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20 **UNITED STATES DISTRICT COURT**
21 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

22 Center for Biological Diversity, a non-
23 profit organization;

24 Plaintiff,

25 v.

26 U.S. Department of Homeland
27 Security; and U.S. Customs and
28 Border Protection,

Defendants.

Case No. 3:17-cv-01215-GPC-WVG

**First Amended Complaint for
Declaratory and Injunctive Relief**

1 **INTRODUCTION**

2 1. In this action for declaratory and injunctive relief, Plaintiff Center for
3 Biological Diversity (“the Center”)—an environmental conservation organization
4 that works to protect native wildlife species and their habitats—challenges the
5 failure of the U.S. Department of Homeland Security (“DHS”) and U.S. Customs
6 and Border Protection (“CBP”) (collectively, “the Agencies” or “Federal
7 Defendants”) to comply with the requirements of the National Environmental
8 Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the Freedom of Information
9 Act (“FOIA”), 5 U.S.C. § 552, in relation to border wall construction projects in
10 San Diego County, including: (1) the border wall prototype project, which would
11 be constructed in a gap between two existing border wall segments, and be the
12 first new segment of border wall built in California in several years (“border wall
13 prototype project”); and (2) the replacement of the westernmost portion of the
14 existing border wall (14 miles of existing primary and secondary border fencing
15 running from the Pacific Ocean to eastern edge of Otay Mesa), as well as 2 miles
16 of existing border wall in the U.S. Border Patrol (“USBP”) El Centro Sector,
17 Imperial County (collectively, “border wall replacement project”).

18 2. The border wall prototype project and border wall replacement
19 project are each federal actions that will impact the environment and are thus
20 subject to NEPA. According to recent public statements by agency staff,
21 including June 13, 2017 testimony by Acting USBP Chief Carla Provost before
22 the House Appropriations Committee, the Agencies plan to complete the border
23 wall prototype project by late summer 2017, and to begin construction on the
24 border wall replacement project by spring 2018.

25 3. Federal Defendants have not provided the Center or the general
26 public with notice or opportunity to comment under NEPA for the border wall
27 prototype project or border wall replacement project. According to the Center’s
28

1 information and belief, the Agencies have not prepared *any* NEPA analysis for
2 either the border wall prototype project or the border wall replacement project.

3 4. Although NEPA does not require a Plaintiff to provide federal
4 agencies with notice of alleged violations prior to filing suit, on June 1, 2017, the
5 Center wrote to the Agencies to provide notice of NEPA violations in relation to
6 the border wall prototype project. The Agencies have not acknowledged or
7 responded to this Notice.

8 5. In light of the Agencies' failure and/or refusal to provide the public
9 with any information regarding their compliance with NEPA and other
10 environmental laws in relation to the border wall prototype project, on May 2,
11 2017, the Center submitted two requests for public records pursuant to FOIA, one
12 to DHS and one to CBP, seeking records pertaining to the Agencies' NEPA
13 environmental analysis, as well as compliance with other environmental laws, for
14 the border wall prototype project.

15 6. Defendants have violated FOIA, or alternatively, the Administrative
16 Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), in relation to the Center's May 2,
17 2017 FOIA requests for records related to the Agencies' compliance with NEPA
18 and other laws in relation to the border wall prototype project. Although the
19 Agencies have acknowledged their receipt of the FOIA requests, they have failed
20 to provide any responsive records or state when they might do so. Accordingly,
21 the Agencies are unlawfully withholding the records by failing to search for and
22 provide all responsive records

23 7. Finally, on June 1, 2017 the Center also provided the Agencies with
24 formal notice of violations of the Endangered Species Act ("ESA"), 16 U.S.C. §
25 1531 *et seq.*, for their failure to consult with U.S. Fish and Wildlife Service
26 ("FWS") in order to ensure that the border wall prototype project does not
27 jeopardize the continued existence of threatened or endangered species, or result
28 in the destruction or adverse modification of their critical habitat. Similarly, on

1 July 7, 2017, the Center provided the Agencies with formal notice of ESA
2 violations for their failure to consult with FWS in relation to the border wall
3 replacement project. In the event that the Agencies fail to remedy these failures
4 within 60 days, the Center intends to move for leave to file a second amended
5 complaint that incorporates the alleged ESA violations.

6 **JURISDICTION**

7 8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§
8 1331 and 1346, 5 U.S.C. §§ 701 to 706, and 5 U.S.C. § 552(a)(4)(B). The causes
9 of action arise under the laws of the United States, including NEPA, FOIA, and
10 the APA, and the implementing regulations established pursuant to these federal
11 statutes. The relief requested is authorized pursuant to 28 U.S.C. §§ 1651 and
12 2201 to 2202, and 5 U.S.C. §§ 705 and 706. An actual and present controversy
13 exists between the parties within the meaning of the Declaratory Judgment Act, 28
14 U.S.C. § 2201.

15 **VENUE**

16 9. Venue is proper in this judicial district pursuant to 28 U.S.C. §
17 1391(b) and (e), as a substantial part of the events or omission giving rise to the
18 claims has occurred in this district due to decisions made by Federal Defendants,
19 and/or failure to act by Federal Defendants. In addition, venue is proper in this
20 judicial district pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for
21 FOIA cases in this district, because a portion of the responsive records may be
22 found in this district.

23 **PARTIES**

24 10. Plaintiff Center for Biological Diversity is a non-profit environmental
25 organization dedicated to the protection of native species and their habitats
26 through science, policy, and environmental law. The Center has more than 1.3
27 million members and on-line activists. The Center is headquartered in Tucson,
28 Arizona, and has offices in Los Angeles and Oakland in California, as well as

1 numerous additional regional offices located throughout the country, and an
2 international office in Baja California Sur, Mexico.

3 11. The Center's members and staff live in or regularly visit the U.S.-
4 Mexico borderlands region in San Diego County, as well as the borderlands
5 region of Baja California Norte, Mexico. The Center's members and staff
6 regularly use the myriad federal, state, and local protected lands along the U.S.-
7 Mexico border in San Diego County, including areas impacted by and/or adjacent
8 to the location of the border wall prototype project and the border wall
9 replacement project, for hiking, camping, viewing and studying wildlife,
10 photography, and other vocational and recreational activities. The Center's
11 members and staff derive recreational, spiritual, professional, scientific,
12 educational, and aesthetic benefit from their activities in these areas. The Center
13 has a long history of environmental advocacy within the borderlands region and
14 San Diego County borderlands region generally, and in relation to border security
15 enforcement in particular. The Center's members and staff have specific
16 intentions to continue to use and enjoy these areas frequently and on an ongoing
17 basis in the future.

