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

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

25 Plaintiff,

26 v.

27 U.S. Department of Homeland  
28 Security; U.S. Customs and Border  
Protection; and Elaine Duke, in her  
official capacity as Acting  
Secretary, U.S. Department of  
Homeland Security,

Defendants.

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

**Second 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.*, the Endangered Species Act  
9 (“ESA”), 16 U.S.C. § 1531 *et seq.*, and the Freedom of Information Act (“FOIA”),  
10 5 U.S.C. § 552, in relation to border wall construction projects in San Diego  
11 County, including: (1) the border wall prototype project, which would also serve  
12 as the first new segment of border barrier built in California in several years  
13 (“border wall prototype project”); and (2) the replacement of the westernmost  
14 portion of the existing border fence (14 miles of existing primary and double layer  
15 border fencing running from the Pacific Ocean to the eastern edge of Otay Mesa)  
16 (“border wall replacement project”).

17 2. The border wall prototype project and border wall replacement  
18 project are each federal actions that will impact the environment as well as several  
19 threatened and endangered species, and are thus subject to the procedural and  
20 substantive requirements of NEPA and the ESA, respectively.

21 3. Federal Defendants have not provided the Center or the general  
22 public with notice or opportunity to comment under NEPA for the border wall  
23 prototype project or border wall replacement project. Indeed, the Agencies have  
24 not prepared *any* NEPA or ESA analysis for either the border wall prototype  
25 project or the border wall replacement project.

26 4. Although NEPA does not require a plaintiff to provide federal  
27 agencies with notice of alleged violations prior to filing suit, on June 1, 2017, the  
28 Center wrote to the Agencies to provide notice of NEPA violations in relation to

1 the border wall prototype project. The Agencies have not acknowledged or  
2 responded to this Notice.

3 5. In addition, on June 1, 2017, the Center also provided the Agencies  
4 with formal notice of violations of the ESA for their failure to consult with U.S.  
5 Fish and Wildlife Service (“FWS”) in order to ensure that the border wall  
6 prototype project does not jeopardize the continued existence of threatened or  
7 endangered species, or result in the destruction or adverse modification of their  
8 critical habitat. Similarly, on July 7, 2017, the Center provided the Agencies with  
9 formal notice of ESA violations for their failure to consult with FWS in relation to  
10 the border wall replacement project. Federal Defendants have failed to remedy  
11 the alleged ESA violations during the 60-day notice period, and thus this second  
12 amended complaint includes those violations.

13 6. In light of the Agencies’ failure and/or refusal to provide the public  
14 with any information regarding their compliance with NEPA, the ESA, and other  
15 environmental laws in relation to the border wall prototype project, on May 2,  
16 2017, the Center submitted two requests for public records pursuant to FOIA, one  
17 to DHS and one to CBP, seeking records pertaining to the Agencies’ NEPA  
18 environmental analysis, as well as compliance with other environmental laws, for  
19 the border wall prototype project.

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

28 8. On August 2, 2017—approximately a month and a half after the

1 filing of this case—former DHS Secretary John Kelly issued a Determination in  
2 the *Federal Register* purporting to waive the application of NEPA, the ESA, the  
3 APA, and more than 30 additional laws not at issue in this lawsuit, to “various  
4 border infrastructure projects” in “an approximately fifteen mile segment of the  
5 border within the San Diego Sector that starts at the Pacific Ocean and extends  
6 eastward,” pursuant to section 102(c) of the Illegal Immigration Reform and  
7 Immigrant Responsibility Act of 1996 (“IIRIRA”). *Codified at* 8 U.S.C. § 1103  
8 note. *Determination Pursuant to Section 102 of the Illegal Immigration Reform*  
9 *and Immigrant Responsibility Act of 1996, As Amended*, 82 Fed. Reg. 35,984.  
10 According to the *Federal Register* determination, the specific “border  
11 infrastructure projects” subject to the purported waiver include the border wall  
12 prototype project and the border wall replacement project at issue in this litigation.  
13 *Id.*

14 9. IIRIRA section 102(c)(1) provides that “[n]otwithstanding any other  
15 provision of law, the Secretary of Homeland Security shall have the authority to  
16 waive all legal requirements to ensure expeditious construction of the barriers and  
17 roads under this section.” Once a waiver determination is issued, IIRIRA sections  
18 102(c)(2)(A)-(C) restrict judicial review by providing federal district courts with  
19 exclusive jurisdiction to hear all causes of action or claims arising from a waiver,  
20 purporting to limit such causes of action or claims to those alleging a violation of  
21 the Constitution of the United States, requiring such causes of action or claims to  
22 be brought not later than 60 days after the DHS Secretary’s waiver determination,  
23 and eliminating appellate court review of the district court decision regarding  
24 constitutional claims, and instead only permitting plaintiffs to seek review of the  
25 district court decision on constitutional claims through a petition for writ of  
26 certiorari to the U.S. Supreme Court.

27 10. As a threshold matter, Plaintiff Center for Biological Diversity  
28 challenges former DHS Secretary Kelly’s August 2, 2017 waiver determination as

1 *ultra vires*, because the determination was outside of the scope of authority vested  
2 in the DHS Secretary pursuant to IIRIRA section 102(c). Specifically, neither the  
3 border wall prototype project nor the border wall replacement project is among  
4 “the barriers and roads” subject to IIRIRA section 102(c) waivers. Federal courts  
5 are empowered to consider challenges to *ultra vires* executive actions despite  
6 language limiting or precluding statutory judicial review such as that found under  
7 IIRIRA section 102(c). *See, e.g., Dart v. United States*, 848 F.2d 217, 224 (D.C.  
8 Cir. 1998) (“[T]he Veterans’ Administrator cannot issue oil drilling permits—nor  
9 can the Secretary of Labor rescind television licenses—and expect to escape  
10 judicial review by hiding behind a finality clause.”).

11 11. In addition, Plaintiff Center for Biological Diversity alleges that the  
12 DHS Secretary’s August 2, 2017 waiver determination, and the waiver authority  
13 provided by IIRIRA section 102(c) generally, violate the U.S. Constitution in  
14 several respects, including the Take Care Clause, the Separation of Powers  
15 Doctrine, the Non-Delegation Doctrine, and the Presentment Clause.

### 16 **JURISDICTION**

17 12. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§  
18 1331 and 1346, 5 U.S.C. §§ 701 to 706, 8 U.S.C. § 1103 note, and 5 U.S.C. §  
19 552(a)(4)(B). The causes of action arise under the laws of the United States,  
20 including NEPA, the ESA, FOIA, the APA, and IIRIRA, and the implementing  
21 regulations established pursuant to these federal statutes, and the U.S.  
22 Constitution. The relief requested is authorized pursuant to 28 U.S.C. §§ 1651  
23 and 2201 to 2202, and 5 U.S.C. §§ 705 and 706.

### 24 **VENUE**

25 13. Venue is proper in this judicial district pursuant to 28 U.S.C. §  
26 1391(b) and (e), because the violations are occurring here, and a substantial part  
27 of the events or omissions giving rise to the claims have occurred in this district  
28 due to decisions made by Federal Defendants, and/or failure(s) to act by Federal

1 Defendants. In addition, venue is proper in this judicial district pursuant to 5  
2 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district,  
3 because a portion of the responsive records may be found in this district.

#### 4 PARTIES

5 14. Plaintiff Center for Biological Diversity is a non-profit environmental  
6 organization dedicated to the protection of native species and their habitats  
7 through science, policy, and environmental law. The Center has more than 1.5  
8 million members and online activists. The Center is headquartered in Tucson,  
9 Arizona, and has offices in Los Angeles and Oakland in California, as well as  
10 numerous additional regional offices located throughout the country, and an  
11 international office in Baja California Sur, Mexico.

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

26 16. The Center has an established track record of active participation in  
27 the oversight of government activities and decision-making as well as consistent  
28 practice of informing, educating, and counseling the public regarding

1 environmental issues, policies, and laws relating to environmental issues. The  
2 Center has displayed its ability to disseminate information obtained pursuant to  
3 FOIA to the general public through far-reaching media, including news media, the  
4 Center's website and newsletters, and social media. The Center and its members  
5 are harmed by Federal Defendants' FOIA violations as they preclude the Center  
6 from gaining a comprehensive understanding of the activities, decisions, priorities,  
7 and communications related to the border wall prototype project and border wall  
8 replacement project.

