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5 **IN THE UNITED STATES DISTRICT COURT**  
6 **FOR THE DISTRICT OF ARIZONA**  
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8 Center for Biological Diversity, et al.,

9 Plaintiffs,

10 v.

11 Alejandro Mayorkas,<sup>1</sup> et al.,

12 Defendants.  
13

No. CV-17-00163-TUC-CKJ

**ORDER**

14  
15 Before the Court are Plaintiffs’ Motion for Summary Judgment (Doc. 63) and  
16 Defendants’ Cross-Motion for Summary Judgment (Doc. 69). For the reasons that follow,  
17 Plaintiffs’ motion for summary judgment is GRANTED IN PART AND DENIED IN  
18 PART, and Defendants’ cross-motion for summary judgment is GRANTED IN PART  
19 AND DENIED IN PART. The Court finds that Defendants violated NEPA but did not  
20 violate the ESA. Plaintiffs’ request for injunctive relief is DENIED.

21 **BACKGROUND**

22 In 1989, President George H.W. Bush created six regional joint task forces, named  
23 Joint Task Force-Six (the “Task Force”), to coordinate anti-drug efforts between the  
24 military and local law enforcement agencies and to provide military reinforcements to  
25 those agencies for anti-drug efforts. Sean J. Kealy, *Reexamining the Posse Comitatus Act:  
26 Toward A Right to Civil Law Enforcement*, 21 Yale L. & Pol’y Rev. 383, 419 (2003). The  
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28 <sup>1</sup> At the time of the original complaint, John F. Kelly was the Secretary of DHS. (Doc. 1 at 10) Since February 1, 2021, Alejandro Mayorkas has been the Secretary. U.S. Department of Homeland Security, <http://www.dhs.gov/secretary> (last visited Aug. 19, 2021).

1 Task Force provides operational, engineering, and general support to law enforcement  
2 agencies that conduct operations at United States borders when the agencies request such  
3 support. (Doc. 70 at 16) The support comes in the form of the design and construction of  
4 buildings, training facilities, roads, fences, and lighting; the manning of ground patrols and  
5 listening and observation posts; and the processing and analysis of data. *Id.* The Task  
6 Force has always been classified as a military command unit under the United States  
7 Department of Defense. *Id.*

8 In 1994, the Department of Defense and the United States Immigration and  
9 Naturalization Service (“INS”) prepared a final programmatic environmental impact  
10 statement to comply with the National Environmental Policy Act (“NEPA”), 42 U.S.C.  
11 § 4321 *et seq.* A.R. at 1, 15.<sup>2</sup> The impact statement addressed the cumulative  
12 environmental effects of past and reasonably foreseeable Task Force activity for numerous  
13 law enforcement agencies along a 50-mile-wide border corridor in Texas, New Mexico,  
14 Arizona, and California. *Id.* at 15. At the time, INS—through its Border Patrol  
15 component—had been the primary beneficiary of Task Force activity and elected to be the  
16 lead agency for the preparation of the statement. *Id.* at 3. The statement described general  
17 Task Force projects and discussed the types of expected environmental impacts from the  
18 continuation of border-enforcement activity. *Id.* at 15.

19 In 2001, the Departments of Justice and Defense prepared a final supplemental  
20 programmatic environmental impact statement. *Id.* at 268. While maintaining a  
21 programmatic approach, the supplemental statement had a narrower focus than its  
22 predecessor and only addressed activity that supported INS projects from 1994 to 2001.  
23 *Id.* at 297; 389. The statement’s focus was narrowed because the agencies felt that the  
24 document’s scope was overly broad, which caused confusion among the public. *Id.* at 389.  
25 In addition to discussing past Task Force activity, the statement also presented the  
26 anticipated level of activity for a five-year period, dating from 2000 to 2005. *Id.* at 297.

27 In 2017, the Center for Biological Diversity (the “Center”), a non-profit  
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<sup>2</sup> The Administrative Record in this case is abbreviated as “A.R.”.

1 environmental organization, and United States Congressman Raul Grijalva, filed suit in  
2 this Court alleging, inter alia, that the Department of Homeland Security (the  
3 “Department”)<sup>3</sup> and its agency component, Customs and Border Protection, violated NEPA  
4 by failing to update their programmatic environmental analysis for border-enforcement  
5 activity<sup>4</sup> since 2001. (Doc. 14 at 2) Plaintiffs also alleged that Defendants failed to consult  
6 with the United States Fish and Wildlife Service (“FWS”) concerning the impacts of  
7 border-enforcement activity on threatened or endangered species in violation of Section  
8 7(a)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq. Id.*

9 In March 2019, the Department officially withdrew from programmatic and  
10 supplemental programmatic environmental impact statements. A.R. at 8832. Prior to the  
11 parties’ filing of summary judgment motions, Defendants expanded the Administrative  
12 Record to include 95 individual documents covering approximately 9,000 pages in length.  
13 Doc. 49 at 29. Defendants also supplemented the Administrative Record on multiple  
14 occasions throughout the litigation and submitted four declarations from their  
15 Environmental Planning and Historic Preservation Program Manager, which explained the  
16 reasoning behind Defendants’ withdrawal from programmatic environmental impact  
17 statements and the logic surrounding other environmental decisions affecting the area in  
18 question. *See* Docs. 49 at 3-29; 54-3 at 2-6; 56 at 5-9; 62-1 at 2-8. At the summary  
19 judgment stage, Plaintiffs’ NEPA and ESA claims remain.

### 20 PROCEDURAL HISTORY

21 On July 24, 2020, Plaintiffs filed their Motion for Summary Judgment (Doc. 63),  
22 Statement of Undisputed Material Facts (Doc. 65) and amended Memorandum in Support  
23 of Motion for Summary Judgment (Doc. 66). On September 18, 2020, Defendants filed  
24 their Cross-Motion for Summary Judgment (Doc. 69), Combined Opposition to Plaintiffs’  
25 Motion for Summary Judgment and Memorandum in Support of Cross-Motion for

26 \_\_\_\_\_  
27 <sup>3</sup> In 2003, Congress created Customs and Border Protection by combining elements of the  
28 former INS and United States Customs Service. Congress made Customs and Border  
Protection a component agency of DHS. (Doc. 71, ¶ 2 at 4)

<sup>4</sup> The Court substitutes Plaintiffs’ use of the term “southern border enforcement program”  
with the activity it attempts to label.