18 12. The Center has an established track record of active participation in
19 the oversight of government activities and decision-making as well as consistent
20 practice of informing, educating, and counseling the public regarding
21 environmental issues, policies, and laws relating to environmental issues. The
22 Center has displayed its ability to disseminate information obtained pursuant to
23 FOIA to the general public through far-reaching media, including news media, the
24 Center's website and newsletters, and social media. The Center and its members
25 are harmed by Federal Defendants' FOIA violations as they preclude the Center
26 from gaining a comprehensive understanding of the activities, decisions, priorities,
27 and communications related to the border wall prototype project.

1 13. The Center and its members are harmed by the Agencies’ violations
2 of FOIA, or alternatively the APA, as well as its violations of NEPA, pertaining to
3 public notice and participation, as such violations will result in harm to the Center
4 and its members’ interests, and will preclude the Center and its members from
5 gaining a full understanding of the activities, decisions, priorities, and
6 communications related to the border wall prototype project and border wall
7 replacement project.

8 14. Defendant U.S. Department of Homeland Security (“DHS”) is an
9 agency within the executive branch of the U.S. government. DHS is responsible
10 for ensuring border security along the U.S.-Mexico border consistent with
11 applicable legal requirements, including NEPA and the ESA. In addition, DHS is
12 in possession and control of the records that the Center seeks under FOIA, and as
13 such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

14 15. Defendant U.S. Customs and Border Protection (“CBP”) is an agency
15 within DHS of the executive branch of the U.S. government. CBP is responsible
16 for ensuring border security along the U.S.-Mexico border consistent with
17 applicable legal requirements, including NEPA and the ESA. In addition, CBP is
18 in possession and control of the records that the Center seeks under FOIA, and as
19 such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

20 **LEGAL BACKGROUND**

21 **A. NEPA**

22 16. NEPA is the “basic national charter for protection of the
23 environment.” 40 C.F.R. § 1500.1(a)(1978). It was enacted with the ambitious
24 objectives of “encouraging productive and enjoyable harmony between man and
25 his environment . . . promoting efforts which will prevent or eliminate damage to
26 the environment and biosphere and stimulating the health and welfare of man; and
27 enriching the understanding of the ecological systems and natural resources
28 important to the Nation” 42 U.S.C. § 4321.

1 17. In order to achieve these goals, NEPA contains several “action
2 forcing” procedures, most significantly the mandate to prepare an environmental
3 impact statement (“EIS”) on major Federal actions “significantly affecting the
4 quality of the human environment.” *Robertson v. Methow Valley Citizen Council*,
5 490 U.S. 332, 348 (1989); 42 U.S.C. § 4332(2)(C).

6 18. The Council on Environmental Quality (“CEQ”) was created to
7 administer NEPA and has promulgated NEPA regulations, which are binding on
8 all federal agencies. *See* 42 U.S.C. §§ 4342, 4344; 40 C.F.R. §§ 1500–1508
9 (1978).

10 19. When a federal agency is not certain whether an EIS is required, it
11 must prepare a briefer document, known as an environmental assessment (“EA”).
12 40 C.F.R. § 1508.9 (1978). If the agency concludes in an EA that a project may
13 have significant impacts on the environment, then an EIS must be prepared. 40
14 C.F.R. § 1501.4 (1978). If an EA concludes that there are no significant impacts
15 to the environment, the federal agency must provide a detailed statement of
16 reasons why the project’s impacts are insignificant and issue a Finding of No
17 Significant Impact (“FONSI”). 40 C.F.R. § 1508.13 (1978).

18 20. The Supreme Court has found that the preparation and public
19 circulation of EISs and EAs promotes NEPA’s broad environmental objectives in
20 two primary ways: “It ensures that the agency, in reaching its decision, will have
21 available, and will carefully consider, detailed information concerning significant
22 environmental impacts; it also guarantees that the relevant information will be
23 made available to the larger audience that may also play a role in both the
24 decision-making process and the implementation of that decision.” *Methow*
25 *Valley Citizens Council*, 490 U.S. at 349.

26 21. NEPA requires that “agencies shall integrate the NEPA process with
27 other planning at the earliest possible time to insure that planning and decisions
28 reflect environmental values, to avoid delays later in the process, and to head off

1 potential conflicts.” 40 C.F.R. § 1501.2 (1978); *id.* § 1502.5 (1978) (“An agency
2 shall commence preparation of an [EIS] as close as possible to the time the agency
3 is developing or is presented with a proposal . . .”). The Ninth Circuit has
4 interpreted these regulations as requiring the NEPA process to be conducted
5 “before any irreversible and irretrievable commitment of resources.” *Connor v.*
6 *Burford*, 848 F.2d 1441, 1446 (9th Cir. 1998).

7 22. DHS has not promulgated regulations to implement NEPA, but has
8 issued an Instruction Manual. Instruction Manual 023-01-001-01, Revision 01,
9 Implementation of NEPA (Nov. 6, 2014) (“DHS NEPA Manual”). The Manual
10 specifically includes “proposed construction, land use, activity, or operation that
11 has the potential to significantly affect environmentally sensitive areas” as an
12 action “normally requiring” the preparation of at least an EA.

13 23. Echoing the general NEPA requirements regarding the need to
14 conduct NEPA early in the process, the DHS NEPA Manual directs DHS to
15 “integrate[] the NEPA process with other planning efforts at the earliest possible
16 stage so that environmental factors are considered with sufficient time to have a
17 practical influence on the decision-making process before decisions are made.”
18 DHS NEPA Manual, at p. IV-1. The Manual directs that agency components that
19 process applications for DHS funding or approval, such as the contracts that will
20 be issued for the border wall prototype project and the border wall replacement
21 project “have a responsibility to integrate NEPA requirements early in the
22 application process,” and to ensure that “completion of the NEPA process occurs
23 before making a decision to approve” the proposal.

24 24. Other agencies which commonly contract with private entities to
25 build public construction projects, such as the border wall prototype project and
26 border wall replacement project, have also promulgated regulations specifying
27 that NEPA must be completed as early as possible in the contracting or
28 procurement process and requiring that NEPA’s environmental and mitigation

1 measures must be incorporated into the contract. *See, e.g.*, 23 C.F.R. § 635.505(b)
2 (2016) (Department of Transportation contracting agency “shall not perform or
3 contract for construction services (including early work packages of any kind)
4 prior to the completion of the NEPA process”); *id.* § 635.505(h) (2016) (DOT
5 contract “must include appropriate provisions ensuring that all environmental and
6 mitigation measures identified in the NEPA documentation and committed to in
7 the NEPA determination for the selected alternative will be implemented.”); 10
8 C.F.R. § 1021.216(i) (1992) (Department of Energy agencies shall complete
9 NEPA “before taking any action pursuant to the contract or award of financial
10 assistance.”).

11 25. NEPA requires that the Agencies involve the public in preparing and
12 considering environmental documents that implement the Act. 40 C.F.R. §
13 1506.6; *id.* § 1506.6(b)(1) (1978) (requiring federal agencies to “[p]rovide public
14 notice of NEPA-related hearings, public meetings, and the availability of
15 environmental documents so as to inform those persons and agencies who may be
16 interested or affected”).

