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John F. Kelly, Secretary  
Department of Homeland Security  
Washington, D.C. 20528  
congresstodhs@hq.dhs.gov

Kevin K. McAleenan, Acting Commissioner  
U.S. Customs and Border Protection  
Department of Homeland Security  
1300 Pennsylvania Ave., N.W.  
Washington, D.C. 20229  
kevin.k.mcaleenan@dhs.gov

Ryan Zinke, Secretary  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240  
secretary\_of\_the\_interior@ios.doi.gov

Jim Kurth, Acting Director  
U.S. Fish and Wildlife Service  
1849 C Street, N.W.  
Washington, D.C. 20240  
Jim\_Kurth@fws.gov

**Sent Via Certified and Electronic Mail**

**Re: Notice of Violations of the Endangered Species Act and National Environmental Policy Act in Relation to Border Wall Prototype Project**

Dear Secretaries Kelly and Zinke, Acting Director Kurth, and Acting Commissioner McAleenan:

On behalf of Center for Biological Diversity, we hereby provide notice, pursuant to Section 11(g)<sup>1</sup> of the Endangered Species Act<sup>2</sup> (“ESA”) that the Department of Homeland Security (“DHS”) and its component agency U.S. Customs and Border Protection (“CBP”) are in violation of Section 7(a)(2) of the ESA<sup>3</sup> for their failure to consult with U.S. Fish and Wildlife Service (“FWS”) in order to ensure that the border wall prototype project (Phase II of the border wall request for proposal contractual process) 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 further in violation of Section 9(a)(1)(B) of the ESA for the likely “take” of threatened or endangered species caused by construction and related activities undertaken as part of the border wall prototype project. This letter also provides notice of violations of the National Environmental Policy Act (“NEPA”)<sup>4</sup>, although such notice is not required under law.

<sup>1</sup> 16 U.S.C. § 1540(g)

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

<sup>3</sup> 16 U.S.C. § 1536(a)(2)

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

The Center for Biological Diversity (“Center”) is a non-profit, public interest environmental organization headquartered in Tucson, with regional offices in Oakland and Los Angeles, and numerous additional offices located throughout the United States, as well as in Baja California Sur, Mexico, dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.3 million members and on-line activists.

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

The threshold for triggering an agency’s duties under the ESA and NEPA is low—if an agency takes an action that may have environmental impacts or that “may affect” a listed species or critical habitat, then NEPA must be conducted and ESA section 7 consultation is required.<sup>5</sup> DHS and CBP, however, have provided no evidence to the public or to the Center that it has initiated or completed the required environmental analyses under either of these laws. On May 2, 2017, the Center submitted Freedom of Information Act (“FOIA”) requests to DHS and CBP for records related to the border wall prototype project, including for all records related to compliance with NEPA and the ESA. The agencies have acknowledged that request, but stated that they will not provide responsive records for 3-6 months, long after the prototype project is scheduled to be completed.

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

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>6</sup> Its fundamental purposes are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . . .”<sup>7</sup> To achieve these objectives, the ESA directs the U.S. Fish and Wildlife Service (“FWS”) to determine which species of plants and animals are “threatened” and “endangered” and place them on the endangered species list.<sup>8</sup> An “endangered” or “threatened” species is one “in danger of extinction throughout all or a significant portion of its range,” or “likely to become endangered in the near future throughout all or a significant portion of its range,” respectively.<sup>9</sup>

Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only the species’ continued survival, but its ultimate recovery. One central protection, Section 7(a)(2), mandates that all federal agencies avoid actions that: (1) jeopardize listed

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<sup>5</sup> 50 C.F.R. § 402.14(a).

<sup>6</sup> *TVA v. Hill*, 437 U.S. 180 (1978).

<sup>7</sup> 16 U.S.C. § 1531(b).

<sup>8</sup> *Id.* § 1533.

<sup>9</sup> *Id.* § 1532(6), (20).

species; or (2) destroy or adversely modify designated critical habitat.<sup>10</sup> Federal agency actions include those projects or programs “authorized, funded, or carried out by such agency.”<sup>11</sup> To comply with these Section 7(a)(2) safeguards, the federal agency taking action and FWS take part in a cooperative analysis of potential impacts to listed species and their designated critical habitat known as a consultation process.