1 Summary Judgment (Doc. 70), Statement of Undisputed Material Facts (Doc. 71), and  
2 Response to Plaintiffs' Statement of Facts (Doc. 72). On October 30, 2020, Plaintiffs filed  
3 their Combined Opposition to Defendants' Motion for Summary Judgment and Reply Brief  
4 in Support of Motion for Summary Judgment (Doc. 73), and Response to Federal  
5 Defendants' Statement of Undisputed Material Facts (Doc. 74). On November 20, 2020,  
6 Defendants filed their Reply in Support of Cross-Motion for Summary Judgment  
7 (Doc. 75). On February 23, 2021, the Court heard oral argument on the parties' summary  
8 judgment motions. (Doc. 77) This Order follows.

### 9 LEGAL STANDARD

10 "The Administrative Procedure Act ("APA") governs judicial review of agency  
11 action." *The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir.  
12 2003). "In a case involving review of final agency action under the APA, . . . the Court's  
13 role is limited to reviewing the administrative record," *Colorado River Cutthroat Trout v.*  
14 *Salazar*, 898 F. Supp. 2d 191, 200 (D.D.C. 2012), and it "generally need not perform any  
15 fact-finding," *All. for the Wild Rockies v. U.S. Forest Serv.*, No. 2:19-CV-00350-SMJ, 2020  
16 WL 7049556, at \*5 (E.D. Wash. Dec. 1, 2020). At the summary judgment stage, the court  
17 need only determine whether "as a matter of law the evidence in the administrative record  
18 permitted the agency to make the decision it did." *Id.* (cleaned up).

19 "Agency action is valid if a reasonable basis exists for the agency's decision."  
20 *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008) (cleaned up). "A reasonable  
21 basis exists where the agency considered the relevant factors and articulated a rational  
22 connection between the facts found and the choices made." *Id.* (citation and quotation  
23 marks omitted). "*Post hoc* explanations of agency action . . . cannot substitute for the  
24 agency's own articulation of the basis for its decision." *Id.* at 1113. "Summary judgment  
25 thus serves as the mechanism for deciding, as a matter of law, whether the agency action  
26 is supported by the administrative record and otherwise consistent with the APA standard  
27 of review." *Colorado River*, 898 F. Supp. 2d at 200 (cleaned up). "When parties file cross-  
28 motions for summary judgment, the [c]ourt must consider the evidence submitted in

1 support of both motions before ruling on either motion.” *Ctr. for Biological Diversity v.*  
2 *U.S. Bureau of Land Mgmt.*, No. CV 17-8587-GW(ASX), 2019 WL 2635587, at \*8 (C.D.  
3 Cal. June 20, 2019).

## 4 DISCUSSION

### 5 I. Standing

6 As a preliminary matter, Defendants argue that Plaintiffs lack standing to sue in  
7 federal court. (Doc. 70 at 20-25). Plaintiffs lack standing, Defendants argue, because their  
8 past injuries are not redressable through after-the-fact environmental review and their  
9 speculative fears about future injury arising from unspecified projects do not satisfy their  
10 burden to identify specific, final agency action approving a border enforcement project as  
11 the source of those fears. *Id.* at 10. Plaintiffs argue that their declarations establish standing  
12 by showing that they suffer injuries that are concrete, particularized, actual and imminent,  
13 fairly traceable to the challenged action, and redressable. (Doc. 73 at 8-10) The issue for  
14 the Court to determine is whether Plaintiffs’ declarations satisfy the standing requirements  
15 for environmental claims that involve procedural injuries.<sup>5</sup>

16 In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the  
17 Supreme Court outlined the standard for organizational standing. 528 U.S. 167 (2000). It  
18 concluded:

19 [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it  
20 has suffered an injury in fact that is (a) concrete and particularized and (b)  
21 actual or imminent, not conjectural or hypothetical; (2) the injury is fairly  
22 traceable to the challenged action of the defendant; and (3) it is likely, as  
23 opposed to merely speculative, that the injury will be redressed by a  
24 favorable decision. An association has standing to bring suit on behalf of its  
25 members when its members would otherwise have standing to sue in their  
26 own right, the interests at stake are germane to the organization's purpose,  
27 and neither the claim asserted nor the relief requested requires the  
28 participation of individual members in the lawsuit.

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<sup>5</sup> See *WildEarth Guardians v. U.S. Dep’t of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015)  
(concluding that a claim “alleging a NEPA violation” is procedural); *Nat. Res. Def. Council  
v. Jewell*, 749 F.3d 776, 783 (9th Cir. 2014) (en banc) (“[A]lleged violations of Section  
7(a)(2)’s consultation requirement constitute a procedural injury for standing purposes.”).

1 *Id.* at 181 (quotation marks omitted). “When there are multiple plaintiffs, at least one  
2 plaintiff must have standing to seek each form of relief requested in the complaint.”  
3 *Friends of Santa Clara River v. U.S. Army Corps of Eng’rs*, 887 F.3d 906, 917 (9th Cir.  
4 2018) (cleaned up). “The party invoking federal jurisdiction bears the burden of  
5 establishing these elements.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, (1992).

#### 6 **A. Injury in Fact**

7 “The ‘injury in fact’ requirement in environmental cases is satisfied if an individual  
8 adequately shows that she has an aesthetic or recreational interest in a particular place, or  
9 animal, or plant species and that that interest is impaired by a defendant's conduct.”  
10 *Ecological Rts. Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000). “[A]n  
11 individual can establish ‘injury in fact’ by showing a connection to the area of concern  
12 sufficient to make credible the contention that the person's future life will be less  
13 enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or  
14 recreational satisfaction—if the area in question remains or becomes environmentally  
15 degraded.” *Id.* at 1149; *see also Friends of the Earth*, 528 U.S. at 183 (“[E]nvironmental  
16 plaintiffs adequately allege injury in fact when they aver that they use the affected area and  
17 are persons for whom the aesthetic and recreational values of the area will be lessened by  
18 the challenged activity.”)