17 26. The CEQ regulations further direct federal agencies to “insure that
18 environmental information is available to public officials and citizens before
19 decisions are made,” and mandate that “public scrutiny [is] essential to
20 implementing NEPA.” 40 C.F.R. § 1500.1(b) (1978).

21 27. The Ninth Circuit has held that a “complete failure to involve or even
22 inform the public” about the agency’s preparation of a NEPA document violates
23 the statute’s public participation requirements. *Citizens for Better Forestry v. U.S.*
24 *Dep’t of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003); *see also Brodsky v. Nuclear*
25 *Regulatory Comm’n*, 704 F.3d 113, 122 (2d Cir. 2013) (“The record before us
26 fails to provide any agency explanation for why *no* public participation was
27 deemed practicable or appropriate with respect to the challenged exemption.”)
28 (emphasis in original).

1 28. Underlying all of NEPA’s procedural requirements is the mandate
2 that agencies take a ‘hard look’ at all of the environmental impacts and risks of a
3 proposed action. As stated by the Ninth Circuit, “general statements about
4 ‘possible effects’ and ‘some risk’ do not constitute a ‘hard look’ absent a
5 justification regarding why more definitive information could not be provided.”
6 *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir.
7 1998) (internal citations omitted).

8 **B. Endangered Species Act**

9 29. The ESA, 16 U.S.C. §§ 1531–1544, is “the most comprehensive
10 legislation for the preservation of endangered species ever enacted by any nation.”
11 *TVA v. Hill*, 437 U.S. 180 (1978). Its fundamental purposes are “to provide a
12 means whereby the ecosystems upon which endangered species and threatened
13 species depend may be conserved [and] to provide a program for the conservation
14 of such endangered species and threatened species” 16 U.S.C. § 1531(b).

15 30. To achieve these objectives, the ESA directs the Secretary of the
16 Interior, through the U.S. Fish and Wildlife Service (“FWS”), to determine which
17 species of plants and animals are “threatened” and “endangered” and place them
18 on the list of protected species. *Id.* § 1533. An “endangered” or “threatened”
19 species is one “in danger of extinction throughout all or a significant portion of its
20 range,” or “likely to become endangered in the near future throughout all or a
21 significant portion of its range,” respectively. *Id.* § 1532(6), (20).

22 31. Once a species is listed, the ESA provides a variety of procedural and
23 substantive protections to ensure not only the species’ continued survival, but its
24 ultimate recovery, including the designation of critical habitat, the preparation and
25 implementation of recovery plans, the prohibition against the “taking” of listed
26 species, and the requirement for interagency consultation. *Id.* §§ 1533(a)(3), (f),
27 1538, 1536.

28 32. The ESA recognizes that federal agencies, such as DHS and CBP,

1 have a critical role to play in meeting these statutory purposes. The ESA
2 establishes that it is “the policy of Congress that all Federal departments and
3 agencies shall seek to conserve endangered species and threatened species and
4 shall utilize their authorities in furtherance of the purposes” of the ESA. *Id.* §
5 1531(c)(1).

6 33. To implement this policy, Section 7(a)(1) of the ESA requires that
7 “Federal agencies shall, in consultation with and with the assistance of [FWS],
8 utilize their authorities in furtherance of the purposes of this Act by carrying out
9 programs for the conservation of endangered species and threatened species.” *Id.*
10 § 1536(a)(1).

11 34. In addition to this programmatic mandate, the ESA requires that
12 “[e]ach Federal agency shall, in consultation with . . . [FWS], insure that any
13 action authorized, funded, or carried out by such agency . . . is not likely to
14 jeopardize the continued existence of any endangered species or threatened
15 species or result in the destruction or adverse modification of [critical habitat].”
16 *Id.* § 1536(a)(2).

17 35. FWS’ regulations define an agency “action” to mean “all activities or
18 programs of any kind authorized, funded, or carried out, in whole or in part, by
19 Federal agencies.” 50 C.F.R. § 402.02 (2016).

20 36. Section 7(a)(2) contains both procedural and substantive mandates.
21 Substantively, it requires that all federal agencies avoid actions that: (1) jeopardize
22 listed species; or (2) destroy or adversely modify designated critical habitat.
23 Procedurally, to ensure compliance with the substantive standards, the federal
24 agency taking action and FWS take part in a cooperative analysis of potential
25 impacts to listed species and their designated critical habitat known as the
26 consultation process. 16 U.S.C. § 1536(a)(2). The consultation process has been
27 described as the “heart of the ESA.” *Western Watersheds Project v.*
28 *Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011).

1 37. Through the formal Section 7 consultation process, FWS prepares a
2 “biological opinion” as to whether the action is likely to jeopardize the species or
3 destroy or adversely modify critical habitat and, if so, suggests “reasonable and
4 prudent alternatives” to avoid that result. 16 U.S.C. § 1536(b)(3)(A). During the
5 consultation process, both agencies must “use the best scientific and commercial
6 data available.” *Id.* § 1536(a)(2); 50 CFR § 402.14(d).

7 **C. Freedom of Information Act**

8 38. FOIA’s basic purpose is government transparency. It establishes the
9 public’s right to access all federal agency records unless such records may be
10 withheld pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C.
11 § 552(b)(1)-(9).

12 39. FOIA imposes strict and rigorous deadlines on federal agencies when
13 they receive a request for records pursuant to FOIA. Specifically, an agency must
14 determine whether to disclose responsive records and notify the requester of its
15 determination within 20 working days of receiving a FOIA request, and it must
16 make records “promptly” available, unless it can establish that certain unusual
17 circumstances are present and/or that it may lawfully withhold records, or portions
18 thereof, from disclosure. *Id.* § 552(a)(3)(A), (a)(6). Also within 20 working days,
19 the agency must inform the requester that it has a right to appeal the agency’s
20 determination. *Id.* § 552(a)(6)(A)(i).

21 40. FOIA places the burden on the agency to prove that it may withhold
22 responsive records from a requester. *Id.* § 552(a)(4)(B).

23 41. Congress has specified limited circumstances in which federal
24 agencies may obtain more time to make the determination that is required by 5
25 U.S.C. § 552(a)(6)(A)(i).

26 42. First, an agency may toll the 20-working-day deadline to seek
27 additional information or clarification from a requester, but that tolling period
28

1 ends when the agency receives such information or clarification. *Id.* §
2 552(a)(6)(A).

