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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SIERRA CLUB,)	Case No.
)	
Plaintiff,)	COMPLAINT
)	(Freedom of Information Act Case)
v.)	
)	
U.S. FISH AND WILDLIFE SERVICE,)	
)	
Defendant.)	
)	

INTRODUCTION

1. Plaintiff Sierra Club, the nation’s oldest and largest grassroots environmental organization, brings this case to remedy violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, by Defendant the U.S. Fish and Wildlife Service (“FWS” or the “Service”). The violations arise out of the Service’s continuing failure to fully respond to Sierra Club’s FOIA request seeking records pertaining to the environmental impacts of existing vehicle barriers and

1 U.S.-Mexico border walls, as well as plans and preparations for new border wall segments,
2 adjacent to the southern edge of the San Bernardino National Wildlife Refuge (“Refuge”).

3 2. The San Bernardino National Wildlife Refuge is an approximately 2,300-acre
4 ranch along the U.S.-Mexico border acquired by the Service in 1982 in order to provide habitat
5 for native plant and wildlife species classified as “endangered” or “threatened” under the
6 Endangered Species Act, including the Yaqui chub and Yaqui catfish. The Refuge is one of the
7 largest natural wetlands in the American Southwest and further serves as “an important link for
8 wildlife to migrate between Mexico’s Sierra Madre Occidental and the Rocky Mountains to the
9 north.” *See* San Bernardino National Wildlife Refuge, U.S. Fish and Wildlife Service,
10 https://www.fws.gov/refuge/San_Bernardino/Wildlife_and_habitat.html (last accessed on July
11 28, 2020).

12 3. In October 2019, construction of a 20-mile, 30-foot-tall barrier adjacent to the
13 southern border of the Refuge began, threatening to not only block wildlife migration but also
14 further deplete scarce surface and groundwater resources by pumping huge quantities of
15 groundwater to mix concrete and suppress dust.

16 4. Sierra Club seeks declaratory, injunctive, and any other appropriate relief to
17 remedy FWS’s failure to provide records in response to Sierra Club’s request, in violation of
18 FOIA or, alternatively, the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06. Sierra
19 Club timely filed an administrative appeal on May 5, 2020 of the Service’s adverse
20 determination, Exhibit 1 hereto. More than 20 days have elapsed, but the Service has not ruled
21 on Sierra Club’s appeal.

22 **JURISDICTION AND VENUE**

23 5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
24 question) and 5 U.S.C. § 552(a)(4)(B) (FOIA).

25 6. Venue properly vests in this District pursuant to 5 U.S.C. § 552(a)(4)(B), because
26 Sierra Club has its principal place of business in Oakland, California.

27 7. For the same reason, intradistrict assignment is proper in the Oakland Division.

PARTIES

1
2 8. Plaintiff Sierra Club is incorporated in the State of California as a Nonprofit
3 Public Benefit Corporation, with its headquarters located at 2101 Webster Street, Suite 1300,
4 Oakland, California 94612. Founded in 1892, Sierra Club is the nation’s oldest grassroots
5 environmental organization. Sierra Club is comprised of 67 chapters and over 800,000 members
6 dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and
7 promoting the responsible use of the earth’s ecosystems and resources; to educating and enlisting
8 humanity to protect and restore the quality of the natural and human environment; and to using
9 all lawful means to carry out these objectives.

10 9. Sierra Club has been a longtime, active public advocate for imperiled wildlife,
11 including wildlife in Arizona and along the U.S.-Mexico border. Sierra Club regularly conveys
12 important information to its members and the public through publications and press releases, as
13 well as by publicly releasing information and documents obtained through FOIA requests. For
14 instance, the organization has disseminated extensive information about impacts to wildlife as a
15 result of border wall construction through press releases, newsletters, and social media.

16 10. The Service’s FOIA violations harm Sierra Club and its members by preventing
17 Sierra Club from gaining a full understanding of how border wall construction near the San
18 Bernardino National Wildlife Refuge may be impacting threatened and endangered plant and
19 animal species. The improper withholding of the requested information also harms Sierra Club’s
20 efforts to advocate and communicate about the need for protections for threatened and
21 endangered species within the Refuge.

22 11. Sierra Club brings this action on its own behalf and on behalf of its members.
23 Sierra Club and its members have been and continue to be injured by the Service’s unlawful
24 failure to provide requested records within the timeframes mandated by FOIA. The requested
25 relief will redress these injuries.

26 12. Defendant United States Fish and Wildlife Service is a federal governmental
27 agency within the meaning of 5 U.S.C. § 552(f)(1) and is a bureau within the United States
28

1 Department of the Interior. The Service is responsible for implementing and enforcing various
2 federal wildlife laws, including the Endangered Species Act. The Service is in possession and
3 control of the records that the Sierra Club seeks and, as such, is subject to FOIA pursuant to 5
4 U.S.C. § 552(f). The Service's headquarters are located at 1849 C Street, NW, Washington, D.C.
5 20240.

6 **STATUTORY BACKGROUND**

7 13. The fundamental purpose of FOIA is to promote transparency and accountability
8 in government. *See Bristol-Myers Co. v. Fed. Trade Comm'n*, 424 F.2d 935, 938 (D.C. Cir.
9 1970) (“the primary purpose of the Freedom of Information Act was to increase the citizen’s
10 access to government records.”). To that end, FOIA requires that federal executive agencies
11 release all documents and other records in their possession upon request by a member of the
12 public, except records that fall under one of the statute’s narrowly-construed exemptions. 5
13 U.S.C. § 552(a)(8), (b)-(c); *see also Milner v. Dep’t of the Navy*, 562 U.S. 562, 565 (2011)
14 (exemptions are “explicitly made exclusive” and “must be narrowly construed.”) (internal
15 citations and quotation marks omitted); *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th
16 Cir. 2009) (noting FOIA’s “strong presumption in favor of disclosure” and that an agency bears
17 the burden for demonstrating an exemption properly applies) (internal citation omitted).

18 14. Upon receiving a FOIA request, an agency has 20 working days to respond by
19 determining whether responsive documents exist and whether the agency will release them. 5
20 U.S.C. § 552(a)(6)(A); 43 C.F.R. § 2.62(a). Agencies must make reasonable efforts to search for
21 records in a manner that is reasonably calculated to locate all records that are responsive to the
22 FOIA request. 5 U.S.C. § 552(a)(3)(C)-(D). FOIA further requires agencies to make records
23 “promptly available” to requesting parties. *Id.* § 552(a)(3)(A).

24 15. To achieve FOIA’s core purpose of disclosure, an agency must perform an
25 adequate search for all responsive records. *Founding Church of Scientology of D.C., Inc. v. NSA*,
26 610 F.2d 824, 837 (D.C. Cir. 1979). “The adequacy of the agency’s search is judged by a
27 standard of reasonableness, construing the facts in the light most favorable to the requestor.”
28

1 *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995). The agency must
2 “demonstrate that it has conducted a search reasonably calculated to uncover all relevant
3 documents.” *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (internal citations and
4 quotation marks omitted).

5 16. If an agency withholds responsive records, in whole or in part, the burden is on
6 the agency to prove that an exemption applies and that it outweighs FOIA’s policy of disclosure.
7 *See, e.g.*, 5 U.S.C. § 552(a)(4)(B); *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991). Simply
8 asserting that an exemption applies is inadequate to overcome FOIA’s strong presumption in
9 favor of disclosure. *Founding Church of Scientology of D.C., Inc.*, 610 F.2d at 830 (“conclusory
10 and generalized allegations of exemptions are unacceptable.”) (internal quotation marks omitted)

11 17. Whenever an agency determines that a portion of a record should be withheld
12 under one of FOIA’s exemptions, the agency must still release to the public any portions of that
13 record that contain “reasonably segregable” non-exempt information. 5 U.S.C. § 552(b).

14 18. If an agency makes an initial determination that it will deny a FOIA request in
15 whole or in part, the requester is entitled to administratively appeal the determination. 5 U.S.C. §
16 552(a)(6)(A)(i)(III)(aa). Fish and Wildlife Service regulations require administrative appeals to
17 be filed within 90 workdays from the date of the final response. 43 C.F.R. §2.58(a). FOIA and
18 the Service’s regulations require the agency to make a determination with respect to an
19 administrative appeal of a denial of a request within 20 working days. 5 U.S.C. §
20 552(a)(6)(A)(ii); 43 C.F.R. § 2.62(a).

21 19. If the agency fails to comply with the statutory time limits to respond to a FOIA
22 request or appeal, the requester is deemed to have exhausted its administrative remedies and may
23 commence litigation in district court to compel an adequate response from the agency. 5 U.S.C.
24 §§ 552(a)(4)(B), (a)(6)(C)(i). FOIA provides that the district court shall have jurisdiction “to
25 enjoin [an] agency from withholding agency records and to order the production of any agency
26 records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

1 23. Additionally, the Refuge serves as a wildlife migratory corridor between Mexico
2 and the United States. Numerous threatened and endangered species, such as the jaguar, ocelot,
3 and many other species, cross between Mexico and United States, passing through the San
4 Bernardino National Wildlife Refuge. *See* Letter to Paul Enriquez, U.S. Customs and Border
5 Patrol, from Acting Assistant Regional Director, Ecological Services, U.S. Fish and Wildlife
6 Service (June 28, 2019) (attached as Exhibit 2).

7 24. In October 2019, U.S. Customs and Border Protection began construction of a 20-
8 mile border wall segment directly adjacent to the southern portion of the Refuge. In stark
9 contrast to the Normandy-style fences that have delineated the border for many years and allow
10 for wildlife migration, the new construction consists of 30-foot-tall barriers that will be
11 impassable for numerous wildlife. Nina Lakhani, *Trump's Border Wall Threatens Fish Species*,
12 High County News (Dec. 31, 2019), *available at* [https://www.hcn.org/articles/climate-desk-](https://www.hcn.org/articles/climate-desk-trumps-border-wall-threatens-fish-species)
13 [trumps-border-wall-threatens-fish-species](https://www.hcn.org/articles/climate-desk-trumps-border-wall-threatens-fish-species); *see also* Nick Miroff, *See the Animals Caught on*
14 *Camera Diverting Around Trump's Border Wall*, Washington Post (March 2, 2020), *available at*
15 <https://www.washingtonpost.com/graphics/2020/national/amp-stories/animals-at-border-wall/>.

