Army Corps of Engineers said:

Activities shown in the video are of 6-foot guardrail being installed to support levee repairs. The guardrail and associated gates sit atop the reinforced levee system and is part of DHS' plans announced April 30 to reduce flooding risk to border communities in the Rio Grande Valley near McAllen, Texas.<sup>45</sup>

On July 27, 2021, DHS announced it would address “serious safety risks and environmental restoration issues” in the Rio Grande Valley Sector.<sup>46</sup> It also stated “[t]hese projects do not involve building new border barriers.”<sup>47</sup>

On August 25, 2021, in communication with the Border Report, a CBP Public Affairs Officer Thomas Gresback stated: “[t]his remediation work does not involve expanding the border barrier.”<sup>48</sup>

On September 3, 2021, The Texas Tribune reported that the U.S. Army Corps of Engineers said the construction “is part of [U.S. Department of Homeland Security] plans announced April 30 to reduce flooding risk to border communities in the Rio Grande Valley near McAllen, Texas. The levee repair work does not involve expanding the border barrier.”<sup>49</sup>

On October 8, 2021, DHS announced it “intends to cancel . . . all border barrier contracts located in the Rio Grande Valley Sector” and that environmental planning “activities will not involve any construction of new border barrier.”<sup>50</sup> But DHS concluded by also stating “[t]his announcement has no impact on previously approved remediation projects necessary to address

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<sup>45</sup> Sandra Sanchez, *Environmentalists ‘disappointed’ with ongoing activity at border wall sites in South Texas*, Border Report (Aug. 25, 2021), <https://www.borderreport.com/hot-topics/the-border-wall/environmentalists-disappointed-with-ongoing-activity-at-border-wall-sites-in-south-texas/>.

<sup>46</sup> *DHS to Address Life, Safety, Environmental, and Operational Considerations for Specific Border Barrier Projects*, DHS (July 27, 2021), <https://www.dhs.gov/news/2021/07/27/dhs-address-life-safety-environmental-and-operational-considerations-specific-border>.

<sup>47</sup> *Id.*

<sup>48</sup> Sandra Sanchez, *Environmentalists ‘disappointed’ with ongoing activity at border wall sites in South Texas*, Border Report (Aug. 25, 2021), <https://www.borderreport.com/hot-topics/the-border-wall/environmentalists-disappointed-with-ongoing-activity-at-border-wall-sites-in-south-texas/>.

<sup>49</sup> Uriel J. García, *The federal government calls it a levee. South Texas immigration advocates and environmentalists see a border wall.*, The Texas Tribune (Sept. 3, 2021), <https://www.texastribune.org/2021/09/03/texas-border-wall-levee/>.

<sup>50</sup> *DHS to Terminate Border Barrier Contracts in Laredo and Rio Grande Valley*, DHS (Oct. 8, 2021), <https://www.dhs.gov/news/2021/10/08/dhs-terminate-border-barrier-contracts-laredo-and-rio-grande-valley>.

life, safety, and environmental restoration issues in the Rio Grande Valley, San Diego, and El Centro Sectors in accordance with the Department's plan."<sup>51</sup>

### **C. Environmental Setting of the Presumed Border Levee Project Location**

The precise location and sections for the current construction plan for the approximate 13.4 mile levee project remains undisclosed to the public. But press articles depict the current construction as replacing the existing International Boundary and Water Commission ("IBWC") flood control levees along the Rio Grande in Hidalgo County.<sup>52</sup>

In several areas, the levee project and associated construction will occur within the Lower Rio Grande Valley National Wildlife Refuge ("Refuge") without compliance with the National Wildlife Refuge System Administration and other laws. Established in 1979 in an effort to preserve the valley's rapidly disappearing native habitat, the Refuge follows the Rio Grande upstream from the Gulf of Mexico for 275 river miles. The Refuge is currently comprised of more than 100 parcels of valley habitat totaling approximately 100,000 acres, connecting otherwise isolated state parks, private conservation properties, federal lands, and other land ownerships. Known as the "Wildlife Corridor," the Refuge is essential to conserving the rich biodiversity of the Rio Grande Valley, benefiting unique riparian plant communities, rare migratory birds and imperiled species such as the endangered Ocelot. The levee project construction will bisect and fragment the Refuge, effectively sealing off vital habitat from the rest of the United States and causing extensive damage to the wildlife corridor along the river.