#### 19 **B. Causation and Redressability**

20 “A showing of procedural injury lessens a plaintiff's burden on the last two prongs  
21 of the Article III standing inquiry, causation and redress[a]bility.” *Salmon Spawning &*  
22 *Recovery All. v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008). To satisfy the causation  
23 and redressability prongs, “[s]uch a litigant need only demonstrate that he has a procedural  
24 right that, if exercised, *could* protect his concrete interests and that those interests fall  
25 within the zone of interests protected by the statute at issue.” *Nat. Res. Def. Council v.*  
26 *Jewell*, 749 F.3d 776, 783 (9th Cir. 2014) (cleaned up).

### 1                   **1. Plaintiffs' Declarations Establish Standing**

2           The Center submits four declarations from of its members<sup>6</sup> to establish standing.  
3   *See* Docs. 66-2; 66-5; 66-6; 66-7. In one declaration, Center member Randy Serraglio  
4   averred that: he has lived in Tucson, Arizona, since 1990; he has hiked, birded, and done  
5   photography several times in the Coronado National Memorial within the past two years;  
6   while visiting the Memorial he hopes for the opportunity to observe rare and vulnerable  
7   species including the Chiricahua leopard frog, jaguar, Gila chub, and Mexican spotted owl;  
8   knowing that he may come across them enhances his enjoyment of time in this area; he  
9   plans to revisit a number of sites in the Coronado National Forest during migration and  
10   breeding season in the coming years; his use and enjoyment of the borderlands has been  
11   degraded in recent years by the effects of the increased amount of border enforcement  
12   activities at the border; where he expects to see vast, pristine vistas of deserts, grasslands,  
13   forests, and mountains, they are instead broken up by 18-and-30-foot high border walls,  
14   extremely tall surveillance towers, equipment yards, badly constructed and eroding roads,  
15   and other ugly scars on the landscape; and, the Border Patrol has recently announced the  
16   start of new construction in the Memorial itself, which will wall off and eliminate one of  
17   the few remaining jaguar corridors that cross the border and destroy the scenic solitude of  
18   the southern terminus of the Arizona National Scenic Trail. (Doc. 66-6 at 2, 4-7)

19           Congressman Grijalva's declaration was also submitted to the Court. *See* Doc. 66-  
20   3. The Congressman averred that: he currently resides in Tucson, Arizona; he is injured  
21   when federal agencies fail to comply with federal environmental laws that are necessary to  
22   protect his property, health, and the environment; border security activities, which include  
23   physical barriers, increased border agents, road construction not associated with border  
24   wall construction, helicopter flights, lighting, and other actions have resulted in significant  
25   changes in the border region; he has been harmed by agencies' failures to comply with  
26   NEPA and other federal laws; border activities stand to cause imminent harm to his interest

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28   <sup>6</sup> The Center submits six declarations in total; however, only four declarations indicate  
that the declarants are Center members.

1 in seeing intact desert ecosystems, listening for birds, and observing wildlife along the  
2 southern border; in January 2020, he visited Organ Pipe Cactus National Monument and  
3 witnessed a current construction area; in February 2020, the Department conducted  
4 blasting on the site resulting in the potential destruction of bone fragments dating back to  
5 the 1600's; he also visited Quitobaquito Springs where certain areas were cut down  
6 exposing and destroying ancient artifacts; he noticed groundwater extraction at various  
7 areas within the Organ Pipe National Park; and he plans on re-visiting Organ Pipe Cactus  
8 National Monument along with other border areas, as soon as this Fall. *Id.* at 2-10.

9       These declarations demonstrate that Plaintiffs use specific affected areas of southern  
10 borderlands where Defendants have been permitted to conduct operations, these are areas  
11 to which Plaintiffs intend to return, and Plaintiffs' aesthetic and recreational interests in the  
12 affected areas will be diminished by unchecked border-enforcement activity or agency  
13 failure to conduct supplemental programmatic environmental analysis. In addition to  
14 demonstrating Plaintiffs' injuries in fact, the declarations also establish that compliance  
15 with NEPA and the ESA *could* protect Plaintiffs' aesthetic and recreational interests in  
16 specific borderland areas.

17       Defendants' proposed standing requirement is too restrictive for the claims at hand.  
18 *See* Doc. 70 at 20-25. It is true that a "deprivation of a procedural right without some  
19 concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is  
20 insufficient to create Article III standing." (Doc. 70 at 21) However, Defendants ignore  
21 the fact that Plaintiffs have identified, in great detail, aesthetic and recreational interests  
22 that *could* be affected by their failure to comply with NEPA and the ESA. Similar  
23 arguments attacking an organization's ability to bring environmental claims have been  
24 addressed and dismissed by the United States Court of Appeals for the Ninth Circuit. *See*  
25 *Cottonwood Env't L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1079-80 (9th Cir. 2015)  
26 (rejecting agency's argument that the plaintiff lacked standing because it failed to challenge  
27 discrete agency action that would cause direct injury); *WildEarth Guardians v. U.S. Dep't*  
28 *of Agric.*, 795 F.3d 1148, 1155 (9th Cir. 2015) (finding that plaintiff environmental



1 organization could challenge a failure to update a programmatic environmental impact  
2 statement through its member's assertion of recreational and aesthetic injury to a specific  
3 impacted geographic area); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1515–  
4 18 (9th Cir.1992) (holding that plaintiffs had standing to challenge a non-site-specific  
5 environmental impact statement that caused an injury in fact). Because Mr. Serraglio and  
6 Congressman Grijalva would have standing to bring the NEPA and ESA claims on their  
7 own, and the Center also satisfies the other associational standing requirements, the Center  
8 and Congressman Grijalva have standing to proceed to the merits of their claims.