16 25. Moreover, construction of vehicle barriers and border walls threaten to deplete
17 available surface and groundwater, as construction requires hundreds of thousands of gallons of
18 water in order to mix concrete and control dust. According to some news reports, U.S. Customs
19 and Border Protection requires approximately 180,000 gallons of water per day to construct the
20 segment of wall running adjacent to the San Bernardino National Wildlife Refuge. *See* Erin
21 Stone, *Concerns Grow that Trump's Wall Will Damage Rivers, Wildlife Habitat on Arizona*
22 *Border*, Arizona Republic (Feb. 5, 2020), *available at*
23 [https://www.azcentral.com/story/news/local/arizona-environment/2020/02/03/border-wall-](https://www.azcentral.com/story/news/local/arizona-environment/2020/02/03/border-wall-construction-arizona-causes-environmental-concerns-rivers-grasslands-wildlife/4551396002/)
24 [construction-arizona-causes-environmental-concerns-rivers-grasslands-wildlife/4551396002/](https://www.azcentral.com/story/news/local/arizona-environment/2020/02/03/border-wall-construction-arizona-causes-environmental-concerns-rivers-grasslands-wildlife/4551396002/)
25 (“Customs and Border Protection said in a Feb. 5 email to The Republic that the contractor is
26 currently pumping approximately 180,000 gallons of water per day . . .”).
27
28

1 d. Photographs of the barriers or walls, or photographs of the location of barriers or
2 walls that show the site before the barriers were erected and the impacts of
3 construction.

4 29. On August 1, 2019, the Service sent an email acknowledging receipt of the
5 records request and assigning it tracking number FWS-2019-00990. The email stated that the
6 Service had placed the request in the “exceptional/voluminous” processing track and further
7 stated that Sierra Club’s request for a fee waiver had been granted. The acknowledgement did
8 not provide an estimated date of completion, nor did it provide a determination.

9 30. The Sierra Club made several attempts to obtain an estimated completion date,
10 including in November 2019, January 2020, and March 2020. On November 13, 2019, the
11 Service stated that the FOIA request was in “the beginning phases of final review.” *See* Exhibit
12 4. One month later, on January 13, 2020, the Service again stated that the agency “need[ed] to
13 finish up final review followed by Solicitor review.” *Id.* Again, on April 7, 2020, the agency
14 stated that it was resolving “some questions regarding responsive records” before the records
15 would be sent to the “Solicitor’s office for review.” *Id.*

16 31. Finally, on April 13, 2020, the Service provided a final determination on the
17 Sierra Club’s FOIA request, nine months after the request was submitted. *See* Exhibit 5. The
18 final determination released approximately 71 records, stated that 37 records were partially
19 redacted and that 20 were withheld in full, under various exemptions:

- 20 a. Exemption 3: The Service partially redacted 4 records, stating that the records
21 contain information related to sensitive tribal sites and that such information is
22 protected under the Archaeological Resources Protection Act of 1979.
- 23 b. Exemption 5: The Service partially redacted 1 record and fully withheld 16
24 records, claiming that the records are exempt from disclosure under the
25 “deliberative process privilege” because the records are both pre-decisional and
26 deliberative.
- 27
28

1 c. Exemption 6: The Service partially redacted 31 records, claiming that the
2 information redacted included personal cell and home phone numbers, e-mail
3 addresses, and home addresses.

4 d. Exemption 7: The Service partially redacted 14 records and fully withheld 4
5 records, claiming that the records either contained personal law enforcement
6 information that would constitute an unwarranted invasion of personal privacy or
7 contained law enforcement records that would disclose techniques and/or
8 procedures for law enforcement investigations or prosecutions. At least 6 records
9 were partially redacted under exemption 7(E).

10 32. The Service did not provide a *Vaughn* index for redacted or withheld records or
11 provide any document-specific details justifying why any particular exemption justified
12 nondisclosure. Rather, the Service merely provided conclusory and general assertions of
13 exemptions.

14 33. Additionally, the Service stated that 28 records were referred to U.S. Customs and
15 Border Protection and three were referred to the U.S. Army Corps of Engineers for a release
16 determination.

17 34. Notably, the Service produced very few records indicating that the agency has
18 considered the potential impact of groundwater depletion on endangered and threatened species
19 within the Refuge caused by border wall construction, despite broad awareness that the
20 construction requires massive quantities of groundwater that is likely to harm endangered aquatic
21 species for which the San Bernardino National Wildlife Refuge was specifically founded to
22 protect. *See, e.g.,* Maya L. Kapoor, *The only catfish native to the Western U.S. is running out of*
23 *water*, *The Counter* (July 9, 2020) available at [https://thecounter.org/catfish-native-western-us-](https://thecounter.org/catfish-native-western-us-running-water-border-wall-yaqui/)
24 [running-water-border-wall-yaqui/](https://thecounter.org/catfish-native-western-us-running-water-border-wall-yaqui/) (documenting harm caused to species found with the Refuge,
25 including the Yaqui catfish, as a result of groundwater depletion, including acknowledgment
26 from Fish and Wildlife Service official William Radke that groundwater levels are a key concern
27 for the survival of fish species at the Refuge).

1 35. Additionally, the Service provided only a few communications between itself and
2 U.S. Border Patrol and no communications with the U.S. Army Corps of Engineers, both of
3 which are involved in border wall construction that could be impacting the Refuge. Similarly, the
4 Service did not provide any records of communication with third party contractors, as requested
5 by the Sierra Club.

6 36. The Service did not provide any information concerning the parameters of its
7 search for responsive records.

8 37. On May 5, 2020, within 90 working days of receiving the Service's final
9 determination, the Sierra Club filed an administrative appeal challenging the withholding and
10 redaction of records under Exemptions 5, 6, and 7. *See* Exhibit 1.

11 38. The Service's statutory and regulatory deadline to rule on the Sierra Club's
12 administrative appeal was June 3, 2020.

13 39. More than 20 working days have elapsed since Sierra Club filed its administrative
14 appeal. Sierra Club has therefore exhausted its administrative remedies.

15 **FIRST CLAIM FOR RELIEF: VIOLATION OF THE FREEDOM OF INFORMATION**
16 **ACT**

17 **Failure to Justify Withholding Records**

18 40. Sierra Club realleges and incorporates by reference the allegations made in all
19 preceding paragraphs.

20 41. The Service has failed to justify withholding public records that are responsive to
21 the Sierra Club's request.

22 42. The Service has thereby violated FOIA's requirements, including (without
23 limitation): the Act's requirement that the agency disclose all public records not otherwise
24 exempt from disclosure, 5 U.S.C. § 552(a)-(b); and FOIA's requirement that an agency justify
25 nondisclosure, 5 U.S.C. § 552(a)(4)(B)

26 43. Sierra Club has exhausted its administrative remedies and has no other adequate
27 remedy at law to redress these legal violations and injuries.

1 **SECOND CLAIM FOR RELIEF: VIOLATION OF THE FREEDOM OF**
2 **INFORMATION ACT**

3 **Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records**

4 44. Sierra Club realleges and incorporates by reference the allegations made in all
5 preceding paragraphs.

6 45. The Service has failed to provide reasonably segregable portions of any lawfully
7 exempt records.

8 46. The Service has thereby violated FOIA's requirement to provide any reasonably
9 segregable portion of a record after deletion of the portions which are exempt from disclosure. 5
10 U.S.C. § 552(b).

11 47. Sierra Club has exhausted its administrative remedies and has no other adequate
12 remedy at law to redress these legal violations and injuries.

13 **THIRD CLAIM FOR RELIEF: VIOLATION OF THE FREEDOM OF INFORMATION**
14 **ACT**

15 **Failure to Justify Redactions**

16 48. Sierra Club realleges and incorporates by reference the allegations made in all
17 preceding paragraphs.

18 49. The Service has failed to justify redactions of disclosed records responsive to
19 Sierra Club's request.

20 50. The Agency has thereby violated FOIA's requirements, including (without
21 limitation): the Act's requirement that the agency disclose all public records not otherwise
22 exempt from disclosure, 5 U.S.C. § 552(a)-(b); and FOIA's requirement that an agency justify
23 nondisclosure, *id.* § 552(a)(4)(B).

24 51. Sierra Club has exhausted its administrative remedies and has no other adequate
25 remedy at law to redress these legal violations and injuries.

1 **FOURTH CLAIM FOR RELIEF: VIOLATION OF THE FREEDOM OF**
2 **INFORMATION ACT**

3 **Failure to Conduct an Adequate Search for Records Responsive to the FOIA Request**

4 52. Sierra Club realleges and incorporates by reference the allegations made in all
5 preceding paragraphs.

6 53. The Service failed to undertake a search that is reasonably calculated to locate all
7 records that are responsive to the Sierra Club's request.

8 54. The Service has thereby violated FOIA's requirement that the agency disclose all
9 public records not otherwise exempt from disclosure by failing to conduct an adequate search. 5
10 U.S.C. § 552(a)-(b); *see also Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328
11 (9th Cir. 1995); *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985).

12 55. Sierra Club has exhausted its administrative remedies and has no other adequate
13 remedy at law to redress these legal violations and injuries.

14 **FIFTH CLAIM FOR RELIEF: VIOLATION OF THE FREEDOM OF INFORMATION**
15 **ACT**

16 **Failure to Comply with FOIA's Mandatory Determination Deadline**

17 56. Sierra Club realleges and incorporates by reference the allegations made in all
18 preceding paragraphs.

19 57. The Service has failed to provide a response to Sierra Club's administrative
20 appeal within the 20-day time limit allotted by statute and regulation. 5 U.S.C. §
21 552(a)(6)(A)(ii); 43 C.F.R. § 2.62(a).

22 58. Sierra Club has exhausted its administrative remedies and has no other adequate
23 remedy at law to redress these legal violations and injuries.

**SIXTH CLAIM FOR RELIEF: VIOLATION OF THE ADMINISTRATIVE
PROCEDURE ACT (In the Alternative to the First Through Fifth Claims)**

59. Sierra Club realleges and incorporates by reference the allegations made in all preceding paragraphs.

60. In the alternative or in addition to Sierra Club’s First through Fifth Causes of Action, Sierra Club alleges that the Service’s failure to produce pertinent non-exempt records in response to its FOIA request constitutes agency action that is “unlawfully withheld or unreasonably delayed,” “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or “without observance of procedure required by law,” in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(1)-(2).

61. Sierra Club has exhausted its administrative remedies and has no other adequate remedy at law to redress these legal violations and injuries.

62. Unless enjoined by the Court, the Service will continue to violate Sierra Club’s legal rights to be provided with copies of the records which it has requested in its FOIA request described above.

63. Sierra Club is directly and adversely affected and aggrieved by Defendant’s failure to provide responsive records to its FOIA request described above.