First, the agency must obtain “a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area” from FWS.<sup>12</sup> If a species or critical habitat may be present, the agency must prepare a biological assessment to determine whether the proposed action “may affect” or “is not likely to adversely affect” any listed species or critical habitat.<sup>13</sup>

Federal agencies must initiate formal consultation with FWS when their actions “may affect” a listed species or designated critical habitat.<sup>14</sup> The standard for consultation is low: “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.”<sup>15</sup> Effects that must be considered as part of this inquiry include “direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.”<sup>16</sup> Indirect effects are “those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.”<sup>17</sup>

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

In addition to duties under Section 7(a)(2), federal agencies are required under ESA Section 7(a)(1) to “utilize their authority for the conservation [*i.e.* recovery] of endangered species and

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<sup>10</sup> *Id.* § 1536(a)(2)

<sup>11</sup> 50 C.F.R. § 402.02.

<sup>12</sup> 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c)–(d).

<sup>13</sup> 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.12(f), 402.14(a), (b)(1).

<sup>14</sup> 50 C.F.R. § 402.14(a).

<sup>15</sup> *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011) (*quoting* 51 Fed. Reg. 19,949).

<sup>16</sup> 50 C.F.R. § 402.02.

<sup>17</sup> *Id.*

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

<sup>19</sup> *Id.* § 1536(a)(2); 50 CFR § 402.14(d).

threatened species.”<sup>20</sup> As stated by the Ninth Circuit, agencies have an “affirmative obligation[] to conserve under section 7(a)(1).”<sup>21</sup>

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

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

NEPA is the “basic national charter for protection of the environment.”<sup>27</sup> It was enacted with the ambitious objectives of “encouraging productive and enjoyable harmony between man and his environment . . . promoting efforts which will prevent or eliminate damage to the environment and biosphere and stimulating the health and welfare of man; and enriching the understanding of the ecological systems and natural resources important to the Nation . . . .”<sup>28</sup> In order to achieve these goals, NEPA contains several “action forcing” procedures, most significantly the mandate to prepare an environmental impact statement on major Federal actions “significantly affecting the quality of the human environment.”<sup>29</sup>

The Supreme Court has found that the preparation of an EIS promotes NEPA’s broad environmental objectives in two primary ways: “It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”<sup>30</sup> The Council on Environmental Quality (“CEQ”) was

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

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

<sup>22</sup> 16 U.S.C. §1538(a).

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

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

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

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

<sup>27</sup> 40 C.F.R. § 1500.1(a).

<sup>28</sup> 42 U.S.C. § 4321.

<sup>29</sup> *Robertson v. Methow Valley Citizen Council*, 490 U.S. 332, 348 (1989); 42 U.S.C. § 4332 (2)(C).

<sup>30</sup> *Methow Valley Citizens Council*, 490 U.S. at 349.

created to administer NEPA and has promulgated NEPA regulations, which are binding on all federal agencies.<sup>31</sup>

The scope of NEPA is quite broad, mandating disclosure and consideration of direct, indirect, and cumulative environmental effects.<sup>32</sup> Direct effects are caused by the action and occur at the same time and place as the proposed project.<sup>33</sup> Indirect effects are caused by the action and are later in time or farther removed in distances, but are still reasonably foreseeable.<sup>34</sup> These effects include “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”<sup>35</sup> A cumulative impact is defined as: “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of which agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”<sup>36</sup>

### **C. The Border Wall Prototype Project (Phase II of the Border Wall RFP Process)**

Within days of taking office, on January 25, 2017 President Donald J. Trump issued an Executive Order on “Border Security and Immigration Enforcement Improvements,” directing DHS 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.” The E.O. defines “wall” to mean “a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.” (Sec. 3(e)).