## 9 **II. NEPA Violation**

10 Plaintiffs argue that Defendants violated NEPA by failing to issue a supplemental  
11 environmental impact statement despite the presence of factors requiring supplementation.  
12 (Doc. 66 at 25-39). Plaintiffs also contend that Defendants violated NEPA by failing to  
13 take a “hard look” at the environmental consequences before withdrawing from the 1994  
14 and 2001 programmatic environmental impact statements in their entirety. *Id.* at 40-46.  
15 Defendants argue that their decision to withdraw from programmatic environmental impact  
16 statements is unreviewable and that there is no ongoing major federal action which requires  
17 programmatic environmental supplementation. (Doc. 70 at 25-37)

18 After thorough review of the Administrative Record, the Court finds that there is  
19 ongoing major federal action in the form of southern-border enforcement activity, and that,  
20 at the time, Defendants violated NEPA by failing to take a “hard look” before deciding to  
21 conduct environmental analysis at the project-level and prior to withdrawing from  
22 programmatic environmental impact statements altogether. The Administrative Record is  
23 devoid of information demonstrating Defendants adequately identified and evaluated any  
24 adverse environmental impacts of their proposed action before implementing their new  
25 strategy. The Court addresses Defendants' arguments in the order of impact on its decision.

### 26 **A. Statutory Requirements**

27 NEPA has twin aims: It places an obligation on agencies to “consider every  
28 significant aspect of the environmental impact of a proposed action,” and “it ensures that

1 the agency will inform the public that it has indeed considered environmental concerns in  
2 its decision[-]making process.” *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*,  
3 462 U.S. 87, 97 (1983). As part of the decision-making process, NEPA requires federal  
4 agencies to prepare an environmental impact statement for “major Federal actions  
5 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).  
6 The environmental impact statement must discuss “the environmental impact of the  
7 proposed action” and include alternatives to the action. *Id.*

8 “The subject of postdecision supplemental environmental impact statements is not  
9 expressly addressed in NEPA.” *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 370  
10 (1989). “Preparation of such statements, however, is at times necessary to satisfy the Act’s  
11 ‘action-forcing’ purpose.” *Id.* The Council on Environmental Quality (“CEQ”), which  
12 issues guidance to assist federal agencies in understanding and complying with NEPA,  
13 requires agencies to supplement environmental impact statements in certain circumstances.  
14 *Id.* at 372-73. Federal agencies must prepare supplements to either draft or final  
15 environmental impact statements if: “(i) [t]he agency makes substantial changes in the  
16 proposed action that are relevant to environmental concerns; or (ii) [t]here are significant  
17 new circumstances or information relevant to environmental concerns and bearing on the  
18 proposed action or its impacts.” 40 C.F.R. § 1502.9(c) (1978); *Marsh*, 490 U.S. at 372.  
19 “[S]upplementation is necessary only if there remains major Federal action to occur[.]”  
20 *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 73 (2004). “[I]n the context of reviewing  
21 a decision not to supplement an [environmental impact statement], courts should not  
22 automatically defer to the agency’s express reliance on an interest in finality without  
23 carefully reviewing the record and satisfying themselves that the agency has made a  
24 reasoned decision based on its evaluation of the significance—or lack of significance—of  
25 the new information.” *Marsh*, 490 U.S. at 378.

### 26 1. Ongoing Major Federal Action

27 Defendants argue that no major federal action remains which requires  
28 supplementation, that there has never been a “southern border enforcement program,” and

1 that Plaintiffs fail to identify any program that continues to rely on their original  
2 environmental impact statement. (Doc. 70 at 28-37) Plaintiffs argue that Defendants  
3 continue to perform the same border-enforcement activity that was analyzed in their initial  
4 environmental impact statement and that the reorganization of border enforcement  
5 agencies does not remove the agencies' responsibility to supplement their programmatic  
6 analysis. (Doc. 73 at 11-14) Plaintiffs also argue that the Administrative Record  
7 demonstrates Defendants' long reliance on the initial and supplemental environmental  
8 impact statements and that the cumulative environmental impacts of agency action can only  
9 be adequately addressed through a programmatic analysis. *Id.* at 12-14

10 This Court has previously concluded that the requirement of an environmental  
11 impact statement is fact based rather than guided by superficial program labels. *See* Doc.  
12 40 at 3. Until recently, the CEQ defined "major federal action" to include "new and  
13 continuing activities, including projects and programs entirely or partly financed, assisted,  
14 conducted, regulated, or approved by federal agencies; [and] new or revised agency rules,  
15 regulations, plans, policies, or procedures; and legislative proposals." 40 C.F.R.  
16 § 1508.18(a) (1978). The Supreme Court has ruled that CEQ's interpretation of NEPA is  
17 entitled to substantial deference and that its regulations are binding on federal agencies.  
18 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1989).

19 Here, the Administrative Record demonstrates that since 1989, there has been major  
20 federal action in the form of border-enforcement activity along a 50-mile-wide border  
21 corridor in four states, including Arizona. A.R. at 15, 268-73. Defendants initially prepared  
22 individual, site-specific environmental assessments to comply with NEPA. *Id.* at 20. But  
23 in 1992, the agencies changed course and elected instead to prepare programmatic  
24 environmental analysis, as the number of their projects increased, public resource agencies  
25 realized the geographic scope of their work, and concerns about cumulative environmental  
26 impacts arose. *Id.*

27 The 1994 environmental impact statement discussed the clearing of approximately  
28 2,500 acres of wildlife habitat for joint agency activity and predicted more than 3,000

1 additional acres of wildlife habitat would be impacted by their actions over the following  
2 five years. A.R. at 4; 114. The 2001 supplemental environmental impact statement  
3 estimated that anticipated infrastructure development would affect an additional 6,900  
4 acres of wildlife habitat. *Id.* at 309; 361. The anticipated level of environmental impact  
5 from border-enforcement activity in 2001 to 2005 was nearly double the environmental  
6 impact of border-enforcement activity from 1989 to 2000. *Id.* at 310.