64. Sierra Club has been required to expend costs and to pay for legal services to prosecute this action.

65. Sierra Club is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552 (a)(4)(E).

PRAYER FOR RELIEF

WHEREFORE, Sierra Club respectfully requests that this Court enter judgment against EPA as follows:

Exhibit 1



5 May 2020

Via electronic mail

DOI FOIA/Privacy Act Appeals Office
Department of the Interior, Office of the Solicitor
1849 C Street, NW
MS-6556 MIB
Washington, D.C. 20240
Telephone: 202-208-5339/Fax: 202-208-6677
Email: FOIA.Appeals@sol.doi.gov

RE: FREEDOM OF INFORMATION APPEAL: FWS/R2/ES/FOIA; FWS-2019-00990

Dear FOIA Appeals Officer:

Sierra Club appeals the above-referenced Freedom of Information Act (FOIA) request (attached as Exhibit A). Sierra Club's FOIA request sought records pertaining to the environmental impacts of existing vehicle barriers and U.S.-Mexico border walls, as well as plans and preparations for new border wall segments, adjacent to the southern edge of the San Bernardino National Wildlife Refuge.

The San Bernardino National Wildlife Refuge is an approximately 2,300-acre ranch along the U.S.-Mexico border acquired by the Service in 1982 in order to provide habitat for native plant and wildlife species classified as "endangered" or "threatened" under the Endangered Species Act, including the Yaqui chub and Yaqui catfish. The Refuge is one of the largest natural wetlands in the American Southwest and further serves as "an important link for wildlife to migrate between Mexico's Sierra Madre Occidental and the Rocky Mountains to the north."¹ In October 2019, construction of a 20-mile, 30-foot-tall barrier adjacent to the southern border of the Refuge began, threatening to not only block wildlife migration but also further deplete scarce surface and groundwater resources by pumping huge quantities of groundwater to mix concrete and suppress dust.

On July 29, 2019, the Sierra Club submitted a FOIA request for records (described below) pertaining to current and proposed border walls near the Refuge. On April 4, 2020, the Service responded to Sierra Club's FOIA request by providing approximately 71 records, many of which were redacted. The Service's final determination additionally stated that 20 records

¹ See San Bernardino National Wildlife Refuge, U.S. Fish and Wildlife Service, https://www.fws.gov/refuge/San_Bernardino/Wildlife_and_habitat.html (last accessed on Apr. 1, 2020).

were withheld in full under Exemptions 3, 5, 6, 7(C), and 7(E). However, the Service did not provide a privilege log or any document-specific information about the withheld records. For the reasons set forth below, the Service has violated FOIA by (1) improperly withholding responsive records without justifying why the withheld records qualify for nondisclosure and (2) failing to conduct a sufficient records search.

EPA has 20 working days to respond to this appeal. This administrative appeal is filed within 90 days of receiving the Service's final determination and is thus timely filed. Please be advised that the Sierra Club intends to pursue legal action if the EPA refuses to disclose all responsive records without further delay, or at a minimum, to justify withholding this information from disclosure.

SIERRA CLUB'S FOIA REQUEST

On July 29, 2019, the Sierra Club submitted a FOIA request to the Service (Exhibit A) for records pertaining to existing and proposed vehicle barriers and border walls (also referred to as tactical infrastructure and border fencing) along the U.S.-Mexico border on or adjacent to the southern edge of the San Bernardino National Wildlife Refuge. Specifically, the Sierra Club sought the following records, subsequent to January 1, 2015, pertaining to these vehicle barriers and border walls:

- a. Emails, letters, call logs, and other communications between Customs and Border Protection, the Border Patrol, the Department of Homeland Security, the Army Corps of Engineers, Baker Engineering, Logistics Management Institute, and the US Fish and Wildlife or the Department of the Interior
- b. Discussions between the Service and contractors working on vehicle barriers and/or border wall construction
- c. Internal Service discussions, reports, updates, and presentation materials such as Power Points; and
- d. Photographs of the barriers or walls, or photographs of the location of barriers or walls that show the site before the barriers were erected and the impacts of construction.

On August 1, 2019, the Service sent an email acknowledging receipt of the records request and assigning it tracking number FWS-2019-00990. The email stated that the Service had placed the request in the "exceptional/voluminous" processing track and further stated that Sierra Club's request for a fee waiver had been granted. The acknowledgement did not provide an estimated date of completion, nor did it provide a determination.

After repeated efforts by the Sierra Club to obtain an estimated completion date, the agency provided a final determination on April 4, 2020 (Exhibit B), nine months after the request was submitted. The final determination indicated that 37 records were partially redacted and 20 were withheld in full, under various exemptions:

- Exemption 3: The Service partially redacted 4 records, stating that the records contain information related to sensitive tribal sites and that such information is protected under the Archaeological Resources Protection Act of 1979.
- Exemption 5: The Service partially redacted 1 record and fully withheld 16 records, claiming that the records are exempt from disclosure under the “deliberative process privilege” because the records are both pre-decisional and deliberative.
- Exemption 6: The Service partially redacted 31 records, claiming that the information redacted included personal cell and home phone numbers, e-mail addresses, and home addresses
- Exemption 7: The Service partially redacted 14 records and fully withheld 4 records, claiming that the records *either* contained personal law enforcement information that would constitute an unwarranted invasion of personal privacy *or* contained law enforcement records that would disclose techniques and/or procedures for law enforcement investigations or prosecutions. At least 6 records were partially redacted under exemption 7(E).

Finally, the Service stated that 28 records were referred to U.S. Customs and Border Protection and three were referred to the U.S. Army Corps of Engineers for a release determination.

DISCUSSION

I. THE FISH AND WILDLIFE SERVICE FAILED TO JUSTIFY WITHHOLDING RECORDS UNDER FOIA’S EXEMPTIONS²

A. The Fish and Wildlife Service Must Demonstrate that an Exemption Authorizes Nondisclosure

Under FOIA, the government agency carries the burden to justify its withholding of any requested material. *See* 5 U.S.C. § 552(a)(4)(B); *see also Nat. Res. Def. Council v. NRC*, 216 F.3d 1180, 1190 (D.C. Cir. 2000) (“FOIA itself places the burden on the agency to sustain the lawfulness of specific withholdings in litigation.”). To meet its burden, “an agency may rely on detailed affidavits, declarations, a *Vaughn* index, in camera review, or a combination of these tools.” *Elec. Frontier Found. v. DOJ*, 57 F. Supp. 3d 54, 59 (D.D.C. 2014) (quoting *Comptel v. FCC*, 910 F. Supp. 2d 100, 111 (D.D.C. 2012)). “Exemptions from disclosure must be narrowly construed,” and “[c]onclusory and generalized allegations of exemptions” do not meet the agency’s burden. *Morley v. CIA*, 508 F.3d 1108, 1114-15 (D.C. Cir. 2007). Simply asserting that an exemption applies is inadequate to overcome FOIA’s strong presumption in favor of disclosure. *Founding Church of Scientology of Wash., D.C., Inc. v. Nat’l Sec. Agency*, 610 F.2d 824, 830 (D.C. Cir. 1979) (“conclusory and generalized allegations of exemptions are unacceptable.”) (internal quotations and citations omitted).

² Although the Fish and Wildlife Service failed to justify withholding records under Exemption 3, Sierra Club does not seek to obtain the records withheld pursuant to Exemption 3 in this appeal.

B. The Fish and Wildlife Service Failed to Justify Withholding Records Under Exemption 5

The deliberative process privilege exempts from disclosure “predecisional, deliberative communications within an agency.” *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978). To be predecisional, the document must be “prepared ‘to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made.’” *Lurie v. Dep’t of Army*, 970 F. Supp. 19, 33 (D.D.C. 1997) (quoting *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 591 F.2d 7531429, 1434 (D.C. Cir. 1992)). Further, “[i]n order to qualify for the Exemption 5 privilege, a document must be . . . deliberative in the sense that it is actually . . . related to the process by which policies are formulated.” *Jordan*, 591 F.2d at 774. In order to withhold records under Exemption 5, the Service must provide some explanation beyond a bare “conclusory” assertion that the documents in question are predecisional and deliberative. *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975). *See also SafeCard Serv. v. SEC*, 926 F.2d 1197, 1204 (D.C. Cir. 1991). Although an agency is not required to identify a specific decision to invoke Exemption 5, “the agency must identify ‘what deliberative process is involved, and the role played by the documents.’” *Wolk Law Firm v. United States of America National Transportation Safety Board*, 392 F. Supp. 3d 514, 525 (E.D. Pa. 2019) (citing *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980)).

The Service did not provide sufficient justification for withholding or redacting records under Exemption 5. The Service asserted that the record withheld “do not contain or represent formal or informal agency policies or decisions . . . are the result of frank and open discussions [and] have been held confidential by all parties[.]” As a threshold matter, if the withheld records do not contain or represent agency policies or decisions, the records cannot be predecisional and thus do not qualify for nondisclosure under Exemption 5. Even assuming that the records do contain discussion of agency policies or decisions, the Service’s cursory assertions did not provide any record-specific information, making it impossible to know from the Service’s response whether any withheld record would meet the criteria for nondisclosure (e.g., be both predecisional and deliberative). The Service has not identified any deliberative process at issue or the role played by any of the withheld or redacted records. Accordingly, the Service did not meet its burden to justify withholding the records.

All of the responsive documents must be released because the Service did not meet its burden to justify nondisclosure; however, assuming that portions of the records withheld in full would qualify for withholding under Exemption 5, the agency must segregate and disclose all non-exempt material in the requested documents. *Founding Church of Scientology of Washington, D.C., Inc. v. Bell*, 603 F.2d 945, 951 (D.C. Cir. 1979) ([I]f only part of a document need be withheld under an exemption, Congress has directed that the Government must segregate the exempt passages and disclose the remainder.”); *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973) (“[T]he agency may not sweep a document under a general allegation of exemption . . . It is quite possible that part of a document should be kept secret while part should be disclosed.”); *Citizens for Responsibility & Ethics v. U.S. Dep’t of Homeland Sec.*, 648 F. Supp. 2d 152, 162 (D.D.C. 2009) (holding that facts must be separated from pre-decisional deliberative materials and disclosed regardless of draft or final form). Accordingly, the agency’s response was deficient as a matter of law.

C. The Fish and Wildlife Service Failed to Justify Withhold Records Under Exemption 6

Information such as names and email addresses may be redacted under FOIA Exemption 6 if full “disclosure . . . would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The public interest in disclosure is weighted against the privacy interest protected by nondisclosure. *Painting Indus. of Haw. Mkt. Recovery Fund v. United States Dep’t of the Air Force*, 26 F.3d 1479 (9th Cir. 1994) (citing *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989)). Before assessing the public benefit of disclosure, the agency must *first* establish that the personal privacy interest in nondisclosure is more than *de minimis*. *Cameranesi v. U.S. Dep’t of Defense*, 856 F.3d 626, 637 (9th Cir. 2017). Where an agency has made only a generalized, conjectural assertion of a privacy interest, courts have found that there is no more than a *de minimis* privacy interest at stake. *See Landmark Legal Found. v. IRS*, 87 F. Supp. 2d 21, 28 (D.D.C. March 9, 2000); *see also Bd. of Trade of Cty. Of Chicago v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 400 (D.C. Cir. 1980). “To justify . . . Exemption 6 withholdings, the defendants must show that the threat to employee’s privacy is real rather than speculative.” *Electronic Privacy Info Center v. Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 117 (D.D.C. 2005).