9 17. The Center has worked for nearly two decades to oppose  
10 environmentally harmful border fencing and other harmful border security  
11 projects along the U.S.-Mexico border generally, and the San Diego region  
12 specifically. The Center also has a long history of advocating for the protection of  
13 rare wildlife habitat that would be impacted by the San Diego border wall  
14 prototype and border wall replacement project, as well as advocating for specific  
15 species that would be harmed by the San Diego border wall prototype and border  
16 wall replacement project, including the western snowy plover, California least  
17 tern, Quino checkerspot butterfly, San Diego and Riverside fairy shrimp, and  
18 coastal California gnatcatcher.

19 18. The Center and its members' interests are harmed by Defendants'  
20 violations of NEPA and the ESA. The proposed border wall prototype project and  
21 border wall replacement project will result in construction of border barriers  
22 where none currently exist (in the case of the prototypes), and the construction of  
23 new border wall that is much higher and more impermeable than currently  
24 existing border fencing. The border wall replacement project will entail a massive  
25 construction operation with associated noise, lighting, and other impacts, and  
26 which will likely necessitate new land clearing, grading, staging, and other  
27 associated activities that will impact the surrounding environment. The violations  
28 of NEPA and the ESA, and the construction which will occur without the benefit

1 of compliance with these laws, will negatively impact the wildlife habitat and  
2 imperiled species described above, which will injure the Center and its members'  
3 aesthetic, conservation, recreational, scientific, educational, and wildlife  
4 preservation interests in those habitats and species. These injuries would be  
5 redressed by the requested relief directing Defendants to comply with those laws.

6 19. The Center and its members are harmed by the Agencies' violations  
7 of FOIA, or alternatively the APA, as well as its violations of NEPA, pertaining to  
8 public notice and participation, as such violations will result in harm to the Center  
9 and its members' interests, and will preclude the Center and its members from  
10 gaining a full understanding of the activities, decisions, priorities, and  
11 communications related to the border wall prototype project and border wall  
12 replacement project.

13 20. The Center and its members are harmed by former DHS Secretary  
14 Kelly's August 2, 2017 Determination under IIRIRA section 102(c) purporting to  
15 waive NEPA, the ESA, the APA, and more than 30 additional laws not at issue in  
16 this litigation. In waiving these laws, the August 2, 2017 Determination will  
17 allow the border wall prototype and border wall replacement projects to proceed  
18 without any compliance with NEPA and the ESA. The absence of environmental  
19 law compliance will negatively impact the wildlife habitat and imperiled species  
20 described above, which will injure the Center and its members' aesthetic,  
21 conservation, recreational, scientific, educational, and wildlife preservation  
22 interests in those habitats and species. These injuries would be redressed by the  
23 requested relief to void the waiver determination as inapplicable and  
24 unconstitutional, and directing Defendants to comply with NEPA, the ESA, and  
25 all other applicable laws. The August 2, 2017 Determination will also result in  
26 harm to the Center and its members' interests by precluding the application of  
27 NEPA, the ESA, and the APA, which will preclude public notification and  
28 transparency.



1           21. Defendant DHS is an agency within the executive branch of the U.S.  
2 government. DHS is responsible for ensuring border security along the U.S.-  
3 Mexico border consistent with applicable legal requirements, including NEPA and  
4 the ESA. In addition, DHS is in possession and control of the records that the  
5 Center seeks under FOIA, and as such, it is subject to FOIA pursuant to 5 U.S.C.  
6 § 552(f).

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

12           23. Defendant Elaine Duke, Acting DHS Secretary, is sued in her official  
13 capacity. Acting Secretary Duke is the official ultimately responsible under  
14 federal law for ensuring that the actions and management decisions of DHS  
15 comply with all applicable laws and regulations. Acting Secretary Duke's  
16 predecessor, former DHS Secretary John Kelly, invoked the IIRIRA section  
17 102(c) waiver in relation to the border wall prototype project and border wall  
18 replacement project on August 2, 2017.

19   **LEGAL BACKGROUND**

20 **A. NEPA**

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

28           25. In order to achieve these goals, NEPA contains several “action

1 forcing” procedures, most significantly the mandate to prepare an environmental  
2 impact statement (“EIS”) on major Federal actions “significantly affecting the  
3 quality of the human environment.” *Robertson v. Methow Valley Citizens*  
4 *Council*, 490 U.S. 332, 348 (1989); 42 U.S.C. § 4332(2)(C).

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

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

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

25 29. NEPA requires that “agencies shall integrate the NEPA process with  
26 other planning at the earliest possible time to insure that planning and decisions  
27 reflect environmental values, to avoid delays later in the process, and to head off  
28 potential conflicts.” 40 C.F.R. § 1501.2 (1978); *id.* § 1502.5 (1978) (“An agency

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

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

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

23 32. Other agencies which commonly contract with private entities to  
24 build public construction projects, such as the border wall prototype project and  
25 border wall replacement project, have also promulgated regulations specifying  
26 that NEPA must be completed as early as possible in the contracting or  
27 procurement process and requiring that NEPA’s environmental and mitigation  
28 measures must be incorporated into the contract. *See, e.g.*, 23 C.F.R. § 635.505(b)

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

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

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

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

28 36. Underlying all of NEPA’s procedural requirements is the mandate

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

7 **B. Endangered Species Act**

8 37. The ESA, 16 U.S.C. §§ 1531–1544, is “the most comprehensive  
9 legislation for the preservation of endangered species ever enacted by any nation.”  
10 *TVA v. Hill*, 437 U.S. 153, 180 (1978). Its fundamental purposes are “to provide a  
11 means whereby the ecosystems upon which endangered species and threatened  
12 species depend may be conserved [and] to provide a program for the conservation  
13 of such endangered species and threatened species . . . .” 16 U.S.C. § 1531(b).

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

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

27 40. The ESA recognizes that federal agencies, such as DHS and CBP,  
28 have a critical role to play in meeting these statutory purposes. The ESA

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

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

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

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

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

28 45. Through the formal Section 7 consultation process, FWS prepares a

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

### 6 **C. Freedom of Information Act**

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

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

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

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

25 50. First, an agency may toll the 20-working-day deadline to seek  
26 additional information or clarification from a requester, but that tolling period  
27 ends when the agency receives such information or clarification. *Id.* §  
28 552(a)(6)(A).

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

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

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

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

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

28           56. Alternatively, an agency’s response to a FOIA request is subject to



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

7 **D. The Illegal Immigration Reform and Immigrant Responsibility Act of**  
8 **1996**

9 57. Section 102 of the 1996 IIRIRA was the first legislative enactment  
10 under which Congress specifically authorized the Attorney General to construct  
11 “border barriers and roads.”<sup>1</sup> P.L. 104-208, div. C., *codified at* 8 U.S.C. § 1103  
12 note.

13 58. Prior to IIRIRA’s enactment, USBP in 1990 (with the assistance of  
14 the U.S. Army Corps of Engineers and the National Guard) began constructing a  
15 border fence in the San Diego region, utilizing Army surplus carbon steel mats  
16 which were used as landing strips during the Vietnam War. The San Diego border  
17 fence—the first in history to be constructed along the U.S.-Mexico border (other  
18 than chain link)—was completed in 1993, beginning at the Pacific Ocean and  
19 running approximately 14 miles eastward to the Otay Mesa region.

20 59. The 1994 *Border Patrol Strategic Plan: 1994 and Beyond*,  
21 emphasized a “prevention through deterrence” strategy under which the agency

---

22 <sup>1</sup> Prior to the September 11, 2001 terrorist attacks, the Attorney General was  
23 vested with the authority over immigration laws. The Attorney General had, in  
24 turn, delegated that authority to the Immigration and Naturalization Service  
25 (“INS”) and its component agency U.S. Border Patrol (“USBP”), which were  
26 located within the Department of Justice. Pursuant to the Homeland Security Act  
27 of 2002, P.L. 107-296, DHS was created, the INS was abolished, and the INS  
28 immigration functions, as well as its component agency USBP, were transferred to  
DHS. Under DHS, USBP became a component of the newly created agency CBP.  
IIRIRA section 102 was subsequently amended to substitute the DHS Secretary  
for the Attorney General as having responsibility over border barriers and roads.