7 Additionally, the Administrative Record is replete with examples of expanding  
8 federal action in the form of border-enforcement activity. For example, the June 2001  
9 supplemental environmental impact statement and its Record of Decision indicate:

10 The National Drug Control Strategy (in addition to the INS National,  
11 regional and field strategies), . . . has focused attention on the southwestern  
12 United States. The number of [United States Border Patrol] agents is  
13 expected to significantly increase during the next 10 years. In order to  
14 accommodate these new agents, support staff, resources, and continued  
15 assistance from JTF-6 would be sought. Infrastructure would need to be  
16 constructed or improved to ensure that these agents can effectively and  
17 efficiently perform their duties. Support would also be needed in training,  
18 intelligence gathering, detecting and deterring illegal activities, and  
19 administrative functions such as transporting evidentiary materials seized by  
20 USBP during drug busts. INS must provide this support to its law  
enforcement arm (USBP) in order for the USBP to effectively implement the  
strategy for gaining and maintaining control of the border. An integral part  
of providing these means to effectively operate is the assistance INS receives  
from the DoD, particularly in regards to JTF-6 support missions.

21 . . . .

22 The National Drug Control Strategy . . . projects up to 1,000 new USBP  
23 agents should be hired over the next 10 years. Filling these new positions  
24 would increase employment, income and sales within local and regional  
25 economies both directly and indirectly. The magnitude of these effects would  
26 depend upon the size and economic condition of the community affected, the  
27 number of positions filled, and the number of local persons hired to fill the  
positions. As discussed in Chapter 1 of this [Supplemental Programmatic  
Environmental Impact Statement], these new agents will require new and/or  
upgraded infrastructure (e.g., roads, fences, ISIS, etc.) in order to effectively  
perform their duties.

28 . . . .

1 The proposed action and preferred alternative under this FSPEIS is to  
2 implement full JTF-6 support to INS' mission to gain and maintain control of  
3 the southwestern U.S./Mexico border. The INS will enhance its operation,  
4 programs and staff through increases in agents' presence, facilities, and  
5 infrastructure during the next 5 years, as specified in the Illegal Immigration  
6 Reform and Immigrant Responsibility Act (IIRIRA) of 1996, as amended. In  
7 order to accommodate these new initiatives it will be necessary to provide  
8 infrastructure support to ensure that agents will be able to effectively and  
9 efficiently perform their duties.

10 *Id.* at 288, 370, 487.

11 This activity unquestionably constitutes “new and continuing activities, including  
12 projects and programs entirely or partly financed, assisted, conducted, regulated, or  
13 approved by federal agencies.” *See* 40 C.F.R. § 1508.18(a) (1978). Accordingly, the Court  
14 finds that there is ongoing major federal action in the form of border-enforcement activity  
15 along the 50-mile-wide southern border corridor where Defendants operate.

## 16 **2. Defendants Failed to Conduct “Hard Look”**

17 Notwithstanding the fact that there is ongoing major federal action in the form of  
18 border-enforcement activity, Defendants argue that they maintained NEPA compliance by  
19 conducting environmental assessments at the site- and project-specific level. (Doc. 70 at  
20 28-32) Plaintiffs argue that Defendants violated NEPA by failing to take a “hard look” at  
21 whether significant changes to border-enforcement activity, its circumstances, and  
22 information relevant to the activity’s environmental impacts, demands supplementation of  
23 the 2001 programmatic environmental analysis. (Doc. 73 at 11, 15-19) Plaintiffs contend  
24 that absent sufficient explanation in the Administrative Record demonstrating that  
25 Defendants took a “hard look” at significant border-enforcement changes and new  
26 information, Defendants have acted in an arbitrary and capricious manner. *Id.*

27 NEPA requires federal agencies to take a “hard look” at the potential environmental  
28 consequences of a proposed action, “even after a proposal has received initial approval.”  
*Marsh*, 490 U.S. at 374; *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067,  
1075 (9th Cir. 2011). “If an agency decides not to prepare an environmental impact

1 statement, it must supply a convincing statement of reasons to explain why a project's  
2 impact[s] are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d  
3 1208, 1212 (9th Cir. 1998) (quotation marks and citation omitted). "The statement of  
4 reasons is crucial to determining whether the agency took a 'hard look' at the potential  
5 environmental impact of a project." *Id.* The decision not to prepare a supplemental  
6 environmental impact statement is controlled by the "arbitrary and capricious" standard.  
7 *Marsh*, 490 U.S. at 376.

8 In determining whether an agency's decision to forego supplemental environmental  
9 analysis was arbitrary or capricious, a court "must consider whether the decision was based  
10 on a consideration of the relevant factors and whether there has been a clear error of  
11 judgment." *Marsh*, 490 U.S. at 360. "A court will uphold a decision not to supplement an  
12 environmental analysis if the decision is reasonable." *Oregon Nat. Res. Council Action v.*  
13 *U.S. Forest Serv.*, 445 F. Supp. 2d 1211, 1225–26 (D. Or. 2006). "Reasonableness depends  
14 on the environmental significance of the new information, the probable [accuracy] of the  
15 information, the degree of care with which the agency considered the information and  
16 evaluated its impact, and the degree to which the agency supported its decision not to  
17 supplement with a statement of explanation or additional data." *Stop H-3 Ass'n v. Dole*,  
18 740 F.2d 1442, 1464 (9th Cir. 1984). "If the adverse environmental effects of the proposed  
19 action are adequately identified and evaluated, the agency is not constrained by NEPA from  
20 deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350.

21 Plaintiffs assert that Defendants violated NEPA because they failed to timely  
22 prepare, or sufficiently evaluate the need for, a supplemental environmental impact  
23 statement in light of substantial expansion of border-enforcement activity and the  
24 designation of new or revised critical habits for threatened or endangered species that live  
25 within the border-enforcement area. (Doc. 73 at 15) Plaintiffs support these assertions  
26 with approximately fifty undisputed statements of fact demonstrating, for example, that  
27 between "2006 to 2011, the Border Patrol nearly doubled the number of agents on patrol,  
28 constructed hundreds of miles of border fences, and installed a variety of surveillance

1 equipment,” and that “[s]ince September 11, 2001, and the creation of DHS, annual  
2 appropriations [to southern-border-enforcement activity] increased . . . by an additional  
3 170 percent, to \$3.8 billion in FY2015.” (Doc. 65 at ¶¶ 92, 94). Plaintiffs also highlight  
4 undisputed statements of fact which demonstrate that there was a large number of new or  
5 revised critical habitat designations for threatened or endangered species within the  
6 southern border enforcement corridor since 2001. *Id.* at ¶¶ 120-148.