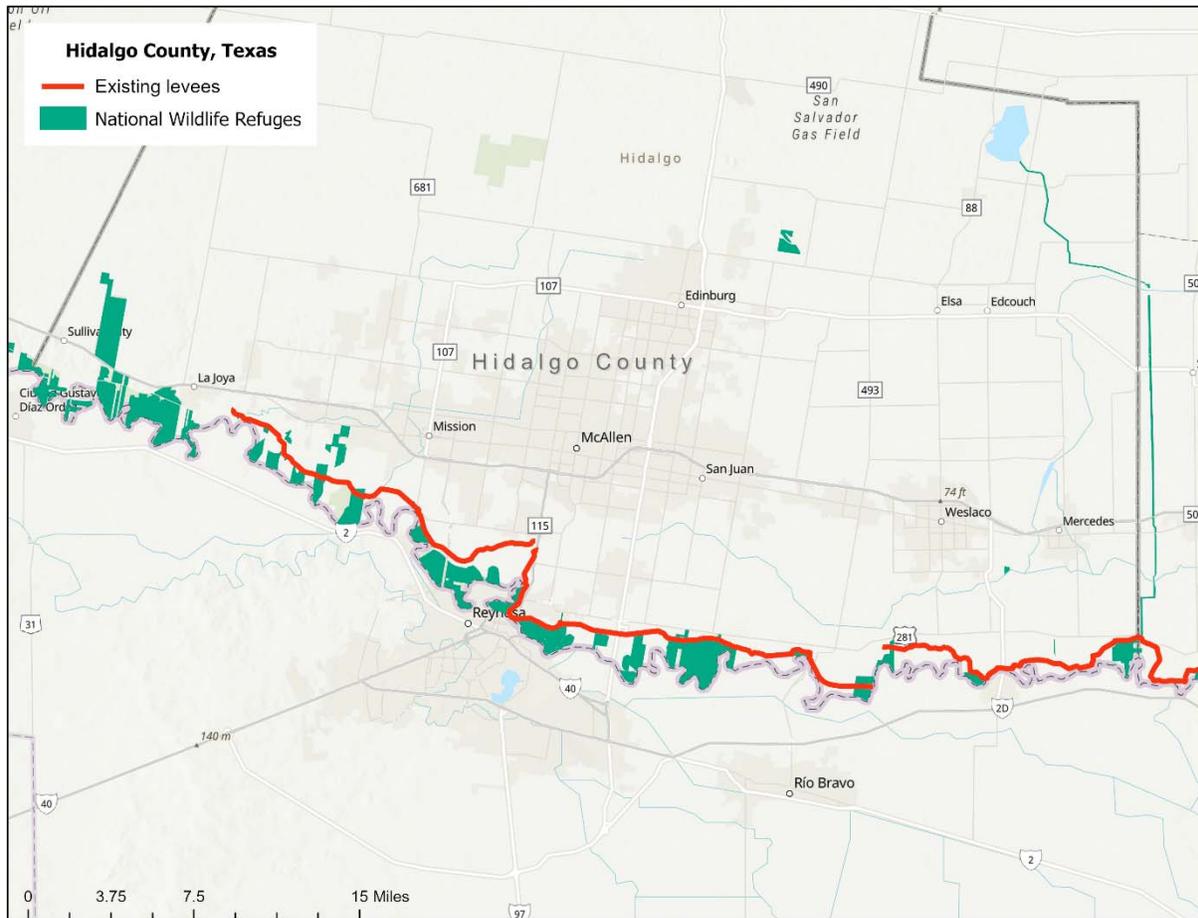
Further, the construction of the levee project, including the associated construction or installation of roads, gates, bridges, and staging areas, and excavation and site preparation, will directly destroy thousands of acres of native vegetation, causing the permanent loss of wildlife and their habitat. Under the waivers, DHS has not and will not properly consider these and myriad other negative environmental impacts of the projects, including whether there are reasonable alternatives that might avoid or mitigate such impacts.

In addition to the direct destruction of wildlife habitat, the approximate 13.4 mile levee project will block migration routes and cross-border movement of the many species that rely on habitat on both sides of the U.S.-Mexico border, preventing the genetic exchange necessary to maintain or restore healthy wildlife populations, including for endangered species such as the Ocelot. The levee project will also exacerbate flooding by altering water flows and related hydrologic processes, trapping wildlife behind the new levee to drown or starve during flood events.