DHS Secretary John Kelly issued an implementing memorandum for the Border Security E.O. on February 17, 2017 (“Kelly memorandum”). The Kelly memorandum directs CBP to “immediately begin planning, design, construction and maintenance of a wall, including the attendant lighting, technology (including sensors), as well as patrol and access roads, along the land border with Mexico in accordance with existing law, in the most appropriate locations and utilizing appropriate materials and technology to most effectively achieve operational control of the border.” In addition, the Kelly memorandum directs the DHS Under Secretary for Management, in consultation with the CBP Commissioner, to “immediately identify and allocate all sources of available funding for the planning, design, construction, and maintenance of a wall, including the attendant lighting, technology (including sensors), as well as patrols and access roads, and develop requirements for total ownership cost of this project, including preparing Congressional budget request for the current fiscal year (e.g., supplemental budget requests) and subsequent fiscal years.”

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<sup>31</sup> See 42 U.S.C. §§ 4342, 4344; 40 C.F.R. §§ 1500–1508.

<sup>32</sup> 40 C.F.R. §§ 1502.16, 1508.7, 1508.8, 1508.27(b)(7).

<sup>33</sup> 40 C.F.R. § 1508.8(a).

<sup>34</sup> *Id.* § 1508.8(b).

<sup>35</sup> *Id.* § 1508.8.

<sup>36</sup> *Id.* § 1508.7.

In accordance with the Border Security E.O. and Kelly memorandum, on March 17, 2017 DHS released two Requests for Proposals (“RFP”) <sup>37</sup>—one for a “Solid Concrete Border Wall Prototype”<sup>38</sup> and the second for an “Other Border Wall Prototype.”<sup>39</sup> The “threshold requirements” for the two prototypes are identical, with the exception that the “other border wall prototype” does not have to be constructed of “reinforced concrete.”<sup>40</sup> These contractual thresholds include requirements that the wall design “shall be physically imposing in height.”<sup>41</sup> The government’s “nominal concept is for a 30-foot high wall,” and designs “with heights of less than 18 feet are not acceptable.”<sup>42</sup> The RFPs further specify that the wall designs “shall prevent digging or tunneling below it for a minimum of 6 feet below the lowest adjacent grade,” “shall be constructible to slopes up to 45 percent,” and shall be built in a manner that it would take at least an hour to breach with a “sledgehammer, car jack, pickaxe, chisel, battery operated impact tools, battery operated cutting tools, Oxy/acetylene torch or other similar hand-held tools.”<sup>43</sup>

Phase I of the RFPs required bidders to submit Concept Papers by April 4, 2017. Up to 20 Offerors from Phase I could be invited to contract for participation in Phase II of the bidding process.<sup>44</sup> Although media reports have indicated that DHS has notified bidders of their selection for the Phase II process, DHS and CBP apparently do not intend to release this information to the public, or to other bidders.<sup>45</sup> As stated in one article, CBP issued an “online notice” stating that “the agency will not release the names of the companies that made it to the prototype stage, or the number of contractors who would be extended that opportunity.”<sup>46</sup>

Phase II requires the Contractors to “provide for the design and construction of a full-scale prototype,” which “shall be 30 feet long,” and “will be constructed at a location in San Diego, CA as determined by the Government.”<sup>47</sup>

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<sup>37</sup> See <https://www.cbp.gov/newsroom/national-media-release/cbp-requests-proposals-border-wall-prototypes>

<sup>38</sup> See

[https://www.fbo.gov/index?s=opportunity&mode=form&id=d4ee003143839cf4c8cd684694812ef&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=d4ee003143839cf4c8cd684694812ef&tab=core&_cview=1)

<sup>39</sup> [https://www.fbo.gov/index?s=opportunity&mode=form&id=893ca637e9c19e4be3845dcd4567a1a9&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=893ca637e9c19e4be3845dcd4567a1a9&tab=core&_cview=1). Due to the similarity between the two RFPs, citations to the documents shall hereafter be simply “RFP,” without distinguishing between the two.

<sup>40</sup> RFP, at Attachment 1 (Statement of Work), p. 2.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

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

<sup>44</sup> RFP, at p. 40.

<sup>45</sup> Kirsten Crow, “In Texas, companies await word on Trump’s border wall.” *USA Today*, May 19, 2017.

<sup>46</sup> *Id.*

<sup>47</sup> RFP, Attachment 1, at p. 3.