3 43. Second, an agency may extend the 20-working-day deadline for an
4 additional 10 working days by giving a written notice to the requester that sets
5 forth “unusual circumstances” to justify a deadline extension, which also requires
6 that it provide the date by which the agency expects to make the determination.
7 *Id.* § 552(a)(6)(B)(i). However, to invoke such “unusual circumstances,” the
8 agency must provide the requester with “an opportunity to limit the scope of the
9 request so that it may be processed within [20 working days] or an opportunity to
10 arrange with the agency an alternative time frame for processing the request or a
11 modified request.” *Id.* § 552(a)(6)(B)(ii). In addition, when asserting unusual
12 circumstances, the agency “shall make available its FOIA Public Liaison” to
13 “assist in the resolution of any disputes between the requester and the agency.”
14 *Id.*

15 44. FOIA requires each agency to make reasonable efforts to search for
16 records in a manner that is reasonably calculated to locate all records that are
17 responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D).

18 45. FOIA requires federal agencies to expeditiously disclose requested
19 records, *see id.* § 552, and mandates a policy of broad disclosure of government
20 records. Any inquiry under FOIA brings with it a strong presumption in favor of
21 disclosure.

22 46. Congress recognized that in certain, limited instances, records may be
23 withheld as exempt from FOIA’s broad disclosure mandate, and thus it created
24 nine categories of exemptions. *Id.* § 552(b). These exemptions, however, are
25 narrowly construed in light of FOIA’s dominant objective of disclosure, not
26 secrecy.

1 47. The U.S. district courts have jurisdiction “to enjoin the agency from
2 withholding agency records and to order the production of any agency records
3 improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

4 48. Alternatively, an agency’s response to a FOIA request is subject to
5 judicial review under the APA, which confers a right of judicial review on any
6 person who is adversely affected by an agency action, 5 U.S.C. § 702, and
7 authorizes district courts to compel agency action that is unlawfully withheld or
8 unreasonably delayed. *Id.* § 706(1). District courts must set aside any agency
9 action that is found to be “arbitrary, capricious, an abuse of discretion or
10 otherwise not in accordance with law.” *Id.* § 706(2)(A).

11 **D. Illegal Immigration Reform and Immigrant Responsibility Act**

12 49. Section 102 of the Illegal Immigration Reform and Immigrant
13 Responsibility Act (“IIRIRA”), originally enacted in 1996, is the primary federal
14 statute addressing the construction of border walls and other border barriers. P.L.
15 104-208, div. C, *codified at* 8 U.S.C. § 1103 *note*. The border security provisions
16 of Section 102 of the IIRIRA have been substantively amended by three
17 enactments—the REAL ID Act of 2005 (P.L. 109-13, div. B), the Secure Fence
18 Act of 2006 (P.L. 109-367), and the Consolidated Appropriations Act of 2008
19 (P.L. 110-161, div. E). As amended, IIRIRA Section 102 has three subsections,
20 which provide the following: 102(a), providing general authority to construct
21 border walls and other border barriers; 102(b), providing specific directions
22 regarding the extent of border wall construction, and requiring DHS to consult
23 with impacted states, local governments, tribes, and others prior to authorizing
24 such construction; and 102(c), providing the DHS Secretary with authority to
25 waive applicable legal requirements that the Secretary deems necessary to ensure
26 the expeditious construction of border barriers in areas of high illegal entry. 8
27 U.S.C. § 1103 *note*.

28 50. During the George W. Bush administration, DHS Secretary Michael

1 Chertoff published five “notices of determination” in the *Federal Register* that he
2 was invoking the IIRIRA Section 102(c) waiver authority (as provided by the
3 REAL ID Act of 2005 amendments to IIRIRA) exempting a total of more than 35
4 laws that would have otherwise applied to construction of border fencing and
5 roads: i) San Diego 14-mile (70 Fed. Reg. 55,622)(Sept. 22, 2005); ii) Barry M.
6 Goldwater Range, Arizona (72 Fed. Reg. 2,535)(Jan. 19, 2007); iii) San Pedro
7 Riparian National Conservation Area (administered by U.S. Bureau of Land
8 Management), Arizona (72 Fed. Reg. 60,870)(Oct. 26, 2007); iv) Hidalgo
9 County, Texas (73 Fed. Reg. 19,077)(April 3, 2008)(corrected on April 8, 2008);
10 v) >450 miles in Texas, New Mexico, Arizona, and California (73 Fed. Reg.
11 18,293)(April 3, 2008).

12 51. In all five of these determinations, the Secretary waived application
13 of NEPA. In addition to NEPA, former DHS Secretary Chertoff waived
14 application of the ESA, Clean Water Act (33 U.S.C. § 1251 *et seq.*), National
15 Historic Preservation Act (Pub. Law 89-665), Migratory Bird Treaty Act (16
16 U.S.C. § 703 *et seq.*), Clean Air Act (42 U.S.C. § 7401 *et seq.*), Archeological
17 Resources Protection Act (16 U.S.C. § 470aa *et seq.*), Safe Drinking Water Act
18 (42 U.S.C. § 300f *et seq.*), Wild and Scenic Rivers Act (16 U.S.C. § 1281 *et seq.*),
19 Wilderness Act (16 U.S.C. § 1131 *et seq.*), National Forest Management Act (16
20 U.S.C. § 1600 *et seq.*), Native American Graves Protection and Repatriation Act
21 (42 U.S.C. § 2000bb), and American Religious Freedom Act (42 U.S.C. § 1996),
22 as well as numerous additional laws.

23 52. Collectively, the five Chertoff REAL ID determinations waived laws
24 that otherwise would have applied to approximately 550 miles of border wall and
25 road construction. In total, DHS has constructed border barriers along
26 approximately 653 miles of the U.S.-Mexico border, consisting of 347.3 miles of
27 “pedestrian fences” or “walls,” and 298.5 miles of “vehicle barriers.”
28

1 53. The first of these waivers applied to the 14-mile segment of primary
2 and secondary border wall in San Diego County that would be replaced under the
3 border wall replacement project. (70 Fed. Reg. 55,622)(Sept. 22, 2005).

4 54. Section 102(b)(1)(C) of the IIRIRA requires the Homeland Security
5 Secretary to “consult with the Secretary of the Interior, the Secretary of
6 Agriculture, States, local governments, Indian tribes, and property owners in the
7 United States to minimize the impact on the environment, culture, commerce, and
8 quality of life for the communities and residents located near the sites” at which
9 border walls are proposed for construction.

10 **E. January 25, 2017 Executive Order 13767 (“Border Security and**
11 **Immigration Enforcement Improvement”)**

12 55. On January 25, 2017, President Donald J. Trump issued Executive
13 Order No. 13767, entitled “Border Security and Immigration Enforcement
14 Improvement” (“Executive Order”), which directed DHS to construct a “secure,
15 contiguous, and impassable physical barrier” along the entirety of the nearly 2,000
16 mile-long U.S.-Mexico border. The Executive Order defined “wall” to mean “a
17 contiguous, physical wall or similarly secure, contiguous, and impassable physical
18 barrier.”