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<sup>51</sup> *Id.*

<sup>52</sup> *See supra* notes 48 and 49.



**Map 1: Flood Control Levees and Federal Lands**

#### **D. The Endangered Ocelot at the Presumed Levee Project Location**

As depicted in the preceding map, the presumed levee project is within or in close proximity to known territory of the endangered Ocelot (*Leopardus pardalis*), including the Lower Rio Grande Valley National Wildlife Refuge (“Refuge”). FWS listed the Ocelot in 1982, due to direct and indirect human impacts including habitat loss and fragmentation.<sup>53</sup> At listing, it was estimated that only 12 to 60 animals exist in the Texas Rio Grande region.<sup>54</sup> In 2012, the FWS stated the Ocelot was a “management priority” for the Refuge with an estimate of fewer than 50 Ocelots left in the U.S., which all reside in South Texas.<sup>55</sup> Habitat restoration, including creating wildlife corridors, is a priority for the Refuge.<sup>56</sup>

<sup>53</sup> 47 Fed. Reg. 31,671 (July 21, 1982).

<sup>54</sup> *Id.*

<sup>55</sup> *Ocelots*, FWS (June 22, 2012),

[https://www.fws.gov/refuge/lower\\_rio\\_grande\\_valley/ocelots.html](https://www.fws.gov/refuge/lower_rio_grande_valley/ocelots.html).

<sup>56</sup> *Id.*

The levee project is currently being constructed through at least one and likely many tracks of the Refuge. The levee project and associated infrastructure threatens the Ocelot. Development of the levee project could have direct impacts to the Ocelot, *i.e.*, destruction of restored habitat and fragmentation of wildlife corridors.

### **III. DHS and CBP Violations of the Endangered Species Act and the National Environmental Policy Act**

DHS stated it would not engage in any environmental review for the levee project as it is relying on the previously issued waivers under IIRIRA<sup>57</sup> and is using FY 2021 appropriations for border barrier funding.<sup>58</sup> But starting in April 30, 2021, DHS and the Corps have repeatedly stated the levee project does not involve building new border barriers and that the levee project is simply to reduce flooding risk to border communities caused by border wall construction conducted under IIRIRA waivers.<sup>59</sup> However, the statutory language of the waiver authority under IIRIRA refers only to the “*construction of the barriers and roads*” and makes no reference to levee and/or flood control purposes.<sup>60</sup> DHS cannot simultaneously rely on the purported IIRIRA waiver authority to skirt compliance with environmental review and then state it is not constructing “barriers and roads” as it is simply constructing / repairing levees to reduce flood risk.

Therefore, the current levee project construction is a federal action subject to NEPA’s requirements. As described by DHS, it is “construct[ing] and/or remediat[ing] approximately 13.4 miles of compromised levee.”<sup>61</sup> While DHS has not disclosed the precise location and sections, the current levee project construction appears to be along the existing IBWC flood control levees. The IBWC flood control levees are along the Rio Grande in Hidalgo County,<sup>62</sup> which also runs through Refuge tracks.

The levee project is being constructed in an area with high environmental and natural resources values, including through the Refuge, with documented occurrences of the endangered ocelot, and potentially the destruction of restored habitat and fragmentation of wildlife corridors. In addition, the NEPA process would shed further light on numerous other environmental issues not addressed in this letter, including potential hydrological and other impacts, cultural resource impacts, and impacts on non-listed sensitive and rare species.

Even in the event that the agencies have completed such analysis, DHS and CBP are failing to provide such records to the public, in a timely and meaningful manner. The agencies’ lack of environmental analysis and/or refusal to provide public notice and opportunity to comment on that analysis, undermines NEPA’s specific requirements, as well as its overall dual purposes of

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<sup>57</sup> *Border Wall Plan Pursuant to Presidential Proclamation 10142*, *supra* note 43.

<sup>58</sup> *Id.* at Sec. IV.

<sup>59</sup> *See supra* notes 37-49.

<sup>60</sup> Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1103 note), as amended (emphasis added).

<sup>61</sup> *Border Wall Plan Pursuant to Presidential Proclamation 10142*, *supra* note 42.