1 significantly increased agent numbers, deployed technological aids such as ground  
2 sensors and surveillance cameras, and proposed extensive construction of border  
3 fences, roads, and other border security infrastructure.

4 60. As part of the prevention through deterrence strategy, and in  
5 recognition that Congress had never provided INS and USBP with specific  
6 statutory authority to construct border barriers, Congress enacted IIRIRA in 1996.  
7 IIRIRA section 102, for the first time, provided INS and USBP with general  
8 authorization to build border barriers, as well as specific direction regarding the  
9 location and extent of specific border barriers to be constructed.

10 61. Amended several times, IIRIRA section 102 remains the primary  
11 federal statute addressing border barriers, pursuant to three primary provisions: (i)  
12 section 102(a) (providing general authority to construct border fences and other  
13 border barriers); (ii) section 102(b) (carrying out subsection (a), by providing  
14 specific mandates for border barrier construction, and the deadlines for such  
15 construction, among other requirements); and (iii) section 102(c) (legal waiver  
16 authority).

17 62. IIRIRA section 102(a), which remains substantively the same as  
18 originally enacted in 1996, provided the Attorney General (now the DHS  
19 Secretary) with the general authority to “take such actions as may be necessary to  
20 install additional physical barriers and roads . . . in the vicinity of the United  
21 States border to deter illegal crossings in areas of high illegal entry into the United  
22 States.”

23 63. IIRIRA section 102(b) “carr[ies] out subsection (a)” by identifying  
24 specific border barriers to be constructed, establishing specific deadlines for the  
25 construction of such barriers, and other requirements.

26 64. The only border fence segment initially mandated by Congress under  
27 IIRIRA section 102(b) was the construction of a double and triple layer border  
28 fence to further fortify the 14-mile long San Diego “primary” border fence that

1 was finished in 1993.

2 65. As originally enacted, IIRIRA section 102(c) stated that the  
3 provisions of NEPA and the ESA “[were] waived to the extent the Attorney  
4 General determines necessary to ensure expeditious construction of the barriers  
5 and roads under this section.” At the time of its enactment, the Department of  
6 Justice and INS opposed IIRIRA section 102(c) and established a policy not to use  
7 the waiver authority. *See* March 6, 1997 Memorandum from INS Assistant  
8 Commissioner David Yentzer.

9 66. The IIRIRA Section 102(c) waiver modifier “under this section”  
10 refers to the specific border fencing required under IIRIRA section 102(b), which  
11 by its plain language “carries out” DHS’s general authority to “install additional  
12 physical barriers and roads” under IIRIRA section 102(a). At the time of  
13 IIRIRA’s enactment, the specific border fencing directed under IIRIRA section  
14 102(b) was limited to the 14-mile double and triple layer San Diego border fence.

15 **E. The 2005 REAL ID Act Amendments to IIRIRA Section 102(c)**

16 67. Enacted in 2005 as an unrelated legislative rider to the “Emergency  
17 Supplemental Appropriations Act for Defense, the Global War on Terror, and  
18 Tsunami Relief, 2005,” section 102 of the REAL ID Act amended the section  
19 102(c) IIRIRA waiver provision.<sup>2</sup> P.L. 109-13, div. B. Specifically, the REAL  
20 ID Act amendment expanded the IIRIRA section 102(c) waiver authority beyond  
21 NEPA and the ESA to permit the DHS Secretary “to waive all legal requirements  
22 such Secretary, in such Secretary’s sole discretion, determines necessary to ensure  
23 expeditious construction of the barriers and roads under this section.”

24  
25 <sup>2</sup> It is a potentially confusing coincidence that section 102 of the REAL ID Act  
26 amended section 102 of the IIRIRA. The REAL ID Act addressed border  
27 security, including the amendment to IIRIRA section 102(c), but its scope was  
28 much broader, consisting of four additional titles addressing: asylum and removal;  
drivers’ licenses; H-2B temporary worker provisions; and Australian E  
nonimmigrant and EB-3 nurses visas.

1           68. In addition, section 102 of the REAL ID Act amended the IIRIRA  
2 section 102(c) waiver authority to restrict judicial review in the following  
3 respects: purporting to limit “all causes or claims” arising from any waiver  
4 determination made by the DHS Secretary to alleged constitutional violations;  
5 requiring any such constitutional challenge to be filed not later than 60 days after  
6 the Secretary’s determination; and eliminating appellate court review of the  
7 district court’s decision on the alleged constitutional violations, instead only  
8 permitting review upon a writ of certiorari to the Supreme Court.

9           69. The REAL ID Act was introduced by Judiciary Chairman James  
10 Sensenbrenner in the House of Representatives on January 26, 2005, and assigned  
11 the bill number H.R. 418. Despite significant controversy concerning the section  
12 102 waiver provisions and numerous other provisions of H.R. 418, there were no  
13 Committee hearings held on the bill in either Chamber of Congress.

14           70. Two weeks after introduction, H.R. 418 was considered in the full  
15 House on February 9, 2005 (151 Cong. Rec. H453-471) and February 10, 2005  
16 (151 Cong. Rec. H527-566).

17           71. The REAL ID Act was never specifically considered in the Senate, as  
18 it was added to the Emergency Supplemental Appropriations Act during  
19 conference committee. As stated by one Senator, the bill “was simply grafted  
20 onto the emergency supplemental appropriations bill that provides funding for our  
21 military operations and our troops, without debate or participation by the  
22 conferees.” 151 Cong. Rec. S4820 (daily ed. May 10, 2005) (Statement of  
23 Senator Byrd).

24           72. Congress intended the REAL ID Act’s amendment and expansion of  
25 that 102(c) waiver authority, like the IIRIRA section 102(c) waiver authority as  
26 originally enacted in 1996, to apply to the specific border barrier and road  
27 requirements at IIRIRA section 102(b), which carries out the general border  
28 barrier authority at IIRIRA section 102(a). At that time, the only specific border

1 barriers required under section 102(b) remained the 14-mile San Diego double and  
2 triple layer fence proposals.

3 73. Congress’s intent that the expansion of the IIRIRA section 102(c)  
4 waiver authority under section 102 of the REAL ID Act continue to be limited to  
5 the specific border barriers mandated by IIRIRA section 102(b) is evidenced by  
6 the bill’s plain language, as well as statements by the bill’s author and co-sponsors  
7 during the limited House Floor debate.

8 74. Indeed, the bill’s official title made clear that Congress’s intent in  
9 expanding the IIRIRA section 102(c) waiver authority was specific to the border  
10 barrier segments identified under section 102(b): “To establish and rapidly  
11 implement regulations for State driver’s license and identification document  
12 security standards, to prevent terrorists from abusing the asylum laws of the  
13 United States, to unify terrorism-related grounds for inadmissibility and removal,  
14 *and to ensure expeditious construction of the San Diego border fence.*” (emphasis  
15 added).

16 75. The intended limitation of the IIRIRA section 102(c) waiver  
17 authority to the San Diego double and triple layered fence specified under IIRIRA  
18 section 102(b) was also repeatedly emphasized by the bill’s supporters on the  
19 House Floor. As stated by the bill’s author:

20 [T]he REAL ID Act will waive Federal laws *to the extent*  
21 *necessary to complete gaps in the San Diego border*  
22 *security fence, which is still stymied 8 years after*  
23 *congressional authorization.*

24 151 Cong. Rec. H454 (daily ed., Feb. 9, 2005)(Statement of Rep.  
25 Sensenbrenner)(emphasis added); *see also* Cong. Rec. H471 (“H.R. 418 provides  
26 the Secretary of Homeland Security with authority to waive environmental laws,  
27 *so that the border fence running 14 miles east from the Pacific Ocean at San*  
28 *Diego may finally be completed.*”) (daily ed., Feb. 9, 2005)(Statement of Rep.

1 Hoekstra)(emphasis added).

2 **F. The 2006 Secure Fence Act Amendments to IIRIRA Section**  
3 **102(b)**

4 76. President George W. Bush signed the Secure Fence Act on October  
5 26, 2016. P.L. 109-367.