19 56. On February 17, 2017, DHS Secretary John Kelly issued a
20 memorandum regarding “Implementing the President’s Border Security and
21 Immigration Enforcement Improvements Policies” (“Kelly Memorandum”),
22 which directed CBP, a component agency of DHS, to “immediately begin
23 planning, design, construction, and maintenance of a wall, including the attendant
24 lighting, technology (including sensors), as well as patrol and access roads, along
25 the land border with Mexico in accordance with existing law” Further, the
26 Kelly Memorandum directed the DHS Undersecretary for Management, in
27 consultation with CBP, to “immediately identify and allocate all sources of
28

1 available funding for the planning, design, construction, and maintenance of a
2 wall”

3 **FACTUAL BACKGROUND**

4 **A. Border Wall Prototype Project**

5 57. In accordance with the Executive Order and the Kelly Memorandum,
6 on March 17, 2017, DHS released two Requests for Proposals (“RFPs”)—one for
7 a “Solid Concrete Border Wall Prototype” and the second for an “Other Border
8 Wall Prototype.” The “threshold requirements” for the two prototypes are
9 identical, with the exception that the “other border wall prototype” does not have
10 to be constructed of “reinforced concrete.” These contractual thresholds include
11 requirements that the wall design “shall be physically imposing in height.” The
12 government’s “nominal concept is for a 30-foot high wall,” and designs “with
13 heights of less than 18 feet are not acceptable.” The RFPs further specify that the
14 wall designs “shall prevent digging or tunneling below it for a minimum of 6 feet
15 below the lowest adjacent grade,” “shall be constructible to slopes up to 45
16 percent,” and shall be built in a manner that it would take at least an hour to
17 breach with a “sledgehammer, car jack, pickaxe, chisel, battery operated impact
18 tools, battery operated cutting tools, Oxy/acetylene torch or other similar hand-
19 held tools.”

20 58. Phase I of the RFPs required bidders to submit Concept Papers by
21 April 4, 2017. Up to 20 bidders from Phase I could be invited to contract for
22 participation in Phase II of the bidding process. DHS and CBP apparently do not
23 intend to release this information to the public, or to other bidders.

24 59. Phase II requires the Contractors to “provide for the design and
25 construction of a full-scale prototype, which shall be 30 feet long, and “will be
26 constructed at a location in San Diego, CA as determined by the Government.”

27 60. Although Federal Defendants have not formally released the location
28 of the border wall prototype project, they have provided information and tours to

1 select media outlets depicting the construction area to be on federally-owned land
2 in San Diego, California, within the vicinity of Otay Mesa near the base of the
3 Otay Mountain Wilderness and the eastern terminus of the approximately 14-mile
4 long, westernmost segment of the current border wall beginning at the Pacific
5 Ocean.

6 61. The Otay Mesa area, where the presumed border wall prototype
7 project will take place, is of high environmental and natural resources value. It
8 contains several vernal pools—one of the most imperiled wildlife habitats in San
9 Diego County—and designated critical habitat for numerous listed threatened and
10 endangered species, including the Quino checkerspot butterfly and San Diego
11 fairy shrimp, as well as habitat for non-listed sensitive and rare species, such as
12 the burrowing owl.

13 62. Federal Defendants were scheduled to announce Phase II bidders by
14 mid-June 2017, but have not yet made that announcement. On June 13, 2017
15 Acting USBP Chief Carla Provost testified before the House Committee on
16 Appropriations that border wall prototype construction had been delayed until late
17 summer 2017.

18 63. On June 27, 2017 Acting CBP Deputy Commissioner Ronald Vitiello
19 held a press briefing in which he stated that the border wall prototype project was
20 to be built on the eastern edge of the existing secondary border wall on Otay
21 Mesa, and that the prototypes would act as an extension to the existing border
22 wall. In other words, the border wall prototype project will also serve as a new
23 border wall construction.

24 64. Despite the fact that border wall prototype construction is anticipated
25 to soon commence, Federal Defendants have yet to issue any NEPA analysis for
26 public review and comment.

1 **B. San Diego County Border Wall Replacement Project**

2 65. In addition to the border wall prototype project, Federal Defendants
3 are implementing the Executive Order and the Kelly Memorandum through the
4 proposed construction of replacement border wall in San Diego County and
5 Imperial County. This construction has been described by Federal Defendants in
6 various pronouncements and agency documents, including the March 2017
7 document, entitled “Building The Wall: The Strategy & Way Forward” (“Wall
8 Strategy Document”).

9 66. The Wall Strategy Document identifies three border wall
10 construction projects that Federal Defendants intend to begin construction on in
11 Fiscal Year 2017 (i.e. by September 30, 2017): (1) the border wall prototype
12 project; (2) the San Diego County border wall replacement project (replacement
13 of the existing 14-mile primary and secondary border walls in San Diego, and
14 replacement of 2 miles of border wall in USBP El Centro Sector); and (3)
15 construction of approximately 34 miles of new border walls in the USBP Rio
16 Grande Valley Sector in Texas.

17 67. Congress has appropriated money specifically to fund the San Diego
18 border wall replacement project.

19 68. The border wall replacement project will likely impact dozens of
20 ESA-listed endangered and threatened species, and their designated critical
21 habitat, including the arroyo toad, the California least tern, and the Southwestern
22 willow flycatcher. At least 20 listed species have designated critical habitat
23 within 50 miles of the 14-mile westward stretch of the San Diego border wall
24 construction, as well as 275 additional species of special concern, designated by
25 California’s Department of Fish and Wildlife, that also are located within or are in
26 close proximity to the San Diego border wall replacement project.

27 69. The existing 14-mile primary and secondary border wall constructed
28 from the Pacific Ocean to eastern edge of Otay Mesa was never adequately

1 studied under NEPA and numerous additional environmental laws due to the legal
2 exemptions issued under IIRIRA Section 102(c) by former Homeland Security
3 Secretary Chertoff during the George W. Bush administration.

4 70. Even though this region has already been heavily impacted by prior
5 border wall construction and other activities and infrastructure, the replacement of
6 the double-layered San Diego border wall is a major construction project that
7 poses significant additional threats to aquatic resources and other rare wildlife
8 habitats, as well as the numerous endangered species and imperiled habitats that
9 lie within the path of the wall. Many of these threats could likely be avoided or
10 mitigated by prior compliance with NEPA and other laws.

11 71. Federal Defendants have failed and/or refused to involve or inform
12 the public regarding NEPA analysis, if any, that the Agencies have conducted for
13 the border wall prototype project and border wall replacement project. Federal
14 Defendants have also apparently failed and/or refused to fulfill their IIRIRA
15 Section 102(b)(1)(C) consultation requirements.

16 72. As a consequence of Federal Defendants' failure and/or refusal to
17 provide for any public participation or consultation in its consideration and
18 authorization of the border wall prototype project and border wall replacement
19 project, the Center and other members of the public did not have any opportunity
20 to obtain information about or provide input prior to approval of those projects.