The RFP further provides that the chosen bidders “shall design and construct a 10 ft. by 10 ft. mock-up of an exemplar section” of their prototype designs at the San Diego location, in order “to allow the Government to test and evaluate the anti-destruct characteristics of the bidder’s wall design.”<sup>48</sup> This mock-up “shall meet all technical requirements except the anti-dig, anti-climb, and aesthetics.”<sup>49</sup> Finally, the mock-up shall be constructed within two weeks after the notice to proceed (“NTP”) and “shall be constructed concurrent to prototype construction,” and after completion, the bidder “shall remove the structure and dispose of it properly” within seven calendar days.<sup>50</sup>

The prototype construction shall be completed within 30 calendar days of the NTP.<sup>51</sup> The Government estimates that the price of each prototype design shall range between \$200,000 and \$500,000. Chosen contractors “will be provided approximately 200 feet (in width) of right of way for the construction of the prototype.”<sup>52</sup> The RFP specifies that the Contractor “shall be responsible for any staging areas as required at an offsite location (i.e. no staging on the border wall will be made available by the Government.”). DHS, however, “will be responsible for any legally required environmental impact studies or other environmental compliance.”<sup>53</sup> Unlike the mock-up design, the RFP does not require removal of prototype construction, but permits the Government to direct such removal. In the event of such order, the bidder shall complete the removal and site restoration within 14 calendar days.<sup>54</sup>

#### **D. Environmental Setting of the Presumed Border Wall Prototype Location**

The precise location of the prototype construction remains undisclosed to the public, with the exception of the chosen bidders (as many as 20).<sup>55</sup> As noted above, the RFP states only that the construction will be “at a location in San Diego, CA as determined by the Government.”<sup>56</sup> The

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<sup>48</sup> *Id.*

<sup>49</sup> RFP, Attachment 1, at p. 4.

<sup>50</sup> *Id.*

<sup>51</sup> RFP, Attachment 1, at p. 5.

<sup>52</sup> RFP, Amendment 6, at p. 5.

<sup>53</sup> Potential bidders repeatedly asked DHS to address environmental requirements throughout the Phase I process. *See* RFP, Amendment 4, at p. 2; RFP, Amendment 5, at p. 6 (stating that DHS “is not expecting offerors to conduct independent environmental impact studies” in response to bidder concerns that NEPA is applicable to border wall construction and noting that a “lack of such information could be grounds for a protest of the award of any and all IDIQ contracts and task orders.”); *id.* (same answer in response to concerns about “environmental impact due to disrupting the migratory patterns of animals.”); RFP, Amendment 6, at p. 4 (same); RFP, Amendment 6, at p. 7 (same).

<sup>54</sup> RFP, Attachment 1, at p. 5.

<sup>55</sup> RFP, Amendment 6, at p. 6 (“Additional information regarding the surrounding information will be provided in Phase II to the down-selected offerors. Additionally, the Government will hold a site visit at the prototype location after the release of the Phase II solicitation.”).

<sup>56</sup> RFP, Attachment 1, at p. 3.

agencies have, however, provided information and tours to select media outlets.<sup>57</sup> The resultant press articles and television segments depict the presumed location to be in the vicinity of the eastern edge of Otay Mesa, near the eastern terminus of the approximate 14-mile long, westernmost segment of the current border wall beginning at the Pacific Ocean.

As stated in the implementing plan for the San Diego County Multiple Species Conservation Program (“MSCP”), the Otay Mesa area “consists primarily of a large mesa, with slopes and deep canyons draining into the Otay River Valley or towards Mexico.”<sup>58</sup> Although DHS and CBP are not signatories to or bound by the plan, the MSCP describes “the optimum future condition envisioned for the Otay Mesa area [as] a network of open and relatively undisturbed canyons containing a full ensemble of native species which provide functional wildlife habitat and movement capability,” while acknowledging that Border Patrol access roads will be “integrated into the area.”<sup>59</sup>

During promulgation of the MSCP, public commenters noted that past Border Patrol activities had resulted in the filling of a vernal pool on Otay Mesa and other environmental impacts.<sup>60</sup> The response to comments noted that DHS (then INS) was not subject to the MSCP but that its activities “will continue to be subject to [ESA] consultation with [FWS] and that the County’s take authorizations would not cover their activities.”<sup>61</sup>