6 77. Section 3 of the Secure Fence Act (“Construction of Fencing and  
7 Security Improvements in Border Area from Pacific Ocean to Gulf of Mexico”) significantly expanded upon IIRIRA section 102(b) and its previous sole focus on  
8 the 14-mile San Diego double and triple layer fence construction. Under the  
9 Secure Fence Act amendments to IIRIRA section 102(b), Congress directed DHS  
10 to “provide for at least 2 layers of reinforced fencing [and] the installation of  
11 additional physical barriers, roads, lighting, cameras, and sensors” in five specific  
12 segments along the U.S.-Mexico border totaling approximately 850 miles.  
13 IIRIRA, former §102(b)(1)(A)(i)-(v). The required border barrier construction  
14 included one California segment, two Texas segments, one segment encompassing  
15 portions of both California and Arizona, and one segment encompassing portions  
16 of both New Mexico and Texas.

17  
18 78. Section 3 further amended IIRIRA section 102(b) to add the specific  
19 requirement that two of these segments be considered “priority areas,” with  
20 construction deadlines of May 30, 2008 and December 31, 2008. Former IIRIRA  
21 § 102(b)(1)(B)(i)-(ii).<sup>3</sup>

22 79. Congress did not specifically consider the impact of the Secure Fence  
23 Act amendments on the scope of the IIRIRA section 102(c) waiver.

24  
25 <sup>3</sup> In addition to its IIRIRA amendments, the Secure Fence Act directed the DHS  
26 Secretary to achieve and maintain operational control over the borders of the  
27 United States [including the northern and coastal borders] through surveillance  
28 activities and physical infrastructure enhancements to prevent unlawful entry and  
facilitate CBP’s access to the borders. Pub. L. No. 109-367, § 3, *codified at* 8  
U.S.C. § 1701 note.

1 **G. The 2008 Consolidated Appropriations Act Amendments to IIRIRA**  
2 **Section 102(b)**

3 80. Just over a year after enactment of the Secure Fence Act, President  
4 George W. Bush signed the 2008 Consolidated Appropriations Act on December  
5 26, 2007. P.L. 110-161, div. E.

6 81. Section 564 of the 2008 Consolidated Appropriations Act again  
7 amended section 102(b) of the IIRIRA to scale back DHS’s duties with respect to  
8 border barriers and roads as defined under the 2006 Secure Fence Act  
9 amendments. These modifications—which remain the law today—include: (1)  
10 eliminating the requirement that border barriers be built in any specific locations,  
11 and instead specifying that such barriers be placed “along not less than 700 miles  
12 of the southwest border where fencing would be most practical and effective”; (2)  
13 eliminating the requirement of double-layered fencing; and (3) amending the  
14 “priority areas” requirement to direct that DHS identify and construct 370 miles of  
15 border barriers by December 31, 2008. IIRIRA § 102(b)(1)(A)-(B).

16 82. The 2008 Appropriations Act also added a new consultation  
17 requirement to IIRIRA section 102(b), directing that DHS “shall consult with the  
18 Secretary of the Interior, the Secretary of Agriculture, States, local governments,  
19 Indian tribes, and property owners in the United States to minimize the impact on  
20 the environment, culture, commerce, and quality of life for the communities and  
21 residents located near the sites where” border barriers are constructed. IIRIRA §  
22 102(b)(1)(C).

23 **FACTUAL BACKGROUND**

24 **A. Past Construction of Border Barriers and Use of the Waiver Authority**  
25 **Under IIRIRA**

26 83. Enabled by billions of dollars in Congressional appropriations, and in  
27 response to IIRIRA’s amendments by the 2005 REAL ID Act, 2006 Secure Fence  
28 Act, and 2008 Consolidated Appropriations Act, DHS has greatly increased the

1 extent of border barriers and roads along the U.S.-Mexico border.

2 84. In order to facilitate this extensive construction, during the George  
3 W. Bush Administration's second term, former DHS Secretary Michael Chertoff  
4 published five "notices of determination" in the *Federal Register* that he was  
5 invoking the IIRIRA Section 102(c) authority to waive in their entirety a total of  
6 more than 35 laws that would have otherwise applied to construction of border  
7 fencing and roads. These waivers applied to border barrier and road construction  
8 in the following areas: (i) San Diego, 70 Fed. Reg. 55,622 (Sept. 22, 2005)(13.9  
9 miles); (ii) Barry M. Goldwater Range, Arizona, 72 Fed. Reg. 2,535 (Jan. 19,  
10 2007)(37.3 miles); (iii) San Pedro Riparian National Conservation Area  
11 (administered by U.S. Bureau of Land Management), Arizona, 72 Fed. Reg.  
12 60,870 (Oct. 26, 2007)(5.5 miles); (iv) Hidalgo County, Texas, 73 Fed. Reg.  
13 19,077 (April 3, 2008)(corrected on April 8, 2008)(21 miles); (v) Various Areas  
14 in Texas, New Mexico, Arizona, and California, 73 Fed. Reg. 18,293 (April 3,  
15 2008)(546.5 miles).

16 85. In all five of these determinations, the former DHS Secretary waived  
17 application of NEPA and the ESA. In addition to these laws, the former DHS  
18 Secretary waived application of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*;  
19 National Historic Preservation Act, Pub. Law 89-665; Migratory Bird Treaty Act,  
20 16 U.S.C. § 703 *et seq.*; Clean Air Act, 42 U.S.C. § 7401 *et seq.*; Archeological  
21 Resources Protection Act, 16 U.S.C. § 470aa *et seq.*; Safe Drinking Water Act, 42  
22 U.S.C. § 300f *et seq.*; Wild and Scenic Rivers Act, 16 U.S.C. § 1281 *et seq.*;  
23 Wilderness Act, 16 U.S.C. § 1131 *et seq.*; National Forest Management Act, 16  
24 U.S.C. § 1600 *et seq.*; Native American Graves Protection and Repatriation Act,  
25 42 U.S.C. § 2000bb; and American Religious Freedom Act, 42 U.S.C. § 1996, as  
26 well as numerous additional laws.

27 86. Collectively, the five REAL ID Determinations waived laws that  
28 otherwise would have applied to approximately 624.5 miles of border barrier and



1 road construction.

2 87. Clearly, DHS has taken aggressive action to comply with Congress's  
3 IIRIRA mandates, including the repeated use by former DHS Secretary Chertoff  
4 of the IIRIRA section 102(c) waiver to "ensure expeditious construction" of the  
5 specific barriers and roads mandated by IIRIRA section 102(b), which have been  
6 identified by Congress as necessary to carry out DHS's general authority to  
7 construct border barriers and roads necessary to deter illegal crossing in areas of  
8 high illegal entry into the United States under IIRIRA section 102(a).

9 88. Consequently, DHS has met its statutory responsibilities to construct  
10 the specific "fencing and road improvements along the border" as currently  
11 defined by IIRIRA section 102(b).

12 89. As of February 2017, DHS has constructed 654 miles of "primary"  
13 border barriers and approximately 5,000 miles of roads along the U.S.-Mexico  
14 border. *See* "Southwest border security: Additional actions needed to better assess  
15 fencing's contributions to operations and provide guidance for identifying  
16 capability gaps." U.S. Government Accountability Office ("GAO") Report 17-  
17 331, a report to congressional requesters (February 2017).

18 90. DHS has met its specific mandate to identify and construct 370 miles  
19 of border fencing in "priority areas . . . where fencing would be most practical and  
20 effective." IIRIRA § 102(b)(1)(B).

21 91. DHS has also met its specific mandate to "construct reinforced  
22 fencing along not less than 700 miles of the southwest border where fencing  
23 would be most practical and effective." IIRIRA § 102(b)(1)(A). In addition to the  
24 654 miles of primary fencing constructed by DHS, the agency has constructed an  
25 additional 37 miles of double-layered fencing and 14 miles of triple-layered  
26 fencing. In total, DHS has deployed a total of 705 miles of reinforced border  
27 fencing, exceeding the 700-mile minimum under IIRIRA section 102(b)(1)(A).

28 92. As summarized recently by the GAO:

1 From fiscal years 2005 through 2015, CBP increased the  
2 total miles of primary border fencing on the southwest  
3 border from 119 miles to 654 miles—including 354 miles  
4 of primary pedestrian fencing and 300 miles of primary  
5 vehicle fencing. With 654 miles of primary fencing  
6 currently deployed, CBP officials have stated that CBP is  
7 in compliance with its legal requirements for the  
8 construction of the southwest border fencing on the  
9 substantial discretion provided to the Secretary of  
10 Homeland Security to determine the appropriate  
11 placement of fencing.