21 **C. Prior "REAL ID Act Waivers" Are Inapplicable to the Border**
22 **Wall Prototype Project and Border Wall Replacement Project**

23 73. Former Homeland Security Secretary Chertoff's first use of the
24 Section 102(c) waiver authority applied to the 14-mile primary and secondary
25 border wall segment that would be replaced under the border wall replacement
26 project. 70 Fed. Reg. 55,622 (Sept. 22, 2005). As stated in that notice, former
27 Secretary Chertoff determined that it was necessary to waive NEPA, ESA, and
28 several other laws "with respect to the construction of the barriers and roads"

1 associated with the 14-mile primary and secondary border wall.

2 74. As reflected in the language of the notice, the 2005 waiver applied to
3 the initial construction of the 14-mile border wall, not the border wall prototype
4 project and border wall replacement project now proposed. The 2005 waiver
5 cannot reasonably be interpreted to exempt compliance with the waived laws in
6 perpetuity for subsequent work to maintain or repair the 14-mile border wall, or
7 the construction of border wall prototypes, even if the footprint for those projects
8 falls within the geographical boundaries of the 2005 waiver.

9 **D. May 2, 2017 DHS and CBP FOIA Requests: Border Wall**
10 **Prototype Project**

11 75. In response to Federal Defendants' failure and/or refusal to provide
12 the Center or public generally with information regarding NEPA and other
13 environmental compliance in relation to the border wall prototype project, on May
14 2, 2017, the Center submitted via email a FOIA request to DHS for the following
15 information:
16

17 1. All National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h
18 ("NEPA") environmental impact statements, environmental assessments,
19 categorical exclusions, and/or other NEPA analysis prepared for
"prototype" border wall construction as part of the border wall request for
proposal ("RFP") process;

20 2. All other environmental analysis and/or compliance records prepared for
21 prototype border wall construction, including but not limited to analysis
22 conducted pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531-
1544 ("ESA"), Clean Water Act, 33 U.S.C. §§ 1251-1387 ("CWA"), and
Coastal Zone Management Act, 16 U.S.C. 22 ("CZMA"); and

23 3. All inter- and intra-agency correspondence records mentioning,
24 referencing and/or including reference to compliance with environmental
and/or all other applicable laws relevant to prototype border wall
25 construction.

26 76. In response, on May 2, 2017, DHS acknowledged the Center's
27 request and assigned it tracking number 2017-HQFO-00717 ("the DHS FOIA
28 Request"). DHS also invoked a 10-working-day extension pursuant to 5 U.S.C. §

1 552(a)(6)(B)(i) due to DHS’s claim that the DHS FOIA Request “seeks
2 documents that will require a thorough and wide-ranging search.”

3 77. A determination on the DHS FOIA Request was due by June 14,
4 2017, which is 30 working days after DHS’s acknowledgement of the DHS FOIA
5 Request.

6 78. As of the date of the filing of this amended complaint, which is past
7 the 30-working-day deadline, DHS has not requested additional time to respond,
8 provided any responsive records, or provided a determination in response to the
9 DHS FOIA Request.

10 79. None of FOIA’s nine exemptions to the statute’s disclosure mandate
11 apply to the records that are responsive to the DHS FOIA Request. *Id.* § 552(b).

12 80. On May 2, 2017, the Center submitted via email a FOIA request to
13 CBP for the following records:

14 1. All National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h
15 (“NEPA”) environmental impact statements, environmental assessments,
16 categorical exclusions, and/or other NEPA analysis prepared for
17 “prototype” border wall construction as part of the border wall request for
18 proposal (“RFP”) process;

19 2. All other environmental analysis and/or compliance records prepared for
20 prototype border wall construction, including but not limited to analysis
21 conducted pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531-
22 1544 (“ESA”), Clean Water Act, 33 U.S.C. §§ 1251-1387 (“CWA”), and
23 Coastal Zone Management Act, 16 U.S.C. 22 (“CZMA”); and

24 3. All inter- and intra-agency correspondence records mentioning,
25 referencing and/or including reference to compliance with environmental
26 and/or all other applicable laws relevant to prototype border wall
27 construction.

28 81. In response, on May 2, 2017, CBP acknowledged the Center’s
request and assigned it the tracking number CBP-2017-053692 (“the CBP FOIA
Request”). On May 3, 2017, CBP sent the Center an automated notice stating that
the “average time to process a FOIA request related to ‘travel/border incidents’ is
a minimum of 3-6 months.” The notice failed to provide any completion date by
which CBP is to provide the requested records.

1 82. A determination on the CBP FOIA Request was due by May 31,
2 2017, which is 20 working days after CBP’s acknowledgement of the CBP FOIA
3 Request.

4 83. As of the date of the filing of this amended complaint, which is past
5 the 20-working-day deadline, CBP has not requested additional time to respond,
6 provided any responsive records, or provided a determination in response to the
7 CBP FOIA Request.

8 84. None of FOIA’s nine exemptions to the statute’s disclosure mandate
9 apply to the records that are responsive to the CBP FOIA Request. *Id.* § 552(b).

10 **CLAIMS FOR RELIEF**

11 **NEPA Violations**

12 85. Plaintiff incorporates by reference the allegations in all preceding
13 paragraphs.

14 86. Federal Defendants are required to prepare an environmental impact
15 statement (“EIS”) on major Federal actions “significantly affecting the quality of
16 the human environment.” *Robertson v. Methow Valley Citizen Council*, 490 U.S.
17 332, 348 (1989); 42 U.S.C. § 4332 (2)(C). A federal agency “bears the primary
18 responsibility to ensure that it complies with NEPA.” *‘Ilio’Ulaokalani Coalition*
19 *v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006). “When an agency decides to
20 proceed with an action in the absence of an EA or EIS, the agency must
21 adequately explain its decision.” *Alaska Ctr. for Environment v. U.S. Forest*
22 *Service*, 189 F.3d 851, 859 (9th Cir. 1999).

23 87. Federal Defendants have violated NEPA and NEPA’s implementing
24 regulations by authorizing the border wall prototype project and border wall
25 replacement project without first conducting the necessary environmental analysis
26 of the impacts of the projects in an EA or EIS in light of the potentially significant
27 impacts that each of the two projects will have.

1 88. Federal Defendants have further violated NEPA and NEPA’s
2 implementing regulations by failing to initiate and complete NEPA at the earliest
3 possible time in the planning process.

4 89. Federal Defendants’ failure and/or refusal to conduct NEPA is
5 inconsistent with provisions of the DHS NEPA Manual, including provisions
6 requiring preparation of at least an EA when a proposed project may impact
7 important environmental resources, and directing that NEPA shall be applied as
8 early as possible in the planning process.

9 90. Federal Defendants have failed to provide any explanation or
10 reasoning for the failure to conduct any NEPA analysis for the border wall
11 prototype project or border wall replacement project. This lack of explanation
12 renders it impossible to determine if Federal Defendants have taken a “hard look”
13 at the potential environmental consequences of the border wall prototype project
14 or border wall replacement project, in violation of NEPA.