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<sup>57</sup> See, e.g., CBS8.com, “*The Border Wall: First Video of Otay Mountain Prototype Location.*” April 28, 2017. Available at: <http://www.cbs8.com/story/35282531/the-border-wall-first-video-of-otay-mountain-prototype-location>

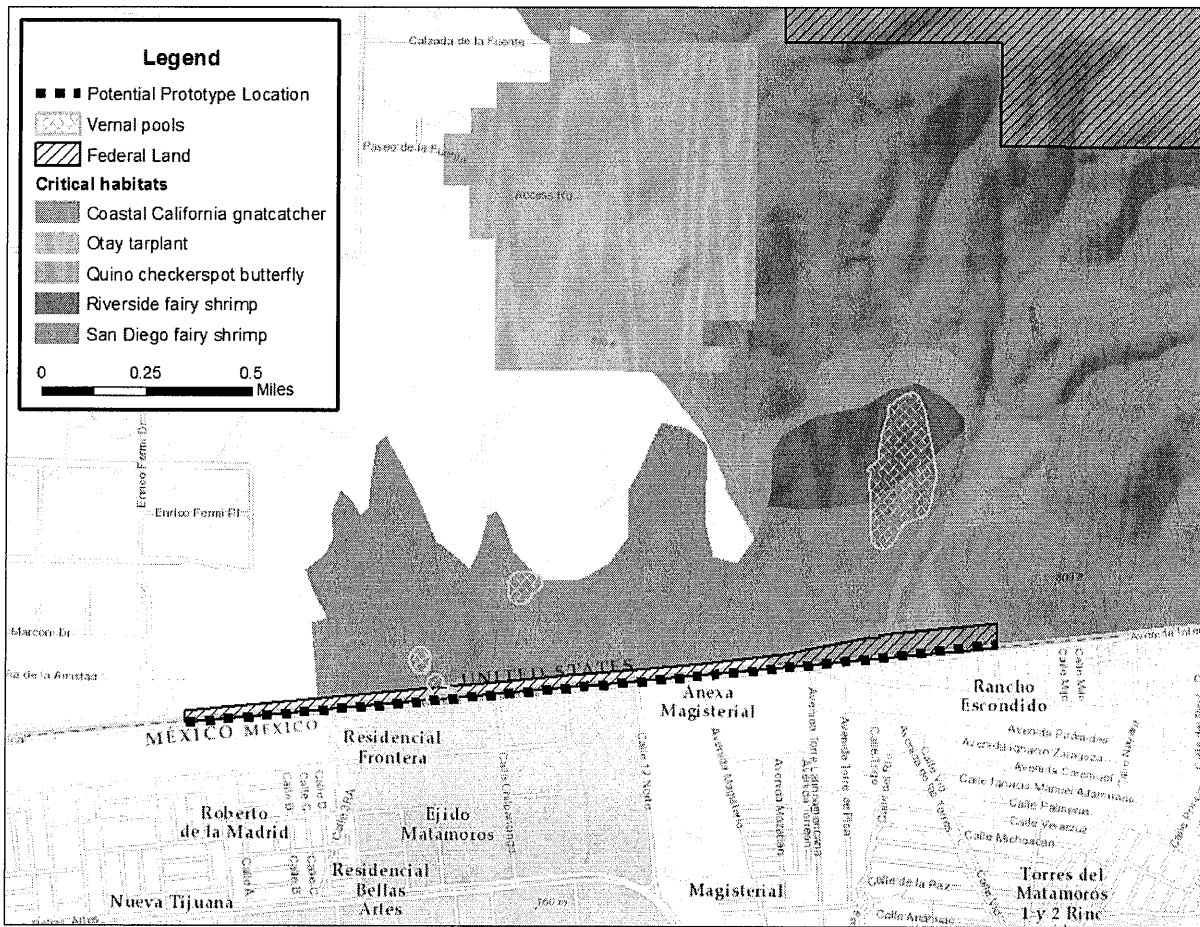
<sup>58</sup> San Diego County Multiple Species Conservation Program, Framework Management Plan (Attachment A).

<sup>59</sup> *Id.*

<sup>60</sup> MSCP Final Environmental Impact Report (“FEIR”), at p. 76-4

<sup>61</sup> *Id.*; see also FEIR, at p. 20-1 (“The wildlife agencies work with the Border Patrol and review their proposed actions through NEPA and Section 7 of the [ESA] to ensure they are able to effectively carry out their mission while avoiding and minimizing impacts to sensitive species.”).





