



Homeland Security

February 14, 2008

Handwritten initials "RHB" and date "2/25/08" next to a stamp.

The Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Lieberman:

Thank you for your December 10, 2007 letter regarding the Department of Homeland Security's (DHS) recent use of the waiver provision in the REAL ID Act, Public Law 109-13, for a section of fence in the San Pedro Riparian National Conservation Area (SPRNCA) along the Arizona-Mexico border. I believe that the Department's efforts to reduce the flow of illegal entrants in and around the SPRNCA will result in a significant improvement to the environment in that area and increase the public's ability to enjoy it as a resource.

Before addressing the Committee's specific questions, let me state that I am certain that the Government did all it could to comply with the applicable environmental laws before proceeding with construction. The Bureau of Land Management (BLM) Environmental Assessment (EA) relating to the SPRNCA that was specifically at issue in the SPRNCA litigation was just one in a series of environmental analyses that preceded construction. For example, a supplemental Programmatic Environmental Impact Statement (PEIS) was completed for the legacy Immigration and Naturalization Service (INS) in June 2001. The scope of work covered by this PEIS included road, pedestrian fence, vehicle fence, and lighting projects for the entire Southwest Border. In preparing the PEIS, ten public scoping meetings were held between 1998 and 2000, and before the PEIS was finalized, INS provided a 60-day public review period that began in August 2000. This supplemental PEIS updated a 1994 PEIS, which also included multiple public comment periods. The PEIS documents are available to the public on the internet at www.borderfencenepa.com.

In addition to those efforts, in November 2003, the United States Army Corps of Engineers (USACE) completed an EA that specifically analyzed the SPRNCA. In so doing, USACE drew on the PEIS mentioned above. In 2007, BLM prepared its own EA, independently determined that the project would not significantly impact the environment, and in August 2007, issued a Border Fence EA, Record of Decision, and Finding of No Significant Impact. On the basis of this analysis, BLM issued a perpetual right-of-way to USACE to begin construction on behalf of

DHS. It is important to note that BLM is the Federal agency charged with administering and protecting the SPRNCA.

Again, we undertook all of these efforts to comply with applicable law, and I am confident that we would have prevailed if the litigation had proceeded. However, illegal entry in and around the SPRNCA is a serious problem. I determined that DHS needed to act immediately to address the problem, rather than wait for the litigation to run its course.

Next, I will address each of the Committee's questions presented in your correspondence.

- 1. What are the criteria used by DHS to determine when it is appropriate to use the waiver provision in the REAL ID Act (P.L. 109-13) to pursue border fence construction? What evidence does DHS have that the section of fence in the SPRNCA meets those criteria?***

The criteria DHS uses to determine whether it is permissible for the Secretary to utilize his statutory waiver authority is the criteria set by Congress in Section 102(c) of the *Illegal Immigrant Reform and Immigrant Responsibility Act (IRRIRA)*, as amended. Public Law 104-208, Div. C, 110 Stat., 3009-554 (Sept. 30, 1996) (8 U.S.C. 1103 note (2000)), as amended by section 102 of the *REAL ID Act of 2005*, Public Law 109-13, Div. B, 119 Stat. 306 (May 11, 2005) (8 U.S.C. 1103 note). Section 102(c) states that the Secretary may utilize his statutory waiver authority to "ensure the expeditious construction of the barriers and roads under this section." In turn, sections 102(a) and 102(b) of IIRIRA direct the Secretary to take whatever actions are necessary to install barriers and roads in the vicinity of the U.S. border so as to "deter illegal crossings in areas of high illegal entry into the United States." Based on well-documented negative impact of illegal entry in and around the SPRNCA, the Department determined that the SPRNCA was an area of high illegal entry. *See* 72 FR 60870 (Oct. 26, 2007). Illegal entry in and around the SPRNCA is such a problem that the BLM has had to impose restrictions on public recreation in the SPRNCA due to high levels of smuggling activity, vehicle thefts, and assaults. Illegal entry also poses a grave risk to our Nation's security. In addition to being an area of high illegal entry, the pending litigation concerning DHS's construction in the SPRNCA was a serious impediment to the "expeditious construction" of the barriers and roads necessary to deter illegal entry in and around the SPRNCA.¹