7 Plaintiffs’ undisputed facts, especially in light of their cumulative effect, constitute  
8 triggering events for which Defendants should have contemporaneously considered and  
9 evaluated the need for supplemental environmental analysis. *See Friends of the Clearwater*  
10 *v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000) (finding federal agency violated NEPA by  
11 failing to prepare, or sufficiently consider and evaluate the need for, a supplemental  
12 environmental impact statement in light of seven new sensitive species designations and  
13 recognition that standards on which the original impact statement relied were inadequate);  
14 *In re Operation of Missouri River Sys. Litig.*, 516 F.3d 688, 693 (8th Cir. 2008) (cleaned  
15 up) (reiterating that “[a] substantial change that requires an SEIS under 40 C.F.R. §  
16 1502.9(c)(1)(l) is one that is *not* qualitatively within the spectrum of alternatives that were  
17 discussed in a prior FEIS.”). While Defendants’ undisputed statements of fact demonstrate  
18 that they performed individual, site-specific environmental assessments for some of the  
19 triggering events that Plaintiffs raise, *see* Doc. 71 at ¶¶ 47-48, 56, it is of no consequence  
20 that they elected to conduct project-level assessments instead of issuing a supplemental  
21 statement if they failed to contemporaneously articulate a reasonable explanation for their  
22 decision. *See Nw. Env’t Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 690 (9th Cir.  
23 2007) (finding federal agency acted in arbitrary and capricious manner when the agency  
24 failed to cogently explain its decision, the record failed to indicate that the decision was  
25 the result of a rational decision-making process, and the agency failed to consider the  
26 purposes of the environmental statute which required it to make a reasoned decision.).

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1 The Administrative Record provides only limited clues and post-hoc analysis<sup>7</sup> to  
2 justify Defendants' decision to forego supplemental programmatic environmental analysis  
3 and instead conduct individual, site-specific environmental assessments on a project level  
4 for border-enforcement activity. For example, the June 2001 final supplemental  
5 environmental impact statement and the Department's March 2019 withdrawal  
6 determination state:

7 In addition, the NEPA team felt that the scope of the original Draft SPEIS  
8 was so broad (covering independent activities of two Federal agencies), that  
9 the document caused confusion among the general public. Consequently, the  
10 NEPA team decided to refocus the scope of the SPEIS to address just the  
11 support provided by JTF-6 to INS and the ISIS program within the 50-mile  
12 corridor and to resubmit the revised Draft SPEIS to the public for review.

12 A.R. at 389.

13 U.S. Customs and Border Protection (CBP), a component of the Department  
14 of Homeland Security (DHS) and Joint Task Force-North (JTF-N), a Joint  
15 Command of the Department of Defense (DoD), have evaluated their  
16 compliance with the National Environmental Policy Act (NEPA) for  
17 activities now being undertaken by and in support of federal law enforcement  
18 agencies in the four states bordering Mexico. Actions currently taken by  
19 either CBP or JTF-N comply with NEPA through individual project analyses.  
20 CBP and JTF-N NEPA compliance does not rely on the Records of Decision  
21 and the supporting joint Programmatic Environmental Impact Statement  
22 (PEIS) of 1994 or the Supplemental Programmatic EIS (SPEIS) of 2001,  
23 documents created by predecessor entities that no longer exist.  
24 Supplementing the documents is of no current value and would be an unwise  
25 use of resources.

26 A.R. at 8832.

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27 <sup>7</sup> See *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007) (cleaned up) (“Post-  
28 hoc examination of data to support a pre-determined conclusion is not permissible because  
this would frustrate the fundamental purpose of NEPA, which is to ensure that federal  
agencies take a ‘hard look’ at the environmental consequences of their actions, early  
enough so that it can serve as an important contribution to the decision making process.”);  
*Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir.1996)  
 (“[P]ost-decision information . . . may not be advanced as a new rationalization either for  
sustaining or attacking an agency's decision.”).



1           The Court finds this limited justification—among thousands of pages of  
2 environmental data and administrative records—fails to demonstrate that Defendants took  
3 a “hard look” and made a reasoned decision to forego, and ultimately withdraw from,  
4 supplemental programmatic environmental impact statements despite the presence of  
5 significant triggering events since the statement was last supplemented in 2001. The  
6 Administrative Record fails to demonstrate that Defendants identified and evaluated the  
7 environmental consequences of their decision(s) to switch from conducting site-specific  
8 assessments to issuing programmatic impact statements to going back to conducting site-  
9 specific assessments in relation to border-enforcement activity. Accordingly, the Court  
10 finds the decisions in question were arbitrary and capricious and grants Plaintiffs’ summary  
11 judgment motion on the issue.

### 12   **III.   ESA Violation**

13           In a related claim, Plaintiffs argue that despite the presence of newly listed species  
14 and revised critical habitat designations since 2001, Defendants have failed to initiate and  
15 complete consultation with the FWS to ensure continuing border-enforcement activity does  
16 not jeopardize the existence of the species or adversely affect their designated critical  
17 habitats. (Doc. 66 at 47) Perplexingly, Plaintiffs assert that Defendants have a duty to  
18 conduct Section 7 ESA consultation on the NEPA supplementation that they seek to  
19 compel in this case. (Doc. 73, n.4 at 15) Defendants argue that Plaintiffs lack standing to  
20 bring their claim; Defendants cannot be in violation of the ESA in connection with a future  
21 NEPA analysis; Plaintiffs have failed to provide a valid 60-day notice of intent to sue, and;  
22 a court-ordered NEPA analysis would not require ESA consultation. (Doc. 75 at 15-22)

23           Assuming *arguendo* that Plaintiffs have standing to sue for a prospective Section 7  
24 violation and that their April 2017 notice sufficiently informed Defendants of the claim at  
25 hand, the Court finds that Plaintiffs fail to sufficiently demonstrate that the ESA mandates  
26 programmatic FWS consultation and that a hypothetical NEPA supplementation would  
27 trigger such a requirement.