**Map 1: Prototype Location, Federal Lands, and ESA Critical Habitat**

**E. Threatened and Endangered Species at the Presumed Border Wall Prototype Location**

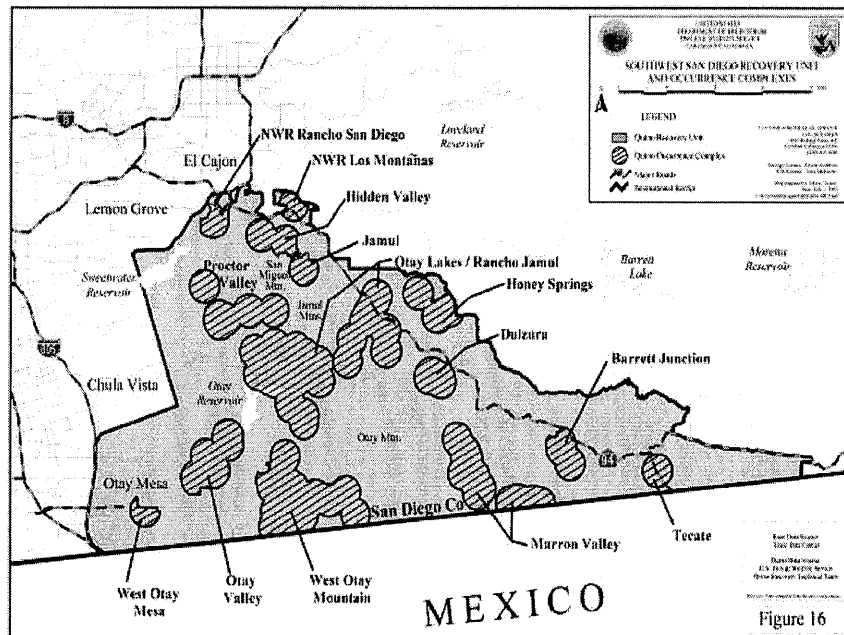
As depicted in the preceding map, the presumed prototype border wall location is within or in close proximity to known vernal pool locations, as well as designated critical habitat for several threatened and endangered species, including Quino checkerspot butterfly (*Euphydryas editha quino*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), Riverside fairy shrimp (*Streptocephalus woottoni*), California coastal gnatcatcher (*Polioptila californica californica*), and Otay tarplant (*Deinandra conjugens*). More detailed information for three of these species follows.

**1. Quino Checkerspot Butterfly**

FWS listed the Quino checkerspot butterfly on January 16, 1997, due to direct and indirect human impacts including habitat loss and fragmentation, invasion of nonnative plants, and

catastrophic natural events such as increased frequency of drought and wildfire.<sup>62</sup> At listing, Quino populations were reduced by more than 95 percent across their range.<sup>63</sup>

The eastern portion of the presumed prototype construction location is within Quino checkerspot butterfly critical habitat unit 8, encompassing Otay Valley and West Otay Mountain, among other areas.<sup>64</sup> The recovery plan (p. 50, 51, 54) states that Quino occupancy in the Otay Mountain area “extends across the international border” and it “is possible that the West Otay Mountain and Marron Valley Occurrence Complexes belong to a metapopulation dependent on local mainland or ‘source’ populations in Mexico.”



Map 2: Quino Checkerspot Butterfly Critical Habitat

## 2. *San Diego Fairy Shrimp*

FWS listed the San Diego fairy shrimp as endangered on February 3, 1997, due primarily to the loss of habitat due to human activities, mainly urban development and agricultural conversion.<sup>65</sup> FWS reported San Diego fairy shrimp were known to inhabit 25 vernal pool complexes in San Diego, Orange, and Santa Barbara counties, and northwestern Baja California, Mexico.<sup>66</sup> At the

<sup>62</sup> 63 Fed. Reg. 2,313 (January 16, 1997)

<sup>63</sup> FWS, Quino Checkerspot Butterfly 5-Year Review (2009), at p. 2.