12 GAO Report, at p. 8.

13 **B. January 25, 2017 Executive Order 13767 (“Border Security and  
14 Immigration Enforcement Improvement”)**

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

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

1 **C. Border Wall Prototype Project**

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

17 96. The 30-foot border wall envisioned under the Executive Order and  
18 called for under the RFP’s would significantly differ from existing border fencing  
19 and other border barriers with respect to height, construction materials, and  
20 permeability, and would pose distinct and additive environmental risks and harms.

21 97. Phase I of the RFPs required bidders to submit Concept Papers by  
22 April 4, 2017. Up to 20 bidders from Phase I could be invited to contract for  
23 participation in Phase II of the bidding process.

24 98. 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 99. The border wall prototype project will be constructed on federally-  
28 owned land in San Diego, California, within the vicinity of Otay Mesa near the

1 base of the Otay Mountain Wilderness and the eastern terminus of existing  
2 secondary fencing within the approximately 14-mile long, westernmost segment  
3 of the current border fence beginning at the Pacific Ocean.

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

11 101. On August 31, 2017, Acting CBP Deputy Commissioner Ronald  
12 Vitiello held a press briefing in which he announced that CBP had chosen four  
13 vendors to construct the “Solid Concrete Wall” prototypes, and that the agency  
14 would announce four additional vendors to construct the “Other Border Wall”  
15 prototypes at a later date.

#### 16 **D. San Diego County Border Wall Replacement Project**

17 102. In addition to the border wall prototype project, Federal Defendants  
18 are implementing the Executive Order and the Kelly Memorandum through the  
19 proposed construction of a border wall to replace the existing 14-mile primary and  
20 secondary fencing in San Diego County. This construction has been described by  
21 Federal Defendants in various pronouncements and agency documents, including  
22 the March 2017 document, entitled “Building The Wall: The Strategy & Way  
23 Forward” (“Wall Strategy Document”), and the August 2, 2017 IIRIRA section  
24 102(c) determination by former DHS Secretary Kelly

25 103. The 14-mile San Diego border wall replacement project will likely  
26 impact numerous ESA-listed endangered and threatened species, and their  
27 designated critical habitat, including the arroyo toad, the California least tern, and  
28 the Southwestern willow flycatcher. The proposed 30-foot high replacement wall

1 is notably higher than the existing border fencing, and may be constructed of  
2 impermeable concrete, both of which would exacerbate environmental impacts of  
3 the existing border fencing.

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

11 105. Federal Defendants have failed to comply with NEPA, the ESA, or  
12 other environmental laws for the border wall prototype project and border wall  
13 replacement project. Federal Defendants have also failed to fulfill their IIRIRA  
14 Section 102(b)(1)(C) consultation requirements.

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

20 **E. Prior IIRIRA Section 102(c) Waivers Are Inapplicable to the Border**  
21 **Wall Prototype Project and Border Wall Replacement Project**

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

28 108. As reflected in the language of the notice, the 2005 waiver applied to

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

7 **F. The August 2, 2017 IIRIRA Section 102(c) Waiver**

8 109. On August 2, 2017, former DHS Secretary John Kelly issued a  
9 Determination in the *Federal Register* purporting to invoke IIRIRA section 102(c)  
10 in order to waive the application of NEPA, the ESA, and more than 30 additional  
11 laws not at issue in this lawsuit to “various border infrastructure projects” in the  
12 “project area,” which is defined as “an approximately fifteen mile segment of the  
13 border within the San Diego Sector that starts at the Pacific Ocean and extends  
14 eastward,” starting at “the Pacific Ocean and extending to approximately one mile  
15 east of Border Monument 251.” 82 Fed. Reg. 35,984-85.

16 110. The additional laws purportedly waived by the August 2, 2017  
17 determination are the: Clean Water Act, 33 U.S.C. § 1251 *et seq.*; National  
18 Historic Preservation Act, Pub. L. 89-665; Migratory Bird Treaty Act, 16 U.S.C. §  
19 703 *et seq.*; Clean Air Act, 42 U.S.C. § 7401 *et seq.*; Archaeological Resources  
20 Protection Act, 16 U.S.C. § 470aa *et seq.*; Paleontological Resources Preservation  
21 Act, 16 U.S.C. § 470aaa *et seq.*; Federal Cave Resources Protection Act of 1988,  
22 16 U.S.C. § 4301 *et seq.*; National Trails System Act, 16 U.S.C. § 1241 *et seq.*;  
23 Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; Noise Control Act, 42 U.S.C.  
24 § 4901 *et seq.*; Solid Waste Disposal Act, as amended by the Resource  
25 Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, and the Comprehensive  
26 Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C.  
27 § 9601 *et seq.*; Archaeological and Historic Preservation Act, 54 U.S.C. § 320301  
28 *et seq.*; Antiquities Act, 54 U.S.C. § 320301 *et seq.*; Historic Sites, Buildings, and

1 Antiquities Act, 54 U.S.C. § 3201-320303 & 320101-320106; Wild and Scenic  
2 Rivers Act, 16 U.S.C. § 1281 *et seq.*; Farmland Protection Policy Act, 7 U.S.C. §  
3 4201 *et seq.*; Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*; Wilderness  
4 Act, 16 U.S.C. § 1131 *et seq.*; Federal Land Policy and Management Act, 43  
5 U.S.C. § 1701 *et seq.*; National Wildlife Refuge System Administration Act and  
6 National Wildlife Refuge System Improvement Act, 16 U.S.C. § 668dd-668ee;  
7 National Fish and Wildlife Act of 1956, 16 U.S.C. § 742a *et seq.*; Fish and  
8 Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*; Wild Horse and Burro Act,  
9 16 U.S.C. § 1331 *et seq.*; Pub. L. 106-398; Otay Mountain Wilderness Act of  
10 1999, Pub. L. 106-145; sections 102(29) and 103 of Title I of the California  
11 Desert Protection Act, Pub. L. 103-433; Rivers and Harbors Act of 1899, 33  
12 U.S.C. § 403; Eagle Protection Act, 16 U.S.C. § 668 *et seq.*; Native American  
13 Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*; American  
14 Indian Religious Freedom Act, 42 U.S.C. § 1996; and Religious Freedom  
15 Restoration Act, 42 U.S.C. § 2000bb.

16 111. The August 2, 2017 determination identifies specific projects within  
17 the broader “project area” as including both projects at issue in this litigation—the  
18 replacement of “existing primary fencing”, as well as “prototype border wall . . .  
19 near the eastern terminus of the existing secondary barrier.” 82 Fed. Reg. at  
20 35,985.

21 **G. May 2, 2017 DHS and CBP FOIA Requests: Border Wall Prototype**  
22 **Project**

23 112. In response to Federal Defendants’ failure and/or refusal to provide  
24 the Center or public generally with information regarding NEPA and other  
25 environmental compliance in relation to the border wall prototype project, on May  
26 2, 2017, the Center submitted via email a FOIA request to DHS for the following  
27 information:  
28

1 1. All National Environmental Policy Act, 42 U.S.C. §§ 4321-  
2 4370h (“NEPA”) environmental impact statements,  
3 environmental assessments, categorical exclusions, and/or other  
4 NEPA analysis prepared for “prototype” border wall  
5 construction as part of the border wall request for proposal  
6 (“RFP”) process;

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

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

17 113. In response, on May 2, 2017, DHS acknowledged the Center’s  
18 request and assigned it tracking number 2017-HQFO-00717 (“the DHS FOIA  
19 Request”). DHS also invoked a 10-working-day extension pursuant to 5 U.S.C. §  
20 552(a)(6)(B)(i) due to DHS’s claim that the DHS FOIA Request “seeks  
21 documents that will require a thorough and wide-ranging search.”

22 114. A determination on the DHS FOIA Request was due by June 14,  
23 2017, which is 30 working days after DHS’s acknowledgement of the DHS FOIA  
24 Request.