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1           **A.     Statutory Requirements**

2           In *National Ass'n of Home Builders v. Defenders of Wildlife*, the Supreme Court  
3 summarized the background and scope of the ESA. 551 U.S. 644 (2007). It observed:

4           The Endangered Species Act of 1973 . . . is intended to protect and conserve  
5 endangered and threatened species and their habitats. Section 4 of the ESA  
6 directs the Secretaries of Commerce and the Interior to list threatened and  
7 endangered species and to designate their critical habitats. The Fish and  
8 Wildlife Service (FWS) administers the ESA with respect to species under  
9 the jurisdiction of the Secretary of the Interior, while the National Marine  
10 Fisheries Service (NMFS) administers the ESA with respect to species under  
11 the jurisdiction of the Secretary of Commerce.

12           Section 7 of the ESA prescribes the steps that federal agencies must take to  
13 ensure that their actions do not jeopardize endangered wildlife and flora.  
14 Section 7(a)(2) provides that [e]ach Federal agency shall, in consultation  
15 with and with the assistance of the Secretary [of Commerce or the Interior],  
16 insure that any action authorized, funded, or carried out by such agency . . .  
17 is not likely to jeopardize the continued existence of any endangered species  
18 or threatened species.

19           *Id.* at 651–52 (citations and quotation marks omitted). ESA implementing regulations  
20 broadly define “agency action” to constitute “all activities or programs of any kind  
21 authorized, funded, or carried out, in whole or in part, by Federal agencies in the United  
22 States” including, but not limited to, “actions directly or indirectly causing modifications  
23 to the land, water, or air.” 50 C.F.R. § 402.02(d); *Karuk Tribe of California v. U.S. Forest*  
24 *Serv.*, 681 F.3d 1006, 1020-21 (9th Cir. 2012).

25           **1.     Programmatic Consultation Not Required**

26           Plaintiffs cite a number of cases to support their contention that Section 7 ESA  
27 consultation—on a programmatic basis—is required for Defendants’ ongoing border-  
28 enforcement activity. *See* Docs. 66 at 46-47; 73 at 21-22. However, neither the statute  
itself nor the case law surrounding the ESA mandate such broad consultation, where  
individual, site-specific consultation sufficiently analyzes the environmental impact of  
proposed agency action. The cases Plaintiffs cite are based upon fact scenarios that are

1 vastly dissimilar to the facts at hand. *See N. Plains Res. Council v. U.S. Army Corps of*  
2 *Eng'rs*, 454 F. Supp. 3d 985, 987-89 (D. Mont. 2020) (addressing agency's decision to  
3 reissue nationwide permit without first consulting with the Services); *Env't Def. Ctr. v.*  
4 *Bureau of Ocean Energy Mgmt.*, No. CV 16-8418 PSG, 2018 WL 5919096, at \*1 (C.D.  
5 Cal. Nov. 9, 2018) (addressing allegation that agencies violated ESA by failing to consult  
6 with the Services about the effects of off-shore fracking on wildlife before issuing a  
7 programmatic environmental assessment); *Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*,  
8 789 F.3d 1075, 1077-80 (9th Cir. 2015) (addressing allegation that agency violated ESA  
9 by failing to reinitiate consultation with FWS after FWS revised its critical habit  
10 designation for Canada lynx); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 55 F. Supp. 2d  
11 1248, 1253-58 (W.D. Wash. 1999) (addressing allegation that agency's no-jeopardy  
12 conclusion concerning mackerel fishery in biological opinion was arbitrary and  
13 capricious).

14 Here, the facts demonstrated by the Administrative Record fail to involve the  
15 reissuance of nationwide permits, the optional requirement to consult with the Services  
16 before issuing initial environmental assessments, a failure to reinitiate consultation after a  
17 determination that critical habitat information was improperly formulated, or any claims  
18 that challenge an agency's conclusion based on questionable information contained in  
19 biological opinions. Plaintiffs propose that Defendants violated the ESA because they  
20 failed to initiate consultation with the FWS in conjunction with a supplemental  
21 programmatic environmental analysis that this Court declines to order. *See infra* pp. 20-  
22 22. Section 7(a)(2) of the ESA "commands each federal agency to insure that any *action*  
23 authorized, funded, or carried out by the agency is not likely to jeopardize the continued  
24 existence of any endangered species . . . or result in the destruction or adverse modification  
25 of habitat of such species." *Def. of Wildlife v. Zinke*, 856 F.3d 1248, 1252 (9th Cir. 2017)  
26 (emphasis added) (quotation marks and citation omitted). Such non-existent NEPA  
27 supplementation fails to constitute agency action even under the broadest interpretation of  
28 the term.

1           Moreover, the Administrative Record indicates that in 2001, Defendants did comply  
2 with Section 7 ESA requirements by issuing biological assessments on site-specific  
3 operations and that they made a commitment to coordinate with the FWS to address  
4 potential impacts to threatened or endangered species during the preplanning stages of, or  
5 prior to undertaking, site-specific activities. A.R. at 366-67. The Administrative Record  
6 also indicates that Defendants addressed a significant number of the newly designated or  
7 revised critical habitat designations that Plaintiffs now challenge on a project-specific  
8 basis. *See e.g.*, A.R. at 618 (Mexican Spotted Owl); 1150-51 (Jaguar); 2295 (Southwestern  
9 Willow Flycatcher); 3064 (Gila Chub); 3284 (Chiricahua Leopard Frog); 6545 (Arroyo  
10 Toad). The Court credits Defendants' uncontested statement of fact that explains why the  
11 Administrative Record fails to contain documentation for each instance of newly  
12 designated critical habitat that Plaintiffs raise. *See* Doc. 71, ¶ 55 at 20. Accordingly, the  
13 Court finds that Defendants have not violated Section 7(a)(2) of the ESA by failing to  
14 consult with the FWS regarding prospective NEPA supplementation and grants  
15 Defendants' cross-motion for summary judgment on the issue.

