



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

## Border Wall Prototype/Endangered Species Act: Center for Biological Diversity Notice of Intent to Sue Department of Homeland Security/U.S. Customs and Border Protection in Regards to Construction

06/08/2017

The Center for Biological Diversity (“CBD”) sent a June 1st “Notice of Intent to Sue” to the Department of Homeland Security and United States Customs and Border Protection (collectively “U.S.”) in regards to what is described as the border wall prototype (“Phase II of border wall request for a proposal contractual process”).

CBD alleges that U.S. are in violation of Section 7(a)(2) of the Endangered Species Act (“ESA”) for their failure to consult with the United States Fishing and Wildlife Service (“FWS”) in order to ensure that the border wall prototype project does not:

. . . jeopardize the continued existence of impacted threatened or endangered species, or result in the destruction or adverse modification of their critical habitat, and is in further violation of Section 9(a)(1)(B) of the ESA for the likely “take” of threatened or endangered species caused by construction or related activities undertaken as part of the border wall prototype project.

The June 1st letter also alleges violations of the National Environmental Policy Act (“NEPA”).

By way of background, CBD references President Trump’s Executive Order (“EO”) on “Border Security and Immigration Enforcement Improvements,” which is stated to have directed the Department of Homeland Security to:

. . . construct a secure, contiguous, and impassable physical barrier along the entirety of the nearly 2,000 mile long U.S.-Mexico border, in order to prevent illegal immigration, drug and human trafficking, and acts of terrorism.

CBD states that the EO defines “wall” to mean a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.

The Notice of Intent further describes the Department of Homeland Security Secretary’s implementing memorandum for the EO (directing planning, design, construction and maintenance of a wall. . . ) along with the release of two Requests for Proposals:

- One for a “Solid Concrete Border Wall Prototype
- “Other Border Wall Prototype”

CBD’s view of the “environmental setting of the presumed border wall prototype location” is described. It identifies what it characterizes as a “threatened and endangered species at the presumed border wall prototype location” as:

- Quino Checkerspot Butterfly
- San Diego Fairy Shrimp
- Riverside Fairy Shrimp

Further identified are alleged violations of the ESA and NEPA in relation to the proposed border wall prototype construction project.

The June 1st Notice of Intent also states that the Request for Proposal envisions the project as consisting of “as many as 20 bidders concurrently constructing full prototype designs and mock-ups of those designs on federally-owned land in San Diego County.” It alleges that the designs will be constructed in an area with high environmental and natural resources values, with documented occurrences of several threatened and endangered species, and potentially within designated critical habitat for one or more of those species.

As to the NEPA, CBD argues that this statute “would shed further light on numerous other environmental issues not addressed in this letter, including potential hydrological and other impacts, cultural resource impacts, and impacts on non-listed sensitive and rare species, such as burrowing owl.”

CBD claims that U.S. has failed to conduct any environmental analysis for the prototype project. As a result, violations of the ESA and NEPA are alleged.

[A copy of the June 1st Notice of Intent to Sue can be downloaded here.](#)