Here, the Service merely provided a cursory assertion that the withheld information “consists of personal information . . . and we have determined that the individuals to whom this information pertains have a substantial privacy interest in withholding it.” Such a perfunctory claim is insufficient to carry the government’s burden to withhold responsive information as it is impossible for the Sierra Club, or a reviewing court, to assess whether a legitimate privacy interest exists. Moreover, many of the redactions under Exemption 6 appear to redact the names and email addresses of federal employees. The public has a cognizable interest in learning the names of government employees – particularly higher-echelon employees – involved in reviewing potential impacts to the San Bernardino National Wildlife Refuge as a result of border wall construction.

D. The Fish and Wildlife Service Failed to Justify Withholding Records Under Exemption 7(C)

Exemption 7(C) protects “records or information compiled for law enforcement purposes,” and which, if disclosed, “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). Although courts are more deferential to agencies when redacting records under Exemption 7(C), the agency must still provide enough information to demonstrate that the records withheld were, in fact, compiled for law enforcement purposes and that an individual has “a privacy interest in the information to be disclosed.” *Dillon v. U.S. Dep’t of Justice*, 2020 WL 1245308, at *15 (March 16, 2020) (citing *100Reporters LLC v. U.S. Dep’t of Justice*, 248 F. Supp. 3d 115, 161 (D.D.C. 2017)).

The Service redacted 10 records under Exemption 7(C), stating that “releasing them would constitute an unwarranted invasion of privacy because they identify individuals referenced in law enforcement records.” However, as above, the Service did not provide any record-specific information that would allow the Sierra Club to determine whether Exemption 7(C) is applicable.

The Service did not identify any specific law enforcement investigation or other similar activity or any particular privacy interest that would apply. The Service did not meet its obligations under FOIA by relying upon blanket and boiler-plate language supporting an exemption.

E. The Fish and Wildlife Service Failed to Justify Withholding Records Under Exemption 7(E)

Exemption 7(E) authorizes an agency to withhold records “complied for law enforcement purposes, but only to the extent that the production . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). “Exemption 7(E) only exempts investigative techniques not generally known to the public,” *Rosenfeld v. U.S. Dep’t of Justice*, 57 F.3d 803, 815 (9th Cir. 1995), and the government must “establish a rational nexus between the withheld document and its authorized law enforcement activities.” *ACLU of Northern California v. FBI*, 881 F.3d 776, 781 (9th Cir. 2018).

The Service withheld 6 records under Exemption 7(E), stating that release “would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement” and that “disclosure could reasonably be expected to risk circumvention of the law.” The Service did not provide any information indicating that the techniques and procedures are not already known to the general public or even attempt to link the withheld records to any authorized Fish and Wildlife Service law enforcement activities. As above, the Service has failed to justify withholding records under Exemption 7. As a result, all responsive records must be released.

II. THE FISH AND WILDLIFE SERVICE DID NOT CONDUCT A “REASONABLE SEARCH” FOR RESPONSIVE RECORDS

To achieve FOIA’s core purpose of disclosure, an agency must perform an adequate search for all responsive records. *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979). An agency “must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir.1990). A court will apply “a ‘reasonableness’ test” to assess whether an agency’s search for responsive records was adequate. *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998). This reasonableness test is “consistent with congressional intent tilting the scale in favor of disclosure.” *Id.*

The Service produced approximately 71 records in response to Sierra Club’s FOIA request. However, the agency did not include many records likely within the agency’s control and responsive to Sierra Club’s request. For example, the Service provided only a few communications between the Service and U.S. Border Patrol and no communications with the U.S. Army Corps of Engineers, both of which are involved in border wall construction that could be impacting the San Bernardino National Wildlife Refuge. Additionally, the Service did not provide any records of communication with third party contractors, such as Baker Engineering.

Because the Service failed to provide the full scope of external communications, as properly requested by the Sierra Club, the Service did not conduct a search reasonably expected to return responsive records, in violation of FOIA. To remedy its FOIA violation, the Service must search for and release responsive records immediately.

CONCLUSION

We respectfully request that the U.S. Fish and Wildlife Service immediately conduct a search and release the external and internal communications requested by Sierra Club's FOIA, and immediately release the full set of responsive documents or provide a thorough justification for withholding each document or portion of document.

Sincerely,



Rose Monahan
Associate Attorney
2101 Webster Street, Suite 1300
Oakland, California 94612
415-977-5704
rose.monahan@sierraclub.org

Counsel for the Sierra Club

Exhibit A



July 29, 2019

Submitted via email to:

David Mendias
U.S. Fish and Wildlife Service
ESA Litigation/FOIA Coordinator
USFWS-Ecological Services
500 Gold Ave SW
Albuquerque, NM 87102
Office: 505-248-6929 / Fax: 505-248-6788
Email: fw2foia@fws.gov

Freedom of Information Act Request

Dear Mr. Mendias,

The Sierra Club makes this request for records, regardless of format, medium, or physical characteristics, including electronic records and information, email, audiotapes, videotapes, and photographs, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, et seq.

The Sierra Club seeks to understand the environmental impacts of existing vehicle barriers and border walls (also referred to as tactical infrastructure and border fencing) as well as plans and preparations for new border walls along the U.S. – Mexico border on or adjacent to the southern edge of the San Bernardino National Wildlife Refuge in Arizona.

We are requesting documents from January 1, 2015 through the present regarding these vehicle barriers / border walls.

Please include emails, letters, call logs, and other communications between Customs and Border Protection, the Border Patrol, the Department of Homeland Security, the Army Corps of Engineers, Baker Engineering, Logistics Management Institute, and US Fish and Wildlife or the Department of the Interior regarding this topic. Also include discussions between USFW and contractors working on this project (for example, Baker Engineering, Logistics Management Institute, Keiwi, etc.). Internal USFW discussions, reports, updates, presentation materials such as Powerpoints, etc., that address these barriers / walls should be included. Photographs of the barriers / walls, or photographs of the location of these barriers / walls that show the site before they were erected and/or the impacts of construction, should also be included.

Please search responsive records regardless of format, medium, or physical characteristics. Where possible, please produce records electronically, in PDF or TIF format on a CD-ROM. We seek records of any kind, including electronic records, e-mail, audiotapes, videotapes, and photographs. Our request includes telephone messages, voice mail messages, e-mail, daily agenda and calendars, information about scheduled meetings and/or discussions regarding the aforementioned topics, whether in person or over the telephone, agendas for those meetings and/or discussions, participants included in those meetings and/or discussions, and transcripts, notes and/or minutes from any such meetings and/or discussions.

If it is your position that any portion of the requested records is exempt from disclosure, the Sierra Club requests that you provide it with an index of those documents as required under Vaughn

v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972). As you are aware, a Vaughn index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.” Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979). Moreover, the Vaughn index must “describe each document or portion thereof withheld, and for **each** withholding it must discuss the consequences of supplying the sought-after information.” King v. U.S. Department of Justice, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis added). Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’” Id. At 224 (citing Mead Data Central v. U.S. Department of the Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977)).

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonable segregable non-exempt portions of the requested records. See 5 U.S.C § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. Mead Data Central, 566 F.2d at 261. Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a Vaughn index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. Part 5, the Sierra Club requests a waiver of fees associated with processing this request for records. The waiver is in the public interest because furnishing this information primarily benefits the general public. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the Sierra Club and the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. §552(a)(4)(A)(iii). See, e.g., McClellan Ecological v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987).

The records requested by the Sierra Club are likely to contribute to the public’s understanding of the impacts of border fencing along the U.S. – Mexico border, and ongoing efforts by Customs and Border Protection and US Fish and Wildlife to mitigate those impacts. This policy issue has been the subject of frequent press inquiry and public debate.

Under these circumstances, the Sierra Club fully satisfied the criteria for a fee waiver.

Conclusion

Please respond to this request in writing within an expedited time-frame. If all of the requested documents are not available within that time period, the Sierra Club requests that you provide all requested records or portions of records that are available within that time period.

If you have any questions about this request or foresee any problems in releasing fully the requested records within the twenty-day period, please contact me at (956) 532-5983 or Irgvsierraclub@gmail.com. Also, if the Sierra Club’s request for a fee waiver is not granted in full, please contact me immediately upon making such a determination.

Thank you.

Please send requested documents to:

Scott Nicol

Sierra Club Borderlands Team
7300 N. 32nd
McAllen, TX 78504
lrgvsierraclub@gmail.com

Exhibit B



United States Department of the Interior

FISH AND WILDLIFE SERVICE



Post Office Box 1306
Albuquerque, New Mexico 87103

In Reply Refer To:
FWS/R2/ES/FOIA
FWS-2019-00990

Mr. Scott Nicol
Sierra Club Borderlands Team
7300 N. 32nd
McAllen, Texas 78504

Dear Mr. Nicol:

This responds to your Freedom of Information Act (FOIA) request dated July 29, 2019, for records related to border wall construction on or adjacent to the San Bernardino National Wildlife Refuge. Specifically, you seek the following:

“... emails, letters, call logs, and other communications between Customs and Border Protection, the Border Patrol, the Department of Homeland Security, the Army Corps of Engineers, Baker Engineering, Logistics Management Institute, and US Fish and Wildlife or the Department of the Interior regarding this topic. Also include discussions between USFW and contractors working on this project (for example, Baker Engineering, Logistics Management Institute, Keiwit, etc.). Internal USWF discussions, reports, updates, presentation materials such as Powerpoints, etc., that address these barriers / walls should be included. Photographs of the barriers / walls, or photographs of the location of these barriers / walls that show the site before they were erected and/or the impacts of construction, should also be included.”

Your FOIA request was assigned tracking number FWS-2019-00990 and forwarded to the Southwest Region National Wildlife Refuge System for processing. Based on this office's review, we reasonably foresee that disclosure of certain information in documents that fall under this request would harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure. Accordingly, from the responsive records portions of 37 records are partially redacted, and 20 records are being withheld in full pursuant to FOIA Exemption (b)(3), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E), as described below. The full release and partially redacted material are provided to you with this letter. Multiple exemptions have been applied to several documents.

Mr. Scott Nicol

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Portions of four records have been redacted pursuant to Exemption (b)(3) of the FOIA. Exemption 3 allows the withholding of information protected by a nondisclosure provision in a federal statute other than FOIA. In this instance, the redacted records contain information related to sensitive tribal sites that is protected under the Archaeological Resources Protection Act of 1979. 16 USC §470hh. We reasonably foresee that disclosure of this information would be prohibited by law.

Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency.” (5 U.S.C. § 552(b)(5)). Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges.