#### 16 **IV. Remedy**

17           To remedy a procedural NEPA violation, Plaintiffs request that the Court grant their  
18 motion, vacate the determination to withdraw from programmatic environmental analysis  
19 and remand the matter back to Defendants with instructions to supplement their  
20 programmatic environmental impact statement by a date certain. (Doc. 73 at 25)  
21 Defendants request that the Court deny Plaintiffs' motion, grant their cross-motion for  
22 summary judgment, and dismiss Plaintiffs' complaint with prejudice. (Docs. 70 at 46; 75  
23 at 23) The issue for the Court to determine is whether injunctive relief is the appropriate  
24 remedy for Defendants' NEPA violation.

25           In *Monsanto Co. v. Geertson Seed Farms*, the Supreme Court outlined the  
26 appropriate standard for injunctive relief for a NEPA violation. 561 U.S. 139 (2010).  
27 It instructed:  
28

1 [A] plaintiff seeking a permanent injunction must satisfy a four-factor test  
2 before a court may grant such relief. A plaintiff must demonstrate: (1) that it  
3 has suffered an irreparable injury; (2) that remedies available at law, such as  
4 monetary damages, are inadequate to compensate for that injury; 3) that,  
5 considering the balance of hardships between the plaintiff and defendant, a  
6 remedy in equity is warranted; and (4) that the public interest would not be  
disserved by a permanent injunction. The traditional four-factor test applies  
when a plaintiff seeks a permanent injunction to remedy a NEPA violation.

7 *Id.* at 156-57 (quotation marks and citations omitted). The court also advised that “[a]n  
8 injunction should issue only if the traditional four-factor test is satisfied[,]” *id.* at 157, and  
9 that injunctive relief “is a drastic and extraordinary remedy, which should not be granted  
10 as a matter of course[,]” *id.* at 165.

11 In addition to the Supreme Court’s guidance, the Ninth Circuit has determined that  
12 “if extra-record evidence shows that an agency has rectified a NEPA violation after the  
13 onset of legal proceedings, that evidence is relevant to the question of whether relief should  
14 be granted.” *Friends of the Clearwater*, 222 F.3d at 560; *see also Warm Springs Dam Task*  
15 *Force v. Gribble*, 621 F.2d 1017, 1025-26 (9th Cir. 1980) (finding that while agency’s  
16 actions did not comport with NEPA, the deficiency had been cured by an extensive post-  
17 trial study which reaffirmed the foundation of a prior supplemental impact statement). The  
18 court has also concluded that “[e]ven when a district court finds that a violation of [NEPA]  
19 has occurred, in unusual circumstances an injunction may be withheld, or . . . limited in  
20 scope,” *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1020 (9th Cir.  
21 2009), and “[i]n determining the scope of an injunction, a district court has broad latitude,  
22 and it must balance the equities between the parties and give due regard to the public  
23 interest,” *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1136 (9th Cir. 2009).

24 Curiously, Plaintiffs have waited over fifteen years to bring claims that address  
25 procedural NEPA violations, which primarily occurred in 2001 and in the immediate years  
26 thereafter. With the exception of Defendants’ decision to withdraw from programmatic  
27 environmental analysis in 2019, Plaintiffs complain of agency non-activity that has failed  
28 to result in any demonstrated adverse environmental consequences due, in part, to the fact

1 that Defendants complied with NEPA requirements through individual, project-specific  
2 environmental assessments. *See e.g.*, A.R. at 3730-4101, 4127-4531, 5265-5354, 6348-  
3 6433, and 14780-14971. As a result of this litigation, Defendants have also thoroughly  
4 evaluated and explained the “hard look” criteria that the Court determined was absent from  
5 the Administrative Record when the agencies made their decisions years ago. *See* Hass  
6 Declarations, Docs. 49 at 3-29; 54-3 at 3-6; and 62-1 at 6-8. Defendants’ recent activity  
7 has mitigated any prospective harm that Plaintiffs seek to remedy, and the Administrative  
8 Record fails to indicate detrimental environmental consequences as a result of Defendants’  
9 NEPA violations.

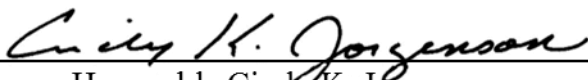
10 In many ways, the claims at hand were best suited for litigation and injunctive relief  
11 more than a decade ago. To grant Plaintiffs’ request for an injunction at this point would  
12 be duplicative, counter-intuitive, and a misallocation of agency resources. The interests of  
13 the public would not be served by updating environmental impact statements which have  
14 since been withdrawn and that no longer serve as guideposts for future agency activity.  
15 While Defendants’ failure to contemporaneously document justification for their internal  
16 decisions constitute NEPA violations, such failure, in this case, does not necessitate  
17 injunctive relief. Accordingly, Plaintiffs’ request for injunctive relief is denied, and this  
18 case is closed.

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**IT IS ORDERED:**

1. Plaintiffs’ Motion for Summary Judgment (Doc. 63) is GRANTED IN PART AND DENIED IN PART. The Court GRANTS Plaintiffs’ Motion for Summary Judgment on their NEPA claim, and DENIES Plaintiffs’ Motion for Summary Judgment on their ESA claim.
2. Defendants’ Cross-Motion for Summary Judgment (Doc. 69) is GRANTED IN PART AND DENIED IN PART. The Court GRANTS Defendants’ Cross-Motion for Summary Judgment on their ESA claim, and DENIES Defendants’ Cross-Motion for Summary Judgment on their NEPA claim.
3. Plaintiffs’ request for injunctive relief is DENIED.
4. The Clerk of Court is instructed to change the name of Defendant Secretary of Homeland Security to Alejandro Mayorkas on the case caption, issue judgment in accord with the aforementioned instructions, and close this case.

Dated this 20th day of August, 2021.

  
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Honorable Cindy K. Jorgenson  
United States District Judge