15 91. Federal Defendants’ failure and/or refusal to prepare NEPA analysis
16 for the border wall prototype project or border wall replacement project also
17 renders it impossible for the Agencies to avoid and/or mitigate environmental
18 impacts that would otherwise likely be identified through the NEPA process, in
19 violation of NEPA.

20 92. NEPA requires that the Agencies involve the public in preparing and
21 considering environmental documents that implement the Act. 40 C.F.R. § 1506.6
22 (1978) ; *id.* § 1506.6(b)(1) (requiring federal agencies to “[p]rovide public notice
23 of NEPA-related hearings, public meetings, and the availability of environmental
24 documents so as to inform those persons and agencies who may be interested or
25 affected”).

26 93. Federal Defendants have utterly failed and/or refused to involve the
27 public in its decision-making processes for the border wall prototype project or
28 border wall replacement project. Federal Defendants’ failure to provide for any

1 public participation in relation to its approval of the border wall prototype project
2 and border wall replacement project violates NEPA and its implementing
3 regulations.

4 94. The border wall prototype project and border wall replacement
5 project decisions are therefore arbitrary and capricious, an abuse of discretion, not
6 in accordance with law, and without observance of procedure required by law, and
7 are subject to judicial review pursuant to the APA, 5 U.S.C. §§ 702–704.

8
9 **FOIA Violations**
10 **May 2, 2017 FOIA Requests**
11 **to DHS (2017-HQFO-00717) and CBP (CBP-2017-053692)**

12 **a) The Agencies Have Failed to Comply with FOIA’s Mandatory**
13 **Determination Deadline**

14 95. The Center re-alleges and incorporates by reference the allegations
15 made in all preceding paragraphs.

16 96. The Agencies have violated FOIA by refusing to disclose records that
17 are responsive to their respective FOIA Requests.

18 97. The Center has a statutory right to a lawful final determination from
19 the Agencies on the FOIA Requests in a manner that complies with FOIA. The
20 Agencies have violated the Center’s rights in this regard by unlawfully delaying
21 their responses beyond the deadlines that FOIA mandates. 5 U.S.C. §
22 552(a)(6)(A)(i).

23 98. Based on the nature of the Center’s organizational activities, it will
24 undoubtedly continue to employ FOIA’s provisions in record requests to the
25 Agencies in the foreseeable future.

26 99. The Center’s organizational activities will be adversely affected if the
27 Agencies continue to violate FOIA’s disclosure provisions as they have in this
28 case.

1 100. Unless enjoined and made subject to a declaration of the Center's
2 legal rights by this Court, the Agencies will continue to violate the Center's rights
3 to receive public records under FOIA.

4
5 **b) The Agencies Have Failed to Disclose All Responsive Records to**
6 **the Center**

7 101. The Center re-alleges and incorporates by reference the allegations
8 made in all preceding paragraphs.

9 102. The Center has a statutory right to the records it seeks, and there is no
10 legal basis for the Agencies to assert that any of FOIA's nine exemptions to
11 mandatory disclosure apply to withhold these records from the Center. *See* 5
12 U.S.C. § 552(b)(1)-(9).

13 103. The Agencies have violated the Center's rights in this regard by
14 withholding records that are responsive to their respective FOIA Requests.

15 104. Based on the nature of the Center's organizational activities, it will
16 undoubtedly continue to employ FOIA's disclosure provisions in the FOIA
17 Requests in the foreseeable future.

18 105. The Center's organizational activities will be adversely affected if the
19 Agencies continue to violate FOIA's disclosure provisions as they have in this
20 case.

21 106. Unless enjoined and made subject to a declaration of the Center's
22 legal rights by this Court, the Agencies will continue to violate the Center's rights
23 to receive public records under FOIA.

24
25 **c) The Agencies Have Failed to Conduct an Adequate Search for**
26 **Responsive Records to the FOIA Requests**

27 107. The Center re-alleges and incorporates by reference the allegations
28 made in all preceding paragraphs.

1 108. The Center has a statutory right to have the Agencies process the
2 FOIA Requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The
3 Agencies have violated the Center's rights in this regard when they unlawfully
4 failed to undertake a search that is reasonably calculated to locate all records that
5 are responsive to their respective FOIA Request.

6 109. Based on the nature of the Center's organizational activities, it will
7 undoubtedly continue to employ FOIA's provisions in record requests to the
8 Agencies in the foreseeable future.

9 110. The Center's organizational activities will be adversely affected if the
10 Agencies continue to violate FOIA's requirement to undertake a search that is
11 reasonably calculated to locate records that are responsive to their respective
12 FOIA Requests.

13 111. Unless enjoined and made subject to a declaration of the Center's
14 legal rights by this Court, the Agencies will continue to violate the Center's rights
15 to receive public records under FOIA.

16
17 **d) The Agencies Have Failed to Provide Reasonably Segregable**
18 **Portions of Any Lawfully Exempt Records**

19 112. The Center re-alleges and incorporates by reference the allegations
20 made in all preceding paragraphs.

21 113. The Center has a statutory right to any reasonably segregable portion
22 of a record that contains information that is subject to any of FOIA's exemptions.
23 5 U.S.C. § 552(b).

24 114. The Agencies violated the Center's rights in this regard by
25 unlawfully withholding reasonably segregable portions of any lawfully exempt
26 records that are responsive to their respective FOIA Request.

1 115. Based on the nature of the Center's organizational activities, it will
2 undoubtedly continue to employ FOIA's disclosure provisions in record requests
3 to the Agencies in the foreseeable future.

4 116. The Center's organizational activities will be adversely affected if the
5 Agencies are allowed to continue violating FOIA's disclosure provisions as they
6 have in this case.

7 117. Unless enjoined and made subject to a declaration of the Center's
8 legal rights by this Court, the Agencies will continue to violate the Center's rights
9 to receive public records under FOIA.

10 **APA Violations**
11 **(In the Alternative to the FOIA Violations)**

12 **a) The Agencies Have Unlawfully Withheld or Unreasonably**
13 **Delayed Actions that FOIA Requires**

14 118. The Center re-alleges and incorporates by reference the allegations
15 made in all preceding paragraphs.

16 119. The Agencies unlawfully withheld agency actions by failing to
17 comply with the mandates of FOIA consequent to each Agency's failure and
18 refusal to: (1) search for and disclose records that are responsive to the respective
19 FOIA Request; (2) make a timely and lawful determination on the respective
20 FOIA Request; (3) conduct a search that is reasonably calculated to locate all
21 records that are responsive to the respective FOIA Request; (4) provide the Center
22 with records that are responsive to the respective FOIA Request that may not be
23 withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory
24 disclosure; and (5) provide the Center with reasonably segregable portions of
25 records responsive to the respective FOIA Request which contains any material
26 that may be lawfully withheld under an exemption(s).