The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring agencies are not forced to operate in a fish bowl. A number of policy purposes have been attributed to the deliberative process privilege. Among the most important are to: (1) assure that subordinates will feel free to provide the decision maker with their uninhibited opinions and recommendations; (2) protect against premature disclosure of proposed policies; and (3) protect against confusing the issues and misleading the public.

The deliberative process privilege protects materials that are both predecisional and deliberative. The privilege covers records that reflect the give-and-take of the consultative process and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.

Under the deliberative process privilege of Exemption 5, 16 records have been withheld in full and 1 is partially redacted that are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Their contents have been held confidential by all parties and public dissemination of these drafts would have a chilling effect on the agency’s deliberative processes and expose the agency’s decision-making process in such a way as to discourage candid discussion within the agency, and thereby undermine its ability to perform its mandated functions.

Portions of 31 records have been redacted pursuant to Exemption (b)(6) of the FOIA. Under Exemption 6, agencies may withhold information or records on individuals contained in “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” (5 U.S.C. §552(b)(6)). The withheld material includes personal contact information (e.g. personal cell and home phone numbers, e-mail addresses, and home addresses).

The phrase “similar files” covers any agency records containing information about a particular individual that can be identified as applying to that individual. To determine whether releasing records containing information about a particular individual would constitute a clearly unwarranted invasion of personal privacy, we are required to balance the privacy interest that

would be affected by disclosure against any public interest in the information. Under the FOIA, the only relevant public interest to consider under the exemption is the extent to which the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens 'know what their government is up to.' (*See Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994) (*quoting Dept. of Justice v. Reporters Comm.*, 489 U.S. 749, 773 (1989))). The burden is on the requester to establish that disclosure would serve the public interest. When the privacy interest at stake and the public interest in disclosure have been determined, the two competing interests must be weighed against one another to determine which is the greater result of disclosure: the harm to personal privacy or the benefit to the public. The purposes for which the request for information is made do not impact this balancing test, as a release of information requested under the FOIA constitutes a release to the general public.

The information that has been withheld under Exemption 6 consists of personal information, as described above, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in withholding it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency's statutory duties. Because the harm to personal privacy is greater than whatever public interest may be served by disclosure, release of the information would constitute a clearly unwarranted invasion of the privacy of these individuals and we are withholding it under Exemption 6. We are releasing the majority of the communication that would not warrant an invasion of privacy for these individuals.

Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes" if the records fall within one or more of six specific bases for withholding set forth in subparts (A) through (F). 5 U.S.C. § 552(b)(7)(A)-(F). We are withholding 4 records in full and 14 in part under Exemption 7 because they are protected under the following subparts.

Exemption 7(C) protects law enforcement records if their release could reasonably be expected to constitute an unwarranted invasion of personal privacy. It is regularly applied to withhold references to individuals in law enforcement files. Ten records have been partially withheld under 7(C), and we have determined that releasing them would constitute an unwarranted invasion of privacy because they identify individuals referenced in law enforcement records and the release of this information would not shed light on an agency's performance of its statutory duties.

Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. For the six records that have been withheld partially or in full under 7(E), we have determined that disclosure could reasonably be expected to risk circumvention of the law.

Lastly, in our compilation and review of responsive records, we identified records that originated from or substantially concern another federal agency. Twenty-Eight records are being referred to U.S. Customs and Border Protection (CBP) and three are being referred to the U.S. Army Corps of Engineers for a release determination. Both agencies will issue a response directly to you.

Mr. Scott Nicol

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You do not have to contact the agency at this time, but should you need to do so in the future, you may do so at:

CESWF-OC
P.O. Box 17300
Fort Worth, TX 76102-0300
e-mail: foia-swf@usace.army.mil

U.S. Customs and Border Protection
Attn: FOIA Officer
1300 Pennsylvania Avenue NW
Washington, D.C. 20528

The undersigned is responsible for this denial.

This response to your FOIA request was made in consultation with Justin Tade, Attorney-Advisor, Office of the Solicitor, Southwest Region, U.S. Department of the Interior (Department). You may appeal this response to the Department's FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal no later than 90 workdays from the date of this letter. Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

Your appeal must be made in writing. You may submit your appeal and accompanying materials to the FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL." You must include an explanation of why you believe the U.S. Fish and Wildlife Service's (Service) response is in error. You must also include with your appeal copies of all correspondence between you and the Service concerning your FOIA request, including your original FOIA request and the Service's response. Failure to include with your appeal all correspondence between you and the Service will result in the Department's rejection of your appeal, unless the FOIA/Privacy Act Appeals Officer determines (in the FOIA/Privacy Act Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional information or clarification of your appeal.

DOI FOIA/Privacy Act Appeals Office
Department of the Interior, Office of the Solicitor
1849 C Street, N.W.
MS-6556 MIB
Washington, D.C. 20240
Telephone: 202-208-5339/Fax: 202-208-6677
Email: FOIA.Appeals@sol.doi.gov

Mr. Scott Nicol

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Also, please note the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation and does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov, Web: <https://ogis.archives.gov>
Telephone: 202-741-5770 / Fax: 202-741-5769 / Toll-free: 1-877-684-6448

You also may seek dispute resolution services from our FOIA Acting Public Liaison, Cindy Cafaro, at 888-603-7119 or via email at cindy.cafaro@sol.doi.gov.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

This completes the Service's response. The fees incurred in responding to your request have been waived in accordance with 43 C.F.R. §2.37. If you have any questions or concerns regarding this request, please contact Government Information Specialist, David Tischer, at 505-248-6658 or by email at fw2foia@fws.gov.

Sincerely,

MELANIE RUIZ Digitally signed
by MELANIE RUIZ
Date: 2020.04.13
09:17:25 -06'00'
Region 2 FOIA Coordinator

Exhibit 2



United States Department of the Interior

FISH AND WILDLIFE SERVICE



Post Office Box 1306
Albuquerque, New Mexico 87103

In Reply Refer To:
FWS/R2/ES-AZ ESFO/070482

JUN 28 2019

Paul Enriquez, Director
Acquisition, Real Estate and Environmental
Border Wall Program Management Office
U.S. Customs and Border Protection
U.S. Border Patrol Headquarters
1300 Pennsylvania Ave. 6.5E Mail Stop 1039
Washington, DC 20229-1100

Dear Director Enriquez:

Thank you for your May 6, 2019, letter requesting input concerning 63 miles of proposed border barrier projects in Pima and Cochise counties, Arizona. In response to your request, we, the U.S. Fish and Wildlife Service (Service), provide the following comments and conservation recommendations to avoid, minimize and offset your proposed projects' potential adverse effects on trust species. The following 16 species, listed under the Endangered Species Act of 1973 (ESA), as amended, and seven other at-risk species of concern, may potentially occur in these areas ("E" is Federally endangered, "T" is Federally threatened, "AR" is at-risk):

Southwestern willow flycatcher (E), western yellow-billed cuckoo (T), Sonoran pronghorn (E), Acuna cactus (E), Sonoyta mud turtle (E), Quitobaquito pupfish (unique desert pupfish species) (E), ocelot (E), jaguar(E), northern Mexican gartersnake (T), Mexican spotted owl (T), Yaqui chub (E), Yaqui catfish (T), Beautiful shiner (T), Yaqui topminnow (E), Huachuca water umbel (E), Cochise pincushion cactus (E), cactus ferruginous pygmy owl (AR), lesser long-nosed bat (delisted in 2018) (AR), Sonoran desert tortoise (AR), Tumamoc globeberry (AR), flat-tailed horned lizard (AR), fringe-toed lizard (AR), and the monarch butterfly (AR).

Background

The U.S. Customs and Border Protection (CBP) proposes to replace up to 63 miles of pedestrian fence and vehicle barriers with a new bollard wall in Pima and Cochise counties, Arizona. Figures 1 through 3 depict the locations where new bollard walls would replace the existing pedestrian fence and vehicle barriers as a part of the proposed projects. The projects include

Mr. Paul Enriquez

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improving or constructing roads, installing lighting, and installing other detection technology. The proposed bollard wall design includes 18 to 30 foot, concrete-filled, steel bollards, approximately six inches in diameter, supported by a 10-foot deep, solid cement footer approximately 8 to 12 inches wide. The CBP provided the below maps.

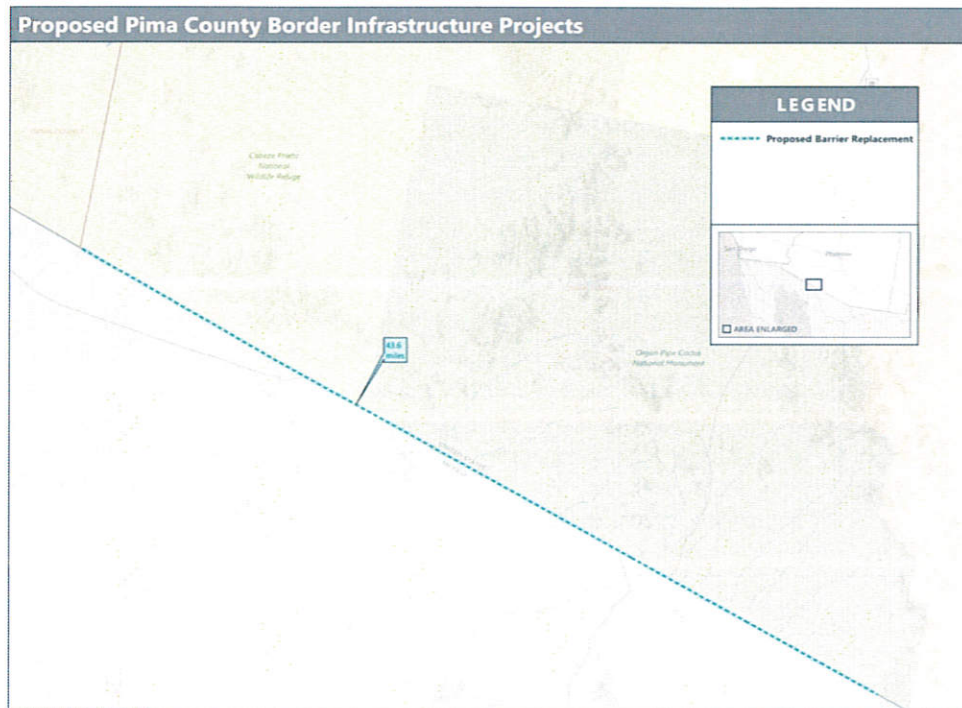


Figure 1. Location of proposed 43.6-mile pedestrian fence on Cabeza Prieta National Wildlife Refuge and Organ Pipe Cactus National Monument, Pima County, Arizona