<sup>62</sup> *See supra* notes 48 and 49.

better informing agency decisionmaking so that potential environmental impacts can be avoided or mitigated, and of conducting a public and transparent analysis of the environmental impacts of governmental action.

Similarly, consultation under ESA Section 7 is required whenever a discretionary agency action “may affect” any listed species or its critical habitat.<sup>63</sup> ESA implementing regulations define “action” as “all activities or programs of any kind authorized, funded, or carried out . . . by Federal agencies.”<sup>64</sup> As detailed in this letter, the DHS and CBP levee project will potentially directly, indirectly, and cumulatively impact the endangered Ocelot. Despite this fact, DHS and CBP have apparently failed to initiate or complete ESA section 7 (a)(2) consultation with FWS in order to ensure that the ongoing implementation of the levee project does not jeopardize the continued existence of the Ocelot. In addition, DHS and CBP have failed to take any affirmative action to conserve the endangered Ocelot that may be impacted by the project. Accordingly, DHS and CBP are also violating Section 7 (a)(1) of the ESA.

Finally, DHS and CBP have failed to conduct surveys or other investigations into endangered species presence and by these failures may needlessly result in impacts to critically imperiled species that could otherwise be avoided or mitigated. These failures may also result in the direct take of listed species, in violation of section 9 of the ESA.

#### **IV. CEQ’s Proposed NEPA Regulations Revisions and Alternatives Analysis**

On October 6, 2021, the Council on Environmental Quality (“CEQ”) announced the need to “restore community safeguards during environmental reviews” for Federal projects and decisions.<sup>65</sup> In particular, CEQ stated the importance to “[r]estore the full authority of agencies to work with communities to develop and analyze alternative approaches that could minimize environmental and public health costs”<sup>66</sup> and the proposed rule includes revising the definition of “reasonable alternatives.”<sup>67</sup>

However, the levee project currently being constructed by the Biden administration is nearly identical to the portions of border levee wall constructed under the Trump administration. The only apparent difference between the current levee project and the Trump administration’s border levee wall is that the 18-foot tall bollard fencing atop vertical concrete river levees will now use 6-foot tall bollard fencing. The current levee project will still be bounded by a 150-foot-wide “enforcement zone” on the river facing side of the barrier that will be cleared of vegetation

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<sup>63</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

<sup>64</sup> 50 C.F.R. § 402.02.

<sup>65</sup> *CEQ Proposes to Restore Basic Community Safeguards during Federal Environmental Reviews*, CEQ (Oct. 6, 2021), <https://www.whitehouse.gov/ceq/news-updates/2021/10/06/ceq-proposes-to-restore-basic-community-safeguards-during-federal-environmental-reviews/>.

<sup>66</sup> *Id.*

<sup>67</sup> National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757 at 55,769 (Oct. 7, 2021); *see also* the November 22, 2021, comments on the 2021 proposed revisions signed by 97 organizations for discussion on “reasonable alternatives,” *available at* <https://drive.google.com/file/d/1k6VmZK47a4xiiP7-VyVm5jVb0RNQ2K9K/view>.

and will also be accompanied by road construction for law enforcement and private property owners, and installation of 24-7 stadium-style, high-intensity lighting, cameras, and sensors.

While DHS, CBP, and the Corps have provided no information to the public on the purportedly impaired levees, given the stance of the Biden administration on NEPA and the need for “agencies to work with communities to develop and analyze alternative approaches that could minimize environmental and public health costs,”<sup>68</sup> DHS, CBP, and the Corps should be considering alternatives under NEPA, such as repairing the existing FEMA approved earthen levee with similar earthen levees. DHS’s use of the purported IIRIRA waiver authority to try to skirt compliance with environmental review of the levee project illustrates the administration disregard to act in according to the letter and spirit of NEPA.

## V. Conclusion

Thank you for your attention to the allegations contained in this notice letter. Should DHS and CBP fail to remedy the ESA violations of law within 60 days, the Center for Biological Diversity intends to pursue this matter in Federal District Court. As prior notice is not required for NEPA violations, the Center for Biological Diversity may immediately pursue relief for those violations at any time. Please contact me at 202-849-8398 should you wish to discuss this notice letter in further detail.

Sincerely,

/s/ Paulo A. Lopes

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<sup>68</sup> *CEQ Proposes to Restore Basic Community Safeguards during Federal Environmental Reviews*, *supra* note 65.