<sup>64</sup> 74 Fed. Reg. 28,802 (July 17, 2009).

<sup>65</sup> 62 Fed. Reg. 4925, 4932 (Feb. 3, 1997)

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

time of listing, the San Diego fairy shrimp was given a FWS recovery priority of 2C, indicating the species faced a high degree of threat but had a high potential for recovery.

Critical habitat for the San Diego fairy shrimp, as determined by FWS in 2012, overlaps with the proposed prototype site at critical habitat Unit 5 (Subunit 5D).<sup>67</sup> At the time of listing, this unit was occupied and contained the features essential to conservation of San Diego fairy shrimp. It is the southernmost unit of critical habitat, which FWS concluded is “essential to the conservation of the San Diego fairy shrimp because it helps to maintain the ecological distribution and genetic diversity of the species.”<sup>68</sup> This unit contains vernal pools that support San Diego fairy shrimp populations of the distinct “Group A” genetic clade (Bohonak 2004, p 3-9). FWS concluded “the conservation of the remaining vernal pools in this unit is essential to maintain continuity in the range between the U.S. and Mexico as well as the genetic diversity of the species.”<sup>69</sup>

Subunit 5D, the area that overlaps with the proposed prototype site, consists of 391 acres of habitat occupied by the species at both the time of listing and at the time of the 5-year review in 2008.<sup>70</sup> The vernal pool complexes in this subunit had not yet been directly impacted by development or habitat fragmentation as of 2007.<sup>71</sup>

At the time of critical habitat designation, FWS concluded that populations of San Diego fairy shrimp in Subunit 5D are the closest U.S. population to any populations in Mexico, and the preservation of vernal pool complexes near to one another would be increasingly important to these ecosystems to provide continuity in the range between the U.S. and Mexico.<sup>72</sup> Further, FWS explicitly concluded that development along the international border threatens the species via destruction of vernal pools or their watersheds, isolation of pools and fragmentation of pool systems, and alterations in the hydrology of adjacent pools.<sup>73</sup>

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<sup>67</sup> 72 Fed. Reg. 70648, 70653 (2007).

<sup>68</sup> *Id.*

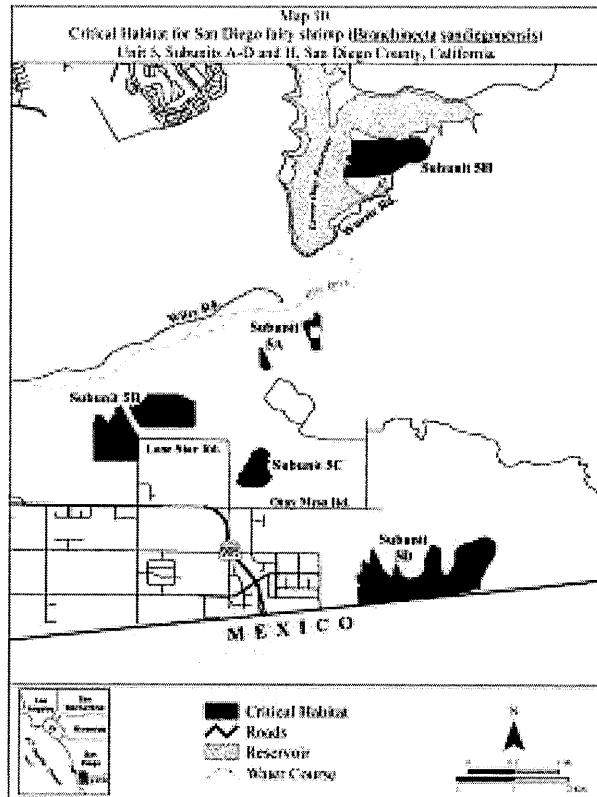
<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 70674.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> USFWS, San Diego Fairy Shrimp 5-Year Review, 11 (2008)