25 115. As of the date of the filing of this second amended complaint, which  
26 is past the 30-working-day deadline, DHS has not requested additional time to  
27 respond, provided any responsive records, or provided a determination in response  
28 to the DHS FOIA Request.

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

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

1. All National Environmental Policy Act, 42 U.S.C. §§ 4321-  
4370h (“NEPA”) environmental impact statements,  
environmental assessments, categorical exclusions, and/or other



1 NEPA analysis prepared for “prototype” border wall  
2 construction as part of the border wall request for proposal  
3 (“RFP”) process;

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

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

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

20 119. A determination on the CBP FOIA Request was due by May 31,  
21 2017, which is 20 working days after CBP’s acknowledgement of the CBP FOIA  
22 Request.

23 120. As of the date of the filing of this second amended complaint, which  
24 is past the 20-working-day deadline, CBP has not requested additional time to  
25 respond, provided any responsive records, or provided a determination in response  
26 to the CBP FOIA Request.

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

1 **CLAIMS FOR RELIEF**

2 **FIRST CLAIM FOR RELIEF**  
3 **Ultra Vires Violations**  
4 **(August 2, 2017 IIRIRA Section 102(c) Determination)**  
5 **(Facial Violation of IIRIRA Section 102(c))**

6 122. Plaintiff incorporates by reference the allegations in all preceding  
7 paragraphs.

8 123. IIRIRA section 102(c) provides the DHS Secretary with “the  
9 authority to waive all legal requirements such Secretary, in such Secretary’s sole  
10 discretion, determines necessary to ensure expeditious construction of the barriers  
11 and roads under this section.”

12 124. The scope of the IIRIRA section 102(c) authority granted to the DHS  
13 Secretary to waive laws “under this section” is limited to the specific border  
14 barriers and roads required to be constructed pursuant to IIRIRA section 102(b).  
15 IIRIRA section 102(a) provides general authority to DHS to construct border  
16 barriers and roads in areas of high illegal entry into the United States, while  
17 IIRIRA section 102(b) identifies the specific “construction of fencing and road  
18 improvements along the border” necessary to “carry[] out subsection(a).”

19 125. At the time of the original 1996 enactment of IIRIRA, as well as its  
20 2005 amendment by section 102 of the REAL ID Act, the specific border barrier  
21 construction required under IIRIRA section 102(b) was limited to the San Diego  
22 14-mile double and triple layer border fence.

23 126. Congress subsequently amended IIRIRA section 102(b) under the  
24 2006 Secure Fence Act and 2008 Consolidated Appropriations Act. The 2006  
25 Secure Fence Act amended IIRIRA section 102(b) to require DHS to construct  
26 five specific segments of double-layered border fencing totaling approximately  
27 850 miles. A year later, with the enactment of the 2008 Consolidated  
28 Appropriations Act, Congress again amended IIRIRA section 102(b) to its current  
version, which requires that DHS identify and construct 370 miles of border

1 barriers by December 31, 2008, and that the agency construct border barriers  
2 “along not less than 700 miles of the southwest border where fencing would be  
3 most practical and effective.”

4 127. Congress has not amended the IIRIRA section 102(c) waiver since  
5 the 2005 REAL ID Act amendments, and did not discuss or consider the scope of  
6 the waiver during its deliberations or discuss how the existing 102(c) waiver  
7 authority would apply to the expanded scope of IIRIRA section 102(b) under the  
8 2006 Secure Fence Act and 2008 Consolidated Appropriations Act amendments.

9 128. Nonetheless, former DHS Secretary Chertoff invoked IIRIRA section  
10 102(c) on five occasions to waive laws on the vast majority of the specific border  
11 barriers required under IIRIRA section 102(b) pursuant to Secure Fence Act and  
12 2008 Appropriations Act amendments.

13 129. Former Secretary Chertoff’s expansion of the IIRIRA section 102(c)  
14 waiver authority beyond the San Diego double and triple layer fence proposal  
15 that was included in the original IIRIRA section 102(b) was not contested in  
16 previous litigation concerning the five waivers issued by the former Secretary.  
17 No court addressed whether the IIRIRA section 102(c) waiver authority was  
18 properly applied by former Secretary Chertoff to the greatly expanded scope of  
19 IIRIRA section 102(b) under the 2005 REAL ID Act amendments and 2008  
20 Consolidated Appropriations Act amendments.

21 130. Even presuming that the section 102(c) waiver authority is applicable  
22 to the expansion of 102(b) specific border barrier mandates beyond the double  
23 and triple layer San Diego fence, DHS has now fulfilled its requirements under  
24 that subsection.

25 131. Specifically, DHS has met its duty to identify and construct 370  
26 miles of border barriers within “priority areas” by December 31, 2008 as required  
27 by IIRIRA section 102(b)(1)(B), as well as its duty to construct a total of not less  
28 than 700 miles of border barriers as required by IIRIRA section 102(b)(1)(A).

1           132. Because the scope of the IIRIRA section 102(c) waiver is limited to  
2 the border barriers and road requirements specified by IIRIRA section 102(b), the  
3 requirements of which have already been fulfilled, the purported waiver of  
4 NEPA, the ESA, the APA, and more than 30 additional laws under Secretary  
5 Kelly’s August 2, 2017 Determination pursuant to IIRIRA section 102(c) is an  
6 unlawful *ultra vires* act subject to review by this Court, and the restrictions on  
7 judicial review and appellate review under that subsection are inapplicable to that  
8 determination.

9           133. Even in the event that the Court finds the IIRIRA section 102(c)  
10 waiver authority is not limited to the border barriers and road requirements  
11 specified by IIRIRA section 102(b), the purported waiver of laws under the  
12 August 2, 2017 IIRIRA section 102(c) Determination is nonetheless an unlawful  
13 *ultra vires* act subject to review by this Court for at least three additional reasons.

14           134. First, the IIRIRA section 102(c) waiver authority, by its plain  
15 language, was intended to apply to the initial construction of border barriers, not  
16 the border wall *replacement* or the border wall *prototype* projects at issue in this  
17 litigation.

18           135. Second, the purported waiver of laws by former DHS Secretary Kelly  
19 under the August 2, 2017 Determination does not contain any rationale  
20 demonstrating that the “approximately fifteen mile segment” of the San Diego  
21 border subject to the purported waiver is necessary to “deter illegal crossings in  
22 areas of high illegal entry into the United States,” as required by the general  
23 border barrier and road authorization at IIRIRA section 102(a). Indeed, the  
24 Determination does not contain *any* Findings specific to the fifteen mile segment  
25 of waived laws, but instead states in conclusory and circular fashion that the  
26 overall San Diego Sector “remains an area of high illegal entry.” 82 Fed. Reg. at  
27 35,985.

28           136. If the San Diego border region at issue in the purported waiver does

1 indeed qualify as “an area of high illegal entry,” such a Finding would call the  
2 entire DHS border fencing and prevention through deterrence strategy into  
3 question, as DHS has expended more resources and constructed more intensive  
4 border barriers in this region than any other along the U.S.-Mexico border, and  
5 has already utilized the IIRIRA section 102(c) waiver authority to finish  
6 construction on the existing San Diego double and triple layer border fence. 70  
7 Fed. Reg. 55,622 (Sept. 22, 2005).

8 137. Third, the purported waiver of laws by former DHS Secretary Kelly  
9 under the August 2, 2017 Determination cannot have been necessary to ensure  
10 the “expeditious” construction of the border wall prototype project and border  
11 wall replacement project at issue in this litigation.

12 138. The IIRIRA section 102(c) waiver authority was enacted in 1996, and  
13 then significantly expanded by the 2005 REAL ID Act amendment. The IIRIRA  
14 section 102(c) waiver authority has not been further amended by Congress in the  
15 12 years since its 2005 consideration and enactment, despite the extensive  
16 amendments to IIRIRA section 102(b) by the 2006 Secure Fence Act and 2008  
17 Consolidated Appropriations Act.