27 120. Alternatively, the Agencies unreasonably delayed agency actions by
28 failing to comply with the mandates of FOIA consequent to each Agency's failure

1 and refusal to: (1) search for and disclose records that are responsive to the
2 respective FOIA Request; (2) make a timely and lawful determination on the
3 respective FOIA Request; (3) conduct a search that is reasonably calculated to
4 locate all records that are responsive to the respective FOIA Request; (4) provide
5 the Center with records that are responsive to the respective FOIA Request that
6 may not be withheld pursuant to any of FOIA's narrowly construed exemptions to
7 mandatory disclosure; and (5) provide the Center with reasonably segregable
8 portions of records responsive to the respective FOIA Request which contains any
9 material that may be lawfully withheld under an exemption(s). The Agencies'
10 failures constitute agency action unreasonably delayed and therefore actionable
11 pursuant to the APA, 5 U.S.C. § 706(1).

12 121. As alleged above, the Agencies' failure to comply with the mandates
13 of FOIA has injured the Center's interests in public oversight of governmental
14 operations and is in violation of each Agency's statutory duties under the APA.

15 122. The Center has suffered a legal wrong as a result of the Agencies'
16 failure to comply with the mandates of FOIA. As alleged above, the Agencies
17 violated their statutory duties under the APA and injured the Center's interests in
18 public oversight of governmental operations.

19 123. The Center has no other adequate remedy at law to redress the
20 violations noted above.

21 124. The Center is entitled to judicial review under the APA, 5 U.S.C. §
22 702.

23

24 **b) The Agencies' Violations of FOIA's Requirements Are**
25 **Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not**
26 **in Accordance with Law**

26

27 125. The Center re-alleges and incorporates by reference the allegations
28 made in all preceding paragraphs.

1 126. The Agencies violated FOIA’s statutory mandates due to each
2 Agency’s failure and refusal to: (1) search for and disclose records that are
3 responsive to the respective FOIA Request; (2) make a timely and lawful
4 determination on the respective FOIA Request; (3) conduct a search that is
5 reasonably calculated to locate all records that are responsive to the respective
6 FOIA Request; (4) provide the Center with records that are responsive to the
7 respective FOIA Request that may not be withheld pursuant to any of FOIA’s
8 narrowly construed exemptions to mandatory disclosure; and (5) provide the
9 Center with reasonably segregable portions of records responsive to the respective
10 FOIA Request which contains any material that may be lawfully withheld under
11 an exemption(s). By repeatedly violating FOIA’s statutory mandates, the
12 Agencies’ actions are arbitrary, capricious, an abuse of discretion, or not in
13 accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. §
14 706(2)(A).

15 127. As alleged above, the Agencies’ repeated failure to comply with the
16 mandates of FOIA has injured the Center’s interests in public oversight of
17 governmental operations and is in violation of the Agencies’ statutory duties
18 under the APA.

19 128. The Center has suffered a legal wrong as a result of the Agencies’
20 failure to comply with the mandates of FOIA. As alleged above, the Agencies
21 violated their statutory duties under the APA and injured the Center’s interests in
22 public oversight of governmental operations.

23 129. The Center has no other adequate remedy at law to redress the
24 violations noted above.

25 130. The Center is entitled to judicial review under the APA, 5 U.S.C. §
26 702.

27
28

PRAYER FOR RELIEF

1
2 WHEREFORE, the Center prays that this Court:

3 1. Declare that Federal Defendants’ failure and/or refusal to prepare any
4 NEPA analysis for the border wall prototype project or border wall replacement
5 project violates NEPA and its implementing regulations;

6 2. Declare that Federal Defendants’ failure and/or refusal to provide
7 opportunity for public participation in its approval of the border wall prototype
8 project or border wall replacement project violates NEPA and its implementing
9 regulations;

10 3. Declare that Federal Defendants failure to demonstrate that they have
11 taken a “hard look” at the potential environmental impacts of the border wall
12 prototype project or border wall replacement project violates NEPA and its
13 implementing regulations;

14 4. Enjoin Federal Defendants from implementing the border wall
15 prototype project or border wall replacement project, until and unless Federal
16 Defendants comply with NEPA and its implementing regulations;

17 5. Order Federal Defendants to conduct searches that are reasonably
18 calculated to locate all records responsive to the FOIA Requests, with the cut-off
19 date for such searches being the date that the searches are conducted, and to
20 provide the Center without charge all responsive records and reasonably
21 segregable portions of lawfully exempt records sought in this action by a
22 reasonable date certain.

23 6. Declare that Federal Defendants’ failure to timely make
24 determinations on the FOIA Requests is unlawful under FOIA, 5 U.S.C. §
25 552(a)(6)(A), or in the alternative, is agency action that has been unlawfully
26 withheld or unreasonably delayed, 5 U.S.C. § 706(1), or is arbitrary, capricious,
27 an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).
28

1 7. Declare that Federal Defendants’ failure to properly apply FOIA
2 exemptions, 5 U.S.C. § 552(b), is unlawful under FOIA, or in the alternative, is
3 agency action that has been unlawfully withheld or unreasonably delayed, 5
4 U.S.C. § 706(1), or is arbitrary, capricious, an abuse of discretion, or not in
5 accordance with law, 5 U.S.C. § 706(2).

6 8. Declare that Federal Defendants’ failure to undertake a search for and
7 disclose to the Center all records that are responsive to the FOIA Requests, as
8 alleged above, are unlawful under FOIA, U.S.C. § 552(a)(6)(A)(i), or in the
9 alternative, is agency action that has been unlawfully withheld or unreasonably
10 delayed, 5 U.S.C. § 706(1), or is arbitrary, capricious, an abuse of discretion, or
11 not in accordance with law, 5 U.S.C. § 706(2).

12 9. Declare that Federal Defendants’ failure to provide the Center with
13 reasonably segregable portions of records which may be lawfully subject to a
14 FOIA exemption, as alleged above, is unlawful under FOIA, U.S.C. §
15 552(a)(7)(b), or in the alternative, is agency action that has been unlawfully
16 withheld or unreasonably delayed, 5 U.S.C. § 706(1), or is arbitrary, capricious,
17 an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2).

18 10. Award the Center its reasonable costs of litigation, including
19 reasonable attorneys’ fees and costs, pursuant to the Equal Access to Justice Act,
20 28 U.S.C. § 2412, and/or FOIA 5 U.S.C. § 552(a)(4)(E), or other authority; and

21 11. Grant such other and further relief as the Court may deem just and
22 proper.

23 DATED: July 7, 2017

Respectfully submitted,

s/ Brian Segee

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2017, I electronically filed Plaintiff’s First Amended Complaint for Declaratory and Injunctive relief with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

s/ Brian Segee

Brian Segee