Mr. Paul Enriquez

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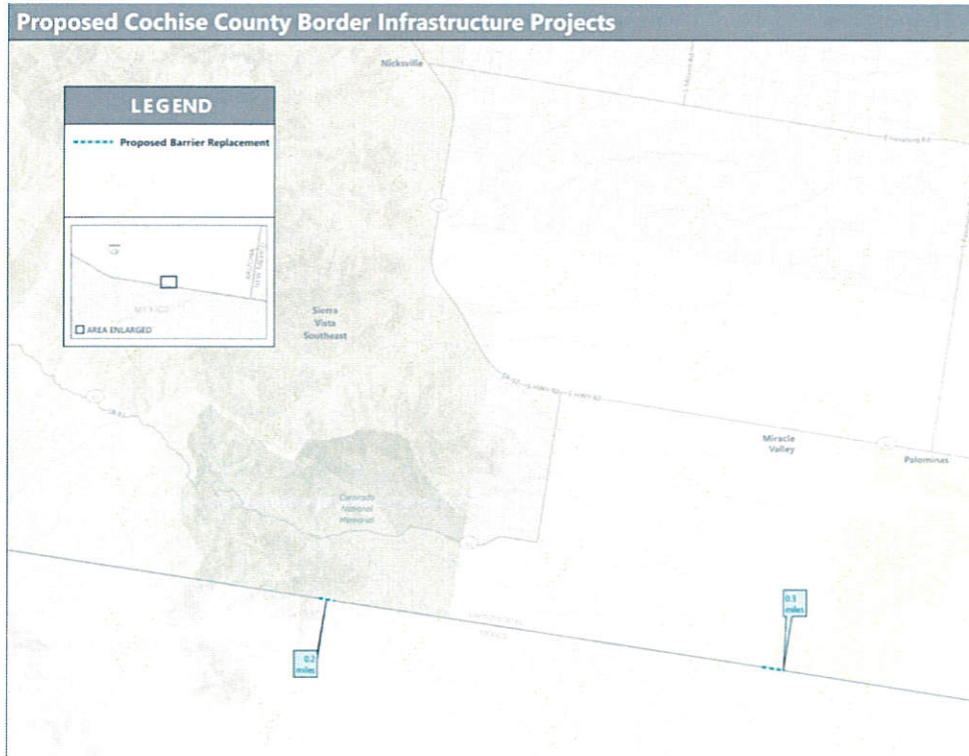


Figure 2. Location of two proposed 0.2 and 0.3-mile pedestrian fences, Cochise County, Arizona

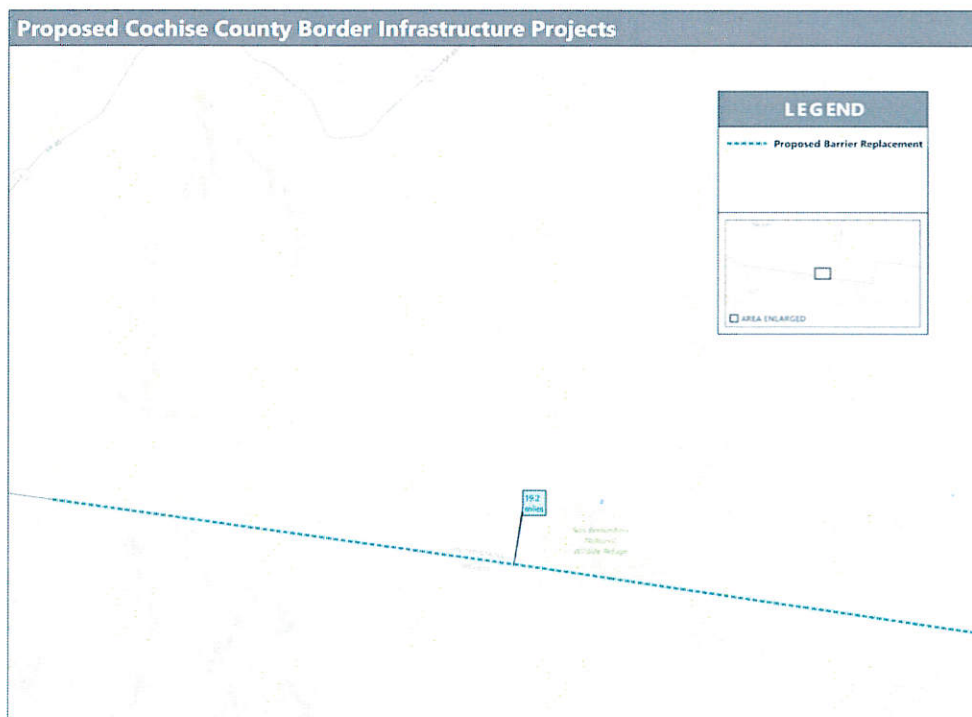


Figure 3. Location of proposed 19.2-mile pedestrian fence along San Bernardino National Wildlife Refuge and other lands, Cochise County, Arizona

Mr. Paul Enriquez

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Concerns and Recommendations

While the Service does not know the proposed border infrastructure projects' entire scope, we understand environmental laws have been waived, including the ESA and Clean Water Act. The Service is committed to providing CBP and the U.S. Army Corps of Engineers practical information to promote cooperative conservation measures. Here, we 1) list our general concerns regarding potential impacts to trust species; 2) provide alternatives to an impermeable fence that may meet CBP's needs while minimizing adverse effects to trust species, and; 3) provide conservation recommendations (enclosure) to avoid, minimize and offset the projects' impacts to trust species and their associated habitats. Because of our uncertainty regarding the proposed border barriers' details, our concerns are not an exhaustive analysis of all potential impacts to trust species, or of all possible solutions. Our concerns also do not consider critical habitat designations.

General Concerns

Placing a pedestrian fence along 63 miles of the Arizona/Mexico border would adversely affect (directly and indirectly) many trust species (i.e., endangered, threatened and candidate species; migratory birds, etc.). Southern Arizona is one of our most biodiverse areas, harboring at least 878 known species along the border (iNaturalist Border Bioblitz 2018). Therefore, conserving overall biodiversity and unique ecosystems has certain implications. Many Federal, tribal, state, and private land managers have spent years working together to manage the border area's valued biological and cultural resources. Therefore, involving landowners and managers to identify and monitor important resources prior to and during on-the-ground implementation, and providing resources to monitor border activity impacts, are vital to upholding partnerships and creating the best outcomes. Below, we discuss some of the most significant potential direct and indirect effects and provide suggested general alternatives.

Potential direct effects from placing an impermeable fence along the border

- Ceasing or restricting movements within and among populations may have deleterious demographic effects, such as isolating small populations or disrupting species' metapopulation dynamics. Restricting movement would be particularly detrimental to migratory species, species with broad home ranges, and for those that rely on connectivity with Mexico for their continued persistence in Arizona (e.g., jaguar, ocelot).
- Ceasing or reducing gene flow among or within populations may result in losing populations' genetic variability and ultimately reduce the species' long-term survival likelihood.
- Direct mortality via vehicular collisions along roads associated with the border barrier or via fence entanglement.
- Habitat reduction, loss, fragmentation and degradation (fence and road footprint; disrupting hydrological processes by fence, road, and footer placement; increased erosion and diminished water quality, and; decreased quantity of riparian and aquatic zones).
- Potential bird and bat strikes (they use visual navigation cues), such as lesser long-nosed bats and Mexican long-tongued bats, and nocturnal birds.
- Temporarily disturbing (or directly killing) species during construction; ongoing disturbance during maintenance and operation.

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- Overall, increased human presence interrupts wildlife behavior that can lead to changed movement, foraging, hunting, water access, mating, and rearing young, along with changed circadian rhythm, cell and DNA repair, and other physiological stress reactions, all of which can impact fitness and survival over time.

Potential indirect effects from placing a pedestrian fence along the border

- Increased disturbance in certain areas from redirecting traffic (illegal and pursuant law enforcement) to unsecured border areas. For example, the proposed border pedestrian barrier on Cabeza Prieta National Wildlife Refuge (CPNWR) and Organ Pipe Cactus National Monument may redirect and increase traffic onto areas without a pedestrian fence. The CPNWR is a key area for Sonoran pronghorn survival and recovery. Increased traffic may further impact important pronghorn use areas, including fawning habitat, forage enhancement plots, water sites, and the semi-captive pronghorn breeding pen, reducing these crucial emergency recovery actions' effectiveness. Increasing activity in pronghorn habitat could disturb pronghorn and result in short-term habitat access denial, likely resulting in severe adverse physiological effects to pronghorn.
- Increased habitat impacts in certain areas from redirecting illegal traffic and pursuant law enforcement to unsecured border areas. Pedestrian fences may particularly shift traffic (illegal and law enforcement) to Arizona's mountainous regions.
- During rain events, the border barrier could act as a dam, capturing debris and backing up water flow. This is particularly concerning around Quitobaquito Pond as floods could erode and destabilize the pond dike and other infrastructure. Restricted flows could also inhibit recharge into the Rio Sonoyta.
- Funneling illegal traffic to more rugged areas may also increase fire risk and frequency in these more sensitive areas.
- Fires that illegal immigrants start in mountainous regions, especially during the severe drought conditions prevalent in southern Arizona, could be disastrous for mountain, upland and aquatic species, such as the Mexican spotted owl, Sonoran chub, Kearney blue star, lemon fleabane, and New Mexico ridge-nosed rattlesnake.

Potential Lighting Impacts

- Artificial lighting at night (ALAN) and ecological light pollution interrupt natural wildlife patterns, behaviors, and activities, including birds, mammals, amphibians, reptiles, and arthropods. Scientists have studied these impacts since the 1800s and scientific literature documents them well.
- Fauna respond to natural sun, moon, and star light, as well as to varying degrees of natural darkness. Migratory species orient themselves based on the presence or absence of natural light.
- Animals' nocturnal activities often occur to avoid predation or to take advantage of more favorable climatic conditions. Additional light can increase predators' foraging efficiency, and change prey species' behavior.
- Many species become attracted to, or disoriented by, ALAN. Flying species, such as birds and insects, flutter about ALAN until collisions damage their wings or they collapse from exhaustion. This behavior change can also expose them to predation or divert them into an area with few resources, where they can die from starvation or exposure.

Mr. Paul Enriquez

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- Some reptiles and amphibians gauge their mating and reproductive opportunities based on light or darkness, and confusion from ALAN can lead to suboptimal decisions in mating behavior, egg laying, and egg placement, leading to greater predation or exposure.
- Many species, often prey animals or mammals that fear humans, expend effort avoiding ALAN, which can sap energy and take a physiological toll and expose them to additional risks, including reduced health from stress.