18 139. The plain meaning of broadly allowing the waiver of any laws  
19 determined by the DHS Secretary as necessary to ensure the “expeditious  
20 construction” under IIRIRA section 102(c) was to provide the DHS Secretary  
21 with the authority to waive laws in order to build border barriers *as soon as*  
22 *possible after the law’s enactment (i.e. the 2005 REAL ID Act amendment)*.  
23 This interpretation is further supported by Congress’s subsequent establishment  
24 of specific deadlines in its amendments to IIRIRA section 102(b) under the 2006  
25 Secure Fence Act and 2008 Consolidated Appropriations Act; most notably, its  
26 direction that at least 370 miles of border barriers be constructed by December  
27 31, 2008, and its explicit termination of the Secretary’s authority to designate  
28 “priority areas” for such construction by that same date. IIRIRA § 102(b)(2)(A)-

1 (B).

2 140. The purported August 2, 2017 waiver of laws under former DHS  
3 Secretary Kelly could only be lawful if the term “expeditious” was construed to  
4 permit DHS to apply such waivers *in perpetuity*, long after the deadlines set by  
5 the statute for the construction of any such barriers, and in relation to the  
6 construction of additional barriers that have not been specifically directed by  
7 Congress.

8 141. Due to fact that the border wall prototype project and border wall  
9 replacement project are not subject to the scope of the IIRIRA section 102(c)  
10 waiver authority, former DHS Secretary Kelly’s purported waiver of laws under  
11 the August 2, 2017 Determination is an unlawful *ultra vires* act subject to review  
12 by this Court, and the restrictions on judicial review and appellate review under  
13 that subsection are inapplicable to that determination.

14  
15 **SECOND CLAIM FOR RELIEF**  
16 **Constitutional Violation**  
17 **Violation of the Take Care Clause of the U.S. Constitution**  
18 **Article II, Section 3**  
19 **(August 2, 2017 IIRIRA Section 102(c) Determination)**

20 142. Plaintiff incorporates by reference the allegations in all preceding  
21 paragraphs.

22 143. Under IIRIRA section 102(c), and subject to the *ultra vires*  
23 restrictions described in the First Claim for Relief, once the DHS Secretary  
24 invokes the waiver authority, the “only cause or claim” that may be brought  
25 arising from the waiver is one “alleging a violation of the Constitution of the  
26 United States.” IIRIRA section 102(c) further provides that “[t]he district courts  
27 of the United States shall have exclusive jurisdiction to hear all causes or claims  
28 arising from any” such action, which “shall be filed not later than 60 days after  
the date of action or decision” at issue.” IIRIRA § 102(c)(2)(A)-(C).

1 144. Article II of the U.S. Constitution provides that “The executive  
2 Power shall be vested in a President,” and that he or she “shall take Care that the  
3 Laws be faithfully executed.” U.S. Constitution Article II, § 3.

4 145. Among the laws the Take Care Clause mandates be “faithfully  
5 executed” are NEPA and the ESA, as well as the conditions and limitations of  
6 IIRIRA section 102 itself. Among the conditions and limitations of IIRIRA  
7 section 102 are the limitations of barrier construction to areas of “high illegal  
8 entry” under subsection (a), the geographical and temporal restrictions for such  
9 construction, along with the requirements for consultation with affected entities  
10 under subsection (b), and the restriction on waiver authority under subsection (c)  
11 to the “expeditious construction of the barriers and roads” otherwise authorized  
12 by the statute.

13 146. DHS Secretary Kelly’s purported waiver of NEPA, the ESA, the  
14 APA, and more than 30 additional laws under the August 2, 2017 Determination  
15 failed to comply with the laws that the Executive Branch is required to “faithfully  
16 execute.”

17 **THIRD CLAIM FOR RELIEF**  
18 **Constitutional Violation**  
19 **Violation of the Separation of Powers of the U.S. Constitution**  
20 **(IIRIRA Section 102(c) and**  
21 **August 2, 2017 IIRIRA Section 102(c) Determination)**

22 147. Plaintiff incorporates by reference the allegations in all preceding  
23 paragraphs.

24 148. Article I, Section 1 of the United States Constitution directs that  
25 “[a]ll legislative Powers herein granted shall be vested in a Congress of the  
26 United States.”

27 149. Article II, Section 1 of the Constitution directs that “[t]he executive  
28 Power shall be vested in a President of the United States of America.”

1           150. Under these constitutional provisions, Congress may not delegate  
2 legislative authority to an executive branch agency, or in the case of IIRIRA  
3 section 102(c), may not delegate legislative authority to an individual executive  
4 branch official.

5           151. IIRIRA section 102(c) unconstitutionally delegates legislative powers  
6 to the DHS Secretary, an executive branch official, and unconstitutionally  
7 purports to exempt the Executive Branch from complying with its constitutional  
8 obligation to faithfully execute the laws.

9           152. Former DHS Secretary John Kelly’s purported waiver of NEPA, the  
10 ESA, the APA, and more than 30 other laws in relation to “border infrastructure  
11 projects” within “an approximately fifteen mile segment” of the border within  
12 San Diego, 82 Fed. Reg. 35,984 (Aug. 2, 2017) is an unconstitutional exercise of  
13 legislative power by an executive branch official, and consequently violates the  
14 U.S. Constitution’s separation of powers and non-delegation requirements.

15  
16                                   **FOURTH CLAIM FOR RELIEF**  
17                                   **Constitutional Violation**  
18                                   **Violation of the Presentment Clause of the U.S. Constitution**  
19                                   **Article I, Section 7**  
20                                   **(IIRIRA Section 102(c) and the**  
21                                   **August 2, 2017 IIRIRA Section 102(c) Determination)**

22           153. Plaintiff incorporates by reference the allegations in all preceding  
23 paragraphs.

24           154. Article I, § 7 of the Constitution provides that any federal statute  
25 must pass both houses of Congress, and “before it become a Law, be presented to  
26 the President of the United States: If he approve he shall sign it, but if not he shall  
27 return it, with his Objections to that House it which it shall have originated, who  
28 shall enter the Objections at large on their Journal, and proceed to reconsider it.”

          155. The “[a]mendment and repeal of statutes, no less than enactment,”  
must conform with the presentment and bicameralism requirements of Article I.



1 *INS v. Chadha*, 462 U.S. 919, 954 (1983).

2 156. The August 2, 2017 Determination by former DHS Secretary Kelly  
3 purported to waive NEPA, the ESA, the APA, and more than 30 other laws that  
4 would otherwise apply to border infrastructure projects, including the border wall  
5 prototype project and border wall replacement project at issue in this litigation.

6 157. The IIRIRA section 102(c) waiver authority and former DHS  
7 Secretary Kelly's August 2, 2017 Determination are unconstitutional  
8 infringements upon the lawmaking procedures required under Article I, § 7 of the  
9 Constitution.

10

11

## FIFTH CLAIM FOR RELIEF

### NEPA Violations

12

#### (Border Wall Prototype Project and Border Wall Replacement Project)

13

14 158. Plaintiff incorporates by reference the allegations in all preceding  
15 paragraphs.

16

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

26

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

1           161. 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           162. 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           163. 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           164. 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           165. NEPA requires that the Agencies involve the public in preparing and  
21 considering environmental documents that implement the Act. 40 C.F.R. §  
22 1506.6 (1978); *id.* § 1506.6(b)(1) (requiring federal agencies to “[p]rovide public  
23 notice of NEPA-related hearings, public meetings, and the availability of  
24 environmental documents so as to inform those persons and agencies who may be  
25 interested or affected”).

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

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

4 167. The border wall prototype project and border wall replacement  
5 project decisions are therefore arbitrary and capricious, an abuse of discretion,  
6 not in accordance with law, and without observance of procedure required by  
7 law, and are subject to judicial review pursuant to the APA, 5 U.S.C. §§ 702–  
8 704.

9  
10 **SIXTH CLAIM FOR RELIEF**  
11 **ESA Violations**  
12 **(Border Wall Prototype Project and Border Wall Replacement Project)**

13 168. Plaintiff incorporates by reference the allegations in all preceding  
14 paragraphs.

15 169. Section 7(a)(2) of the ESA requires that “[e]ach Federal agency shall,  
16 in consultation with . . . [FWS], insure that any action authorized, funded, or  
17 carried out by such agency . . . is not likely to jeopardize the continued existence  
18 of any endangered species or threatened species or result in the destruction or  
19 adverse modification of [critical habitat].” *Id.* § 1536(a)(2).

20 170. FWS’s regulations define an agency “action” to mean “all activities  
21 or programs of any kind authorized, funded, or carried out, in whole or in part, by  
22 Federal agencies.” 50 C.F.R. § 402.02.