- 2. What specific evidence does DHS have that the section of the border in the SPRNCA represents a higher threat for illegal entrants than other sections of the Arizona-Mexico border?***

DHS routinely conducts vulnerability and threat assessments along the border. This section of the border currently presents a higher risk than other parts of Arizona as

¹ Plaintiffs in the San Pedro litigation challenged the constitutionality of the SPRNCA waiver, arguing that the waiver authority is an unconstitutional delegation of legislative authority. The U.S. District Court for the District of Columbia rejected this argument. Moreover, the SPRNCA case is one of three lawsuits that have been brought challenging the constitutionality of the waiver authority. In each instance, the courts have affirmed the constitutionality of the waiver authority and found that the Department exercised it appropriately.

evidenced by an upward trend in activity. Specifically, there have been sustained increases in apprehensions, illegal entries, and narcotics seizures. In addition to the increases in activity, the threats and vulnerabilities in this area are longstanding, and are also attributable to the region's topography, which includes rivers, mountains, foliage, and thick vegetation that smugglers attempt to exploit.

3. ***Please describe why vehicle barriers, which have reduced impact on wildlife movement compared to pedestrian fencing, would not be an acceptable alternative to deter illegal migration in this area?***

The majority of the traffic in this area is on foot. Vehicle barriers would not have presented an effective deterrent to the foot traffic.

4. ***Why does the waiver cover almost 7 miles of fence when the judge's restraining order only applied to approximately 2 miles of fence?***

Consistent with its Congressional waiver authority, DHS determined that it was necessary to authorize a waiver for the 6.9 mile segment of fence (which includes the 1.5 miles noted in the temporary restraining order) to ensure the expeditious completion of tactical infrastructure and fencing in and around the SPRNCA without any further delay caused by pending or threatened litigation.

5. ***If DHS was confident that the pending case would ultimately be decided in its favor, why did it not continue to pursue the case?***

In the enactment of the waiver authority of the REAL ID Act, the intent of Congress was evident, ensuring the security of the homeland in the vicinity of the border without delay. Thus, consistent with this Congressional authorization, I determined any further delay in construction while litigation was being resolved would have presented a risk to our Nation's security. I also determined that it was necessary to utilize this statutory waiver authority to ensure the expeditious construction of tactical infrastructure and fencing in and around the SPRNCA. Moreover, further delay in the construction of this fencing would have resulted in additional environmental degradation. Illegal entrants leave trash and high concentrations of human waste, which impact wildlife, vegetation, and water quality.

6. ***Please describe, in detail, the measures that DHS, in cooperation with the Fish and Wildlife Service, has adopted to reduce the impact of the fence in the SPRNCA on the ability of wildlife to disperse across the border.***

In cooperation with the U.S. Fish and Wildlife Service, DHS agreed to several measures to reduce the impact of the fence in the SPRNCA on the ability of wildlife to migrate across the border. Specifically, DHS agreed to exclude, on a trial basis, the installation of fence within the San Pedro River channel. Should the lack of fence within the river corridor prove to be problematic from the perspective of ongoing illegal entry and resulting environmental damage, DHS will install "removable" bollard-style fence in the

channel that will allow existing migration routes of large mammal species to remain intact.

7. ***Please describe, in detail, the measures that DHS, in cooperation with the Fish and Wildlife Service, has adopted to reduce the spread of invasive species associated with the construction of the SPRNCA fence.***

In cooperation with the U.S. Fish and Wildlife Service, DHS implemented the following measures during construction to prevent the spread of invasive weeds: (1) vehicular crossing of streams with flowing or standing water was avoided to the fullest extent practicable; (2) in instances where crossings of streams could not be avoided, the vehicles were washed and sterilized to kill any organisms; (3) materials used for on-site erosion control were free of non-native aquatic plant seeds and other plant parts to limit the potential for infestation; and (4) DHS agreed to monitor the project site post-construction for non-native plants and implement the appropriate removal and control measures, if necessary. The monitoring completed to date has revealed no invasive weeds present within the project's area of disturbance.