General Suggested Alternatives

- Consider substituting electronic surveillance (Integrated Fixed Towers (IFTs), infrared sensors, balloons, drones, etc.) for proposed border barrier segments, or for border barriers in remote areas and/or known wildlife corridors.
- Consider leaving existing vehicle fencing (assisted by IFTs, etc.) in lieu of replacing it with the proposed 30-foot bollard barriers. Studies show that vehicle fencing, in conjunction with other technology, can be as effective as bollard fencing in prohibiting illegal substance movement and human movement in some areas, such as along the border in San Bernardino National Wildlife Refuge.
- Should an area require constructing the proposed border barrier, consider widening the gap between bollards to greater than four inches. Many mammals, turtles, and tortoises are wider than four inches and the barrier could block their movement. Blocked movements could have long-term implications not only for the concerns listed above, but in light of allowing future range shifts in response to climate change.
- Should an area require constructing the proposed border barrier, consider lowering the height from 30 feet to match the surrounding natural canopy height to alleviate the threat to flying birds, bats, and insect pollinators that use the habitat for breeding and feeding at the height of their associated plant species.
- Omit lighting if possible. Use infrared technology at night, which allows natural darkness to provide the nocturnal conditions within which animals evolved. If you deem lighting necessary, consider replacing white light with red light to avoid wildlife impacts and to maximize human vision while preventing light blindness.

Conservation Recommendations

Please see the enclosure for our conservation recommendations by location and species to avoid, minimize, and offset border barrier projects' impacts to trust species. To address some of the proposed projects' most significant potential effects, the Service recommends that CBP include design measures to allow continued wildlife movement between Arizona and Mexico to the greatest degree possible.

We appreciate your efforts to engage landowners and managers and we are ready to work together to minimize the proposed projects' potential impacts to trust species. Given the high degree of interest in border activities, and available expertise in southern Arizona hydrology, wildlife, and habitats, we request the opportunity to participate in project planning to minimize impacts. We also acknowledge that controlling cross-border traffic can benefit wildlife and wildlife habitats by reducing border crossers' regular travel through border ecosystems and

Mr. Paul Enriquez

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vegetation communities. We look forward to continually working with you to protect and recover listed and sensitive species. Please contact me at 505-248-6492, if you have questions or need further assistance.

Sincerely,

A handwritten signature in black ink, consisting of a stylized 'S' followed by a horizontal line with a small upward curve at the end.

Acting Assistant Regional Director
Ecological Services

Enclosure

Exhibit 3



July 29, 2019

Submitted via email to:

David Mendias
U.S. Fish and Wildlife Service
ESA Litigation/FOIA Coordinator
USFWS-Ecological Services
500 Gold Ave SW
Albuquerque, NM 87102
Office: 505-248-6929 / Fax: 505-248-6788
Email: fw2foia@fws.gov

Freedom of Information Act Request

Dear Mr. Mendias,

The Sierra Club makes this request for records, regardless of format, medium, or physical characteristics, including electronic records and information, email, audiotapes, videotapes, and photographs, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, et seq.

The Sierra Club seeks to understand the environmental impacts of existing vehicle barriers and border walls (also referred to as tactical infrastructure and border fencing) as well as plans and preparations for new border walls along the U.S. – Mexico border on or adjacent to the southern edge of the San Bernardino National Wildlife Refuge in Arizona.

We are requesting documents from January 1, 2015 through the present regarding these vehicle barriers / border walls.

Please include emails, letters, call logs, and other communications between Customs and Border Protection, the Border Patrol, the Department of Homeland Security, the Army Corps of Engineers, Baker Engineering, Logistics Management Institute, and US Fish and Wildlife or the Department of the Interior regarding this topic. Also include discussions between USFW and contractors working on this project (for example, Baker Engineering, Logistics Management Institute, Keiwi, etc.). Internal USFW discussions, reports, updates, presentation materials such as Powerpoints, etc., that address these barriers / walls should be included. Photographs of the barriers / walls, or photographs of the location of these barriers / walls that show the site before they were erected and/or the impacts of construction, should also be included.

Please search responsive records regardless of format, medium, or physical characteristics. Where possible, please produce records electronically, in PDF or TIF format on a CD-ROM. We seek records of any kind, including electronic records, e-mail, audiotapes, videotapes, and photographs. Our request includes telephone messages, voice mail messages, e-mail, daily agenda and calendars, information about scheduled meetings and/or discussions regarding the aforementioned topics, whether in person or over the telephone, agendas for those meetings and/or discussions, participants included in those meetings and/or discussions, and transcripts, notes and/or minutes from any such meetings and/or discussions.

If it is your position that any portion of the requested records is exempt from disclosure, the Sierra Club requests that you provide it with an index of those documents as required under Vaughn

v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972). As you are aware, a Vaughn index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.” Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979). Moreover, the Vaughn index must “describe each document or portion thereof withheld, and for **each** withholding it must discuss the consequences of supplying the sought-after information.” King v. U.S. Department of Justice, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis added). Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’” Id. At 224 (citing Mead Data Central v. U.S. Department of the Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977)).

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonable segregable non-exempt portions of the requested records. See 5 U.S.C § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. Mead Data Central, 566 F.2d at 261. Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a Vaughn index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. Part 5, the Sierra Club requests a waiver of fees associated with processing this request for records. The waiver is in the public interest because furnishing this information primarily benefits the general public. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the Sierra Club and the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. §552(a)(4)(A)(iii). See, e.g., McClellan Ecological v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987).

The records requested by the Sierra Club are likely to contribute to the public’s understanding of the impacts of border fencing along the U.S. – Mexico border, and ongoing efforts by Customs and Border Protection and US Fish and Wildlife to mitigate those impacts. This policy issue has been the subject of frequent press inquiry and public debate.

Under these circumstances, the Sierra Club fully satisfied the criteria for a fee waiver.

Conclusion

Please respond to this request in writing within an expedited time-frame. If all of the requested documents are not available within that time period, the Sierra Club requests that you provide all requested records or portions of records that are available within that time period.

If you have any questions about this request or foresee any problems in releasing fully the requested records within the twenty-day period, please contact me at (956) 532-5983 or Irgvsierraclub@gmail.com. Also, if the Sierra Club’s request for a fee waiver is not granted in full, please contact me immediately upon making such a determination.

Thank you.

Please send requested documents to:

Scott Nicol

Sierra Club Borderlands Team
7300 N. 32nd
McAllen, TX 78504
lrgvsierraclub@gmail.com

Exhibit 4



Rose Monahan <rose.monahan@sierraclub.org>

Fwd: [EXTERNAL] Re: FOIA Acknowledgement; FWS-2019-00990

Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com>
To: rose.monahan@sierraclub.org

Tue, Mar 10, 2020 at 3:32 PM

Hi Rose,

It was good speaking with you today. Below are the emails that have been exchanged with US Fish and Wildlife re: the San Bernardino FOIA, and I am also attaching a copy of the original request and their letter acknowledging it.

Thanks for your help. This is a section of wall that will inflict terrible damage, and there are some very important documents waiting to be liberated.

Scott

----- Forwarded message -----

From: **Lower Rio Grande Valley Sierra Club** <lrgvsierraclub@gmail.com>
Date: Fri, Feb 21, 2020 at 4:58 PM
Subject: Fwd: [EXTERNAL] Re: FOIA Acknowledgement; FWS-2019-00990
To: <gloria.smith@sierraclub.org>

Hi Gloria,

Here are the emails that have been exchanged re: the San Bernardino FOIA.

Thanks,

Scott

----- Forwarded message -----

From: <fw2foia@fws.gov>
Date: Mon, Jan 13, 2020 at 10:43 AM
Subject: RE: [EXTERNAL] Re: FOIA Acknowledgement; FWS-2019-00990
To: Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com>, FW2 FOIA <fw2foia@fws.gov>

Hi Scott,

For 19-00990, we still need to finish up final review followed by Solicitor review.

For 19-00978, we received some records but are still waiting for more.

As things progress over the next couple weeks, I hope to provide you an update on our status.

Sincerely,

David Tischer

Government Information Specialist (FOIA)

U.S. Fish & Wildlife Service - Ecological Services

Region 2 – Albuquerque, New Mexico

☎ : 505.248.6658

From: Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com>

Sent: Friday, January 10, 2020 3:21 PM

To: FOIA, FW2 <fw2foia@fws.gov>

Subject: Re: [EXTERNAL] Re: FOIA Acknowledgement; FWS-2019-00990

Could you please provide an estimate as to when production of responsive documents will begin for the Sierra Club's FOIA requests?

Thanks,

Scott Nicol

Sierra Club Borderlands

On Wed, Nov 13, 2019 at 9:34 PM Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com> wrote:

Great. Thanks for the update.

Scott

On Wed, Nov 13, 2019 at 3:20 PM <fw2foia@fws.gov> wrote:

Hi Scott,

We're close. We just started the beginning phases of a final review.

I do not want to give you a firm date, but we are actively working the case.

FYI... I started document review for your LRGV border wall FOIA (19-00978).

Sincerely,

David Tischer

Government Information Specialist (FOIA)

U.S. Fish & Wildlife Service - Ecological Services

Region 2 – Albuquerque, New Mexico

☎ : 505.248.6658

From: Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com>

Sent: Sunday, November 10, 2019 5:31 PM

To: FOIA, FW2 <fw2foia@fws.gov>

Subject: [EXTERNAL] Re: FOIA Acknowledgement; FWS-2019-00990

Could you please provide a status update for the Sierra Club's FOIA request, FWS-2019-00990.

Thanks,

Scott Nicol

Sierra Club Borderlands

On Thu, Aug 1, 2019 at 2:00 PM <fw2foia@fws.gov> wrote:

Dear Mr. Nicol,

Please see attached FOIA acknowledgement letter.

David Tischer

Government Information Specialist (FOIA)

U.S. Fish & Wildlife Service - Ecological Services

Region 2 – Albuquerque, New Mexico

☎ : 505.248.6658

From: Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com>

Sent: Monday, July 29, 2019 8:17 PM

To: FOIA, FW2 <fw2foia@fws.gov>

Subject: [EXTERNAL] Sierra Club FOIA request re: San Bernardino NWR

Mr. Mendias,

Attached is a Freedom of Information Act request regarding vehicle barriers and border walls along the southern boundary of the San Bernardino National Wildlife Refuge.

Please acknowledge receipt of this FOIA request.

Thanks,

Scott Nicol

Sierra Club Borderlands

2 attachments



2019 Sierra Club FOIA request to USFW re San Bernardino NWR border fences.pdf
140K



19-00990_Acknowledgement_(8-1-19) (1).pdf
171K



Rose Monahan <rose.monahan@sierraclub.org>

Fwd: [EXTERNAL] Re: FOIA Acknowledgement; FWS-2019-00990

Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com>
To: Rose Monahan <rose.monahan@sierraclub.org>

Wed, Mar 18, 2020 at 3:23 PM

Regarding the Sierra Club's FOIA for docs pertaining to the San Bernardino NWR border wall.