23 171. The border wall prototype project and border wall replacement  
24 projects directly, indirectly, and cumulatively impact numerous species listed as  
25 threatened or endangered under the ESA, as well as designated critical habitat for  
26 many of those species.

27 172. Despite the presence of many listed species, the documented impacts  
28 of DHS border barrier and road construction on many of these species, and the

1 significant number of species listings and critical habitat designations in the  
2 borderlands region, Federal Defendants have failed to initiate, reinstate, or  
3 complete consultation with FWS in order to ensure that the border wall prototype  
4 project and border wall replacement project do not jeopardize the continued  
5 existence of any listed species or adversely modify or destroy the designated  
6 critical habitat for any of those species, in violation of Section 7(a)(2). 16 U.S.C.  
7 § 1536(a)(2).

8 173. Federal Defendants have also failed to take any affirmative action to  
9 conserve the many threatened or endangered species impacted by the border wall  
10 prototype project and border wall replacement project, in violation of Section  
11 7(a)(1) of the ESA. 16 U.S.C. § 1536(a)(1).

12 **SEVENTH CLAIM FOR RELIEF**  
13 **FOIA Violations**  
14 **May 2, 2017 FOIA Requests**  
15 **to DHS (2017-HQFO-00717) and CBP (CBP-2017-053692)**

16 174. The Center re-alleges and incorporates by reference the allegations  
17 made in all preceding paragraphs.

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

1 176. Plaintiff has a statutory right to a lawful final determination from the  
2 Agencies on the FOIA requests in a manner that complies with FOIA. The  
3 Agencies have violated Plaintiff's rights in this regard by unlawfully delaying  
4 their responses beyond the deadlines that FOIA mandates. 5 U.S.C. §  
5 552(a)(6)(A)(i).

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

9 178. Plaintiff's organizational activities will be adversely affected if the  
10 Agencies are allowed to continue violating FOIA's provisions as they have in this  
11 case.

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

15 **APA Violations**  
16 **(In the Alternative to the FOIA Violations)**

17 180. Plaintiff re-alleges and incorporates by reference the allegations  
18 made in all preceding paragraphs.

19 181. The Agencies violated FOIA's statutory mandates due to each  
20 Agency's failure and refusal to: (1) search for and disclose records that are  
21 responsive to the respective FOIA requests; (2) make a timely and lawful  
22 determination on the respective FOIA requests; (3) conduct a search that is  
23 reasonably calculated to locate all records that are responsive to the respective  
24 FOIA requests; (4) provide Plaintiff with records that are responsive to the  
25 respective FOIA requests that may not be withheld pursuant to any of FOIA's  
26 narrowly construed exemptions to mandatory disclosure; and (5) provide Plaintiff  
27 with reasonably segregable portions of records responsive to the respective FOIA  
28 requests which contains any material that may be lawfully withheld under an

1 exemption(s). By repeatedly violating FOIA's statutory mandates, the Agencies'  
2 actions are arbitrary, capricious, an abuse of discretion, or not in accordance with  
3 the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).  
4 Alternatively, the Agencies' failures constitute agency action unreasonably  
5 delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

6 182. As alleged above, the Agencies' failure to comply with the mandates  
7 of FOIA has injured Plaintiff's interests in public oversight of governmental  
8 operations and is in violation of each Agency's statutory duties under the APA.

9 183. Plaintiff has suffered a legal wrong as a result of the Agencies'  
10 failure to comply with the mandates of FOIA. As alleged above, the Agencies  
11 violated their statutory duties under the APA and injured Plaintiff's interests in  
12 public oversight of governmental operations.

13 184. Plaintiff has no other adequate remedy at law to redress the violations  
14 noted above.

15 185. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff Center for Biological Diversity prays that this  
18 Court:

19 1. Declare that Former DHS Secretary Kelly and Federal Defendants  
20 lacked the authority under IIRIRA section 102(c) to waive NEPA, the ESA, the  
21 APA, and other laws in the August 2, 2017 *Determination Pursuant to Section*  
22 *102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,*  
23 *As Amended*, 82 Fed. Reg. 35,984.

24 2. Declare that the purported waiver pursuant to IIRIRA section 102(c)  
25 of NEPA, the ESA, the APA, and other laws in the August 2, 2017 *Determination*  
26 *Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant*  
27 *Responsibility Act of 1996, As Amended*, 82 Fed. Reg. 35,984, violates the U.S.  
28 Constitution's Take Care Clause.

1           3.     Declare that the purported waiver pursuant to IIRIRA section 102(c)  
2 of NEPA, the ESA, the APA, and other laws in the August 2, 2017 *Determination*  
3 *Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant*  
4 *Responsibility Act of 1996, As Amended*, 82 Fed. Reg. 35,984, violates the U.S.  
5 Constitution’s fundamental Separation of Powers principles.

6           4.     Declare that the purported waiver pursuant to IIRIRA section 102(c)  
7 of NEPA, the ESA, the APA, and other laws in the August 2, 2017 *Determination*  
8 *Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant*  
9 *Responsibility Act of 1996, As Amended*, 82 Fed. Reg. 35,984, violates the U.S.  
10 Constitution’s Presentment Clause.

11           5.     Set aside and declare null and void former DHS Secretary Kelly’s  
12 purported waiver pursuant to IIRIRA section 102(c) of NEPA, the ESA, the APA,  
13 and other laws in the August 2, 2017 *Determination Pursuant to Section 102 of*  
14 *the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, As*  
15 *Amended*, 82 Fed. Reg. 35,984, due to the *ultra vires* nature of that Determination.

16           6.     Set aside and declare null and void the waiver of laws authority  
17 contained in IIRIRA section 102(c) due to its constitutional infirmities.

18           7.     Declare that Federal Defendants have violated NEPA and its  
19 implementing regulations with respect to the border wall prototype project and/or  
20 the border wall replacement project by, *inter alia*, failing to conduct any NEPA  
21 analysis, by failing to provide any opportunity for public participation, and by  
22 failing to take a “hard look” at the potential environmental impacts of the border  
23 wall prototype project and/or border wall replacement project.

24           8.     Declare that Federal Defendants violated the ESA by failing to  
25 initiate or complete ESA section 7(a)(2) consultation with FWS in order to ensure  
26 that the border wall prototype project and border wall replacement project do not  
27 jeopardize the continued existence of any listed species or adversely modify or  
28 destroy the designated critical habitat for those species.

1           9.     Declare that Federal Defendants violated the ESA by failing to take  
2 any affirmative action to conserve threatened or endangered species impacted by  
3 the border wall prototype project and border wall replacement project, in violation  
4 of section 7(a)(1) of the ESA.

5           10.    Enjoin Federal Defendants from implementing the border wall  
6 prototype project or border wall replacement project, until and unless Federal  
7 Defendants comply with NEPA, the ESA, and the implementing regulations for  
8 those laws.

9           11.    Declare that Federal Defendants unlawfully failed to timely make  
10 determinations on the FOIA Requests, failed to properly apply FOIA exemptions,  
11 failed to undertake a search for and disclose to Plaintiff all records that are  
12 responsive to the FOIA Requests, and failed to provide Plaintiff with reasonably  
13 segregable portions of records which may be lawfully subject to a FOIA  
14 exemption, and Order Federal Defendants to conduct searches that are reasonably  
15 calculated to locate all records responsive to the FOIA Requests, with the cut-off  
16 date for such searches being the date that the searches are conducted, and to  
17 provide Plaintiff without charge all responsive records and reasonably segregable  
18 portions of lawfully exempt records sought in this action by a reasonable date  
19 certain.

20           12.    Retain jurisdiction in this action to ensure compliance with the  
21 Court's Orders.

22           13.    Award Plaintiff its reasonable costs of litigation, including  
23 reasonable attorneys' fees and costs, pursuant to the Equal Access to Justice Act,  
24 28 U.S.C. § 2412, and/or FOIA 5 U.S.C. § 552(a)(4)(E), and/or other authority;  
25 and

26           14.    Grant such other and further relief as the Court may deem just and  
27 proper.  
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DATED: September 6, 2017

Respectfully submitted,

*s/ Brian Segee*

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*Attorneys for Plaintiff*

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 6, 2017, I electronically filed Plaintiff’s Second 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