Map 3: San Diego Fairy Shrimp Critical Habitat

### 3. *Riverside Fairy Shrimp*

FWS listed the Riverside fairy shrimp on August 3, 1993 due mainly to habitat loss or destruction.<sup>74</sup> At the time of listing, vernal pool habitat in San Diego County had declined by an estimated 97 percent with similar declines elsewhere.<sup>75</sup> By the time of listing, FWS knew the species to inhabit only five vernal pool complexes within the United States and two complexes in Baja California, Mexico.<sup>76</sup> All sites were considered under imminent threat of development or other anthropogenic impacts, but FWS concluded that Otay Mesa—the area where the proposed prototype site is—had the most threats of habitat damage of all of the sites in which Riverside fairy shrimp occurred.<sup>77</sup>

As with the San Diego fairy shrimp, development of border security and associated infrastructure threatens the Riverside fairy shrimp along the international border. Development in the area of the proposed prototype site could have direct impacts to fairy shrimp habitat, *i.e.*, destruction of

<sup>74</sup> 58 Fed. Reg. 41,384 (August 3, 1993).

<sup>75</sup> USFWS, Riverside Fairy Shrimp 5-Year Review (2008), at p. 42.

<sup>76</sup> 58 Fed. Reg. 41,384

<sup>77</sup> *Id.*

vernal pools or their watersheds, isolation of pools and fragmentation of pool systems, and alterations in the hydrology of adjacent pools.<sup>78</sup>

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

The proposed border wall prototype construction project is a federal action subject to NEPA's requirements. As described in the RFP, the project will consist 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. Additional information provided by DHS to select media outlets depicts the location to be in the eastern portion of Otay Mesa. While the RFP specifies that the bidders will be required to remove the mock-ups, it does not institute similar requirements on the full prototype designs. These 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. In addition, the NEPA process would shed further light on numerous other environmental issues not addressed in this letter, including potential hydrological and other impacts, cultural resource impacts, and impacts on non-listed sensitive and rare species, such as burrowing owl.

However, DHS and CBP have apparently failed to conduct any environmental analysis for the prototype project. Even in the event that the agencies have completed such analysis, DHS and CBP are failing to provide such records to the public, even in response to FOIA requests, in a timely and meaningful manner. The agencies' lack of environmental analysis and/or refusal to provide public notice and opportunity to comment on that analysis, undermines NEPA's specific requirements, as well as its overall dual purposes of better informing agency decisionmaking so that potential environmental impacts can be avoided or mitigated, and of conducting a public and transparent analysis of the environmental impacts of governmental action.

Similarly, consultation under ESA Section 7 is required whenever a discretionary agency action "may affect" any listed species or its critical habitat.<sup>79</sup> ESA implementing regulations define "action" as "all activities or programs of any kind authorized, funded, or carried out . . . by Federal agencies."<sup>80</sup> As detailed in this letter, the DHS and CBP border wall prototype construction project will potentially directly, indirectly, and cumulatively impact several threatened and endangered species. Despite this fact, DHS and CBP have apparently failed to initiate or complete ESA section 7 (a)(2) consultation with FWS in order to ensure that the ongoing implementation of the prototype border wall construction project does not jeopardize the continued existence of any listed species or adversely modify or destroy the designated critical habitat for any of those species. In addition, DHS and CBP have failed to take any affirmative

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<sup>78</sup> USFWS, Riverside Fairy Shrimp 5-Year Review, 12 (2008)

<sup>79</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a)

<sup>80</sup> 50 C.F.R. § 402.02 (emphasis added)

action to conserve the threatened and endangered species that may be impacted by the project. Accordingly, DHS and CBP are also violating Section 7 (a)(1) of the ESA.

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

#### **G. Conclusion**

Thank you for your attention to the allegations contained in this notice letter. Should DHS and CBP fail to remedy the ESA violations of law within 60 days, the Center for Biological Diversity intends to pursue this matter in Federal District Court. As prior notice is not required for NEPA violations, the Center for Biological Diversity may immediately pursue relief for those violations at any time. Please contact me at (805) 750-8852 should you wish to discuss this notice letter in further detail.

Sincerely Yours,



Brian Segee, Senior Attorney  
Center for Biological Diversity  
P.O. Box 1646  
Ojai, CA 93024  
(805) 750-8852  
bsegee@biologicaldiversity.org

cc: DHS Office of General Counsel  
245 Murray Lane, SW  
Mail Stop 0475  
U.S. Department of Homeland Security  
Washington, D.C. 20528

CBP Office of General Counsel  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C. 20229