Scott

----- Forwarded message -----

From: **FOIA, FW2** <fw2foia@fws.gov>

Date: Tue, Mar 17, 2020 at 10:54 AM

Subject: Re: [EXTERNAL] Re: FOIA Acknowledgement; FWS-2019-00990

To: Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com>

Cc: FOIA, FW2 <fw2foia@fws.gov>

Scott,

My apologies, we haven't been able to tackle our backlog like we hoped due to all the litigation cases taking time away from FOIA. I spoke with Melanie yesterday and she's hoping to start final review this week. I'll let you know the status as we progress.

Sincerely,

David Tischer

Government Information Specialist (FOIA)

U.S. Fish & Wildlife Service - Ecological Services

Region 2 – Albuquerque, New Mexico

☎ : 505.248.6658

From: Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com>

Sent: Thursday, March 12, 2020 3:09 AM

[Quoted text hidden]

[Quoted text hidden]



Rose Monahan <rose.monahan@sierraclub.org>

Fwd: [EXTERNAL] Re: FOIA Acknowledgement; FWS-2019-00990

Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com>
To: Rose Monahan <rose.monahan@sierraclub.org>

Tue, Apr 7, 2020 at 12:42 PM

FYI

----- Forwarded message -----

From: **FOIA, FW2** <fw2foia@fws.gov>

Date: Tue, Apr 7, 2020 at 12:57 PM

Subject: RE: [EXTERNAL] Re: FOIA Acknowledgement; FWS-2019-00990

To: Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com>

Cc: FOIA, FW2 <fw2foia@fws.gov>

Mr. Nichol: I apologize for the delay. As David mentioned, we are managing a heavy workload in both FOIA and litigation. We are working with the Refuges program to address some questions regarding responsive records and then the package will go to our Solicitor's office for review and surname. We are close, but it is unlikely that we will have a final response issued by April 14. We are doing our best to continuing processing during this time and will keep you posted on our progress. I appreciate your patience and hope that you will refrain from filing litigation at this time.

Thank you,

Melanie

Melanie Ruiz

Chief, Branch of Litigation/FOIA

USFWS-Southwest Region

Division of Ecological Services

Office: 505-248-6284

Cell: 505-259-0335

From: Lower Rio Grande Valley Sierra Club <lrgvsierraclub@gmail.com>

Sent: Tuesday, March 31, 2020 3:03 PM

To: FOIA, FW2 <fw2foia@fws.gov>

Subject: Re: [EXTERNAL] Re: FOIA Acknowledgement; FWS-2019-00990

Mr. Tischer,

As you know, federal agencies are required to make a final determination on a FOIA request within 20 working days of receiving the request and then make the records "promptly" available. 5 U.S.C. § 552(a)(3)(A), (a)(6). The Sierra Club submitted this request over 8 months ago, and you've indicated that the records have been in "final review" for at least 4 months. However, we have not received a final determination or the release of any records. Due to this delay, the Sierra

Club has been forced to evaluate legal options available to enforce FOIA and will consider pursuing legal action if the agency continues to violate its responsibilities under FOIA. Please provide a final determination on the Sierra Club's FOIA request (FWS-2019-00990) by April 14th.

Thanks,

Scott Nicol

Sierra Club Borderlands

[Quoted text hidden]

Exhibit 5



United States Department of the Interior

FISH AND WILDLIFE SERVICE



Post Office Box 1306
Albuquerque, New Mexico 87103

In Reply Refer To:
FWS/R2/ES/FOIA
FWS-2019-00990

Mr. Scott Nicol
Sierra Club Borderlands Team
7300 N. 32nd
McAllen, Texas 78504

Dear Mr. Nicol:

This responds to your Freedom of Information Act (FOIA) request dated July 29, 2019, for records related to border wall construction on or adjacent to the San Bernardino National Wildlife Refuge. Specifically, you seek the following:

“... emails, letters, call logs, and other communications between Customs and Border Protection, the Border Patrol, the Department of Homeland Security, the Army Corps of Engineers, Baker Engineering, Logistics Management Institute, and US Fish and Wildlife or the Department of the Interior regarding this topic. Also include discussions between USFW and contractors working on this project (for example, Baker Engineering, Logistics Management Institute, Keiwit, etc.). Internal USWF discussions, reports, updates, presentation materials such as Powerpoints, etc., that address these barriers / walls should be included. Photographs of the barriers / walls, or photographs of the location of these barriers / walls that show the site before they were erected and/or the impacts of construction, should also be included.”

Your FOIA request was assigned tracking number FWS-2019-00990 and forwarded to the Southwest Region National Wildlife Refuge System for processing. Based on this office's review, we reasonably foresee that disclosure of certain information in documents that fall under this request would harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure. Accordingly, from the responsive records portions of 37 records are partially redacted, and 20 records are being withheld in full pursuant to FOIA Exemption (b)(3), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E), as described below. The full release and partially redacted material are provided to you with this letter. Multiple exemptions have been applied to several documents.

Mr. Scott Nicol

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Portions of four records have been redacted pursuant to Exemption (b)(3) of the FOIA. Exemption 3 allows the withholding of information protected by a nondisclosure provision in a federal statute other than FOIA. In this instance, the redacted records contain information related to sensitive tribal sites that is protected under the Archaeological Resources Protection Act of 1979. 16 USC §470hh. We reasonably foresee that disclosure of this information would be prohibited by law.

Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency.” (5 U.S.C. § 552(b)(5)). Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges.

The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring agencies are not forced to operate in a fish bowl. A number of policy purposes have been attributed to the deliberative process privilege. Among the most important are to: (1) assure that subordinates will feel free to provide the decision maker with their uninhibited opinions and recommendations; (2) protect against premature disclosure of proposed policies; and (3) protect against confusing the issues and misleading the public.

The deliberative process privilege protects materials that are both predecisional and deliberative. The privilege covers records that reflect the give-and-take of the consultative process and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.

Under the deliberative process privilege of Exemption 5, 16 records have been withheld in full and 1 is partially redacted that are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Their contents have been held confidential by all parties and public dissemination of these drafts would have a chilling effect on the agency’s deliberative processes and expose the agency’s decision-making process in such a way as to discourage candid discussion within the agency, and thereby undermine its ability to perform its mandated functions.

Portions of 31 records have been redacted pursuant to Exemption (b)(6) of the FOIA. Under Exemption 6, agencies may withhold information or records on individuals contained in “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” (5 U.S.C. §552(b)(6)). The withheld material includes personal contact information (e.g. personal cell and home phone numbers, e-mail addresses, and home addresses).

The phrase “similar files” covers any agency records containing information about a particular individual that can be identified as applying to that individual. To determine whether releasing records containing information about a particular individual would constitute a clearly unwarranted invasion of personal privacy, we are required to balance the privacy interest that

would be affected by disclosure against any public interest in the information. Under the FOIA, the only relevant public interest to consider under the exemption is the extent to which the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens 'know what their government is up to.' (*See Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994) (*quoting Dept. of Justice v. Reporters Comm.*, 489 U.S. 749, 773 (1989))). The burden is on the requester to establish that disclosure would serve the public interest. When the privacy interest at stake and the public interest in disclosure have been determined, the two competing interests must be weighed against one another to determine which is the greater result of disclosure: the harm to personal privacy or the benefit to the public. The purposes for which the request for information is made do not impact this balancing test, as a release of information requested under the FOIA constitutes a release to the general public.

The information that has been withheld under Exemption 6 consists of personal information, as described above, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in withholding it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency's statutory duties. Because the harm to personal privacy is greater than whatever public interest may be served by disclosure, release of the information would constitute a clearly unwarranted invasion of the privacy of these individuals and we are withholding it under Exemption 6. We are releasing the majority of the communication that would not warrant an invasion of privacy for these individuals.

Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes" if the records fall within one or more of six specific bases for withholding set forth in subparts (A) through (F). 5 U.S.C. § 552(b)(7)(A)-(F). We are withholding 4 records in full and 14 in part under Exemption 7 because they are protected under the following subparts.

Exemption 7(C) protects law enforcement records if their release could reasonably be expected to constitute an unwarranted invasion of personal privacy. It is regularly applied to withhold references to individuals in law enforcement files. Ten records have been partially withheld under 7(C), and we have determined that releasing them would constitute an unwarranted invasion of privacy because they identify individuals referenced in law enforcement records and the release of this information would not shed light on an agency's performance of its statutory duties.

Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. For the six records that have been withheld partially or in full under 7(E), we have determined that disclosure could reasonably be expected to risk circumvention of the law.

Lastly, in our compilation and review of responsive records, we identified records that originated from or substantially concern another federal agency. Twenty-Eight records are being referred to U.S. Customs and Border Protection (CBP) and three are being referred to the U.S. Army Corps of Engineers for a release determination. Both agencies will issue a response directly to you.

Mr. Scott Nicol

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You do not have to contact the agency at this time, but should you need to do so in the future, you may do so at:

CESWF-OC
P.O. Box 17300
Fort Worth, TX 76102-0300
e-mail: foia-swf@usace.army.mil

U.S. Customs and Border Protection
Attn: FOIA Officer
1300 Pennsylvania Avenue NW
Washington, D.C. 20528

The undersigned is responsible for this denial.

This response to your FOIA request was made in consultation with Justin Tade, Attorney-Advisor, Office of the Solicitor, Southwest Region, U.S. Department of the Interior (Department). You may appeal this response to the Department's FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal no later than 90 workdays from the date of this letter. Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

Your appeal must be made in writing. You may submit your appeal and accompanying materials to the FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL." You must include an explanation of why you believe the U.S. Fish and Wildlife Service's (Service) response is in error. You must also include with your appeal copies of all correspondence between you and the Service concerning your FOIA request, including your original FOIA request and the Service's response. Failure to include with your appeal all correspondence between you and the Service will result in the Department's rejection of your appeal, unless the FOIA/Privacy Act Appeals Officer determines (in the FOIA/Privacy Act Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional information or clarification of your appeal.

DOI FOIA/Privacy Act Appeals Office
Department of the Interior, Office of the Solicitor
1849 C Street, N.W.
MS-6556 MIB
Washington, D.C. 20240
Telephone: 202-208-5339/Fax: 202-208-6677
Email: FOIA.Appeals@sol.doi.gov

Mr. Scott Nicol

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Also, please note the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation and does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov, Web: <https://ogis.archives.gov>
Telephone: 202-741-5770 / Fax: 202-741-5769 / Toll-free: 1-877-684-6448

You also may seek dispute resolution services from our FOIA Acting Public Liaison, Cindy Cafaro, at 888-603-7119 or via email at cindy.cafaro@sol.doi.gov.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

This completes the Service's response. The fees incurred in responding to your request have been waived in accordance with 43 C.F.R. §2.37. If you have any questions or concerns regarding this request, please contact Government Information Specialist, David Tischer, at 505-248-6658 or by email at fw2foia@fws.gov.

Sincerely,

MELANIE RUIZ Digitally signed
by MELANIE RUIZ
Date: 2020.04.13
09:17:25 -06'00'
Region 2 FOIA Coordinator