8. ***Please describe, in detail, the measures that DHS, in cooperation with the Fish and Wildlife Service, has adopted to reduce the impact of the SPRNCA fence on sedimentation in the San Pedro River.***

Standard best-management construction practices, including the implementation of a Storm Water Pollution Prevention Plan and installation of sediment and erosion controls, were utilized during the construction activities to minimize the potential for erosion and sedimentation during construction. Further, a hydraulic and hydrology study was prepared by a professional engineer to help ensure that proposed fence and associated improvements would not create erosive soil conditions once constructed (e.g. channel flow drainage patterns). During a recent site visit by DHS and representatives of USACE, two areas of minor erosion were identified downstream of a low-water crossing. Arrangements are currently being made by DHS and USACE to stabilize these areas via the placement of rock used to prevent soil erosion.

9. ***Does DHS or BLM have a monitoring plan in place that would evaluate the impact of the fence?***

DHS has agreed to monitor the project site post-construction for invasive plant species, erosion, and sediment control problems.

10. ***On September 19, 2007, DHS filed a Notice of Intent to Prepare an Environmental Impact Statement to identify and assess the potential impacts associated with a proposal to construct and operate tactical infrastructure along approximately 70 miles of border between Texas and Mexico. By what criteria did DHS decide to conduct an EIS on a regional scale in Texas, but decide it was not appropriate in Arizona or other southern border states?***

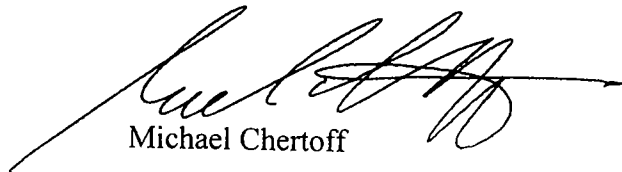
Under the National Environmental Protection Act (NEPA), an Environmental Impact Statement (EIS) is required for all major Federal actions significantly affecting the quality of the human environment. Whether a particular project meets this standard is dependent on a variety of factors, many of which are outlined in the Council on Environmental Quality's (CEQ) regulations implementing NEPA and DHS's Management Directive 5100.1, Environmental Planning Program. The CEQ regulations state that an agency should specifically consider the potential scope and intensity of the proposed action in determining whether to prepare an EIS. 40 C.F.R. 1509.27. In the case of DHS's proposed action in Texas, DHS determined that, given the potential scope and intensity of the project, it would be the type of project that would likely require an EIS, thus, DHS moved directly to perform one. For the SPRNCA, however, it was not as clear from the outset whether the scope and intensity of the project required an EIS; therefore, DHS chose to first prepare an EA. Based on the findings of the EA, and as reflected in the Finding of No Significant Impact, DHS determined that the SPRNCA would not significantly impact the quality of the human environment and thus did not require the preparation of an EIS from the SPRNCA. As noted above, BLM also prepared an EA concerning the SPRNCA project and determined that it would not have a significant impact on the environment.

11. Please provide a copy of the Environmental Assessments and Environmental Impact Statements done in relation to a possible border barrier from 1999-2006 for SPRNCA.

The Final Supplemental PEIS for INS and Joint Task Force-6 Activities, June 2001, can be found at the Border Fence NEPA web site (<http://www.borderfencenepa.com/>) or by clicking on the PEIS title. The final supplemental EA for infrastructure within U.S. Border Patrol Naco-Douglas Corridor Cochise County, Arizona (November 2003), can be found at: <http://www.swf.usace.army.mil/pubdata/notices/naco-douglas.asp>.

I hope the efforts discussed above will reassure you of DHS's commitment to approach these issues in a manner that addresses the concerns of all parties involved. If you or your staff would like further information, please contact me or the Office of Legislative Affairs at (202) 447-5890.

Sincerely,



Michael Chertoff