



Homeland Security

Office of General Counsel

December 24, 2009

Dr. Paul Ganster
Chair,
Good Neighbor Environmental Board

Dear Dr. Ganster:

I have reviewed the advice letter sent to the President by the Good Neighbor Environmental Board (GNEB). I want to thank you for what became very constructive conversations among representatives of the Department of Homeland Security, you and other members of your Board. We appreciated the Board's openness to our efforts to make its advice letter as accurate as possible and the spirit in which those efforts were undertaken.

You know, of course, that along with the other members of the Federal Executive, the Department recused itself from the letter. I feel obligated, however, to ensure that you fully understand that our recusal was not merely due to the nature of Executive Branch proprieties. The Department opposes the Board's recommendations that the President require all border security infrastructure projects fully comply with NEPA and all other laws and that he work with Congress to eliminate the current authority to waive laws which preclude the Department from meeting our congressionally mandated obligation to obtain and maintain operational control of the border. I am confident we can do that while also meeting the spirit and objectives of all laws enacted to protect and preserve our environmental resources. There were specific circumstances in which the Department's prior Secretary could not comply with Congress' direction without exercising that authority.

I am attaching a Background Paper that provides a detailed look at the lengths to which the professionals of the Department and our component, Customs and Border Protection, have gone to minimize adverse impacts on the environment of the Southwest. It also provides an overview of the current status of the Southwest Border security infrastructure projects. It will clarify some of the misconceptions we feel remain in the GNEB advice letter.

The Department is committed to improving our communications with your Board (to which we look forward to having a member appointed), with other members of the federal family, with state, tribal and local leaders, and with the public. We appreciate the role your Board can play in that effort. Continued attention to this important area will enable us to be most effective in our consultative processes. We look forward to working with you.

Sincerely,
A handwritten signature in black ink, appearing to read "Andrew S. Gordon".

Andrew S. Gordon

Attachment

Cc: The Honorable Carol Browner
Counselor to the President

The Honorable Ken Salazar
Secretary, Department of Interior

The Honorable Nancy Sutley
Chair, Council on Environmental Quality

The Honorable Lisa P. Jackson
Administrator, Environmental Protection Agency

Background Paper

As you know, Congress has given the Department a mandate to achieve and maintain effective control of the borders of the United States. Public Law 109-367, § 2, 120 Stat. 2638 (October 26, 2006) (codified at 8 U.S.C. § 1701 note). Within the Department, U.S. Customs and Border Protection (CBP) is the nation's single unified border agency charged with the responsibility of protecting our nation's borders from the threats of terrorism, human and drug smuggling, illegal migration, and agriculture pests while simultaneously facilitating the flow of legitimate travel and trade. In support of the CBP mission, the U.S. Border Patrol (USBP) acquires and deploys the proper balance of personnel, equipment, technology, and border infrastructure to achieve incremental and focused operational control of our Nation's borders. *See* National Border Patrol Strategy.

In furtherance of this mission, in Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress has called on the Department to construct the border infrastructure necessary to deter and prevent illegal entry into the United States. IIRIRA § 102 (codified as amended by the Consolidated Appropriations Act, 2008, Public Law 110-161, Div. E, Title V, § 564, 121 Stat. 2090 (December 26, 2007) at 8 U.S.C. § 1103 note). Section 102(a) of IIRIRA provides that the Secretary of Homeland Security (the Secretary) shall take such actions as may be necessary to install additional barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States. *Id.* Section 102(b) of IIRIRA requires that, in carrying out Section 102(a), the Secretary install fencing, barriers, roads, lighting, cameras, and sensors on not less than 700 miles of the southwest border, including certain "priority miles" that were required to be completed by December 31, 2008. *Id.*

In order to execute the Congressional mandates of Section 102 of IIRIRA, the USBP undertook an extensive systematic assessment of tactical infrastructure needs based on operational requirements. Through the assessment, USBP was able to identify both the location and type of fencing that would be most effective in deterring and preventing illegal entry. Based upon the findings of that assessment, former Secretary Chertoff made a commitment to construct approximately 670 miles of pedestrian and vehicle fence on the southwest border by the end of 2008.

A major aspect of this construction program was appropriate environmental planning and consultation with stakeholders to ensure compliance with environmental laws, and preserve our valuable natural and cultural resources. From the outset in 2007, CBP engaged Federal and State agencies, Native American Tribes, community members and other stakeholders to ensure potential environmental impacts were identified and thoroughly evaluated for each project. CBP prepared and circulated for public comment and review, 18 National Environmental Policy Act (NEPA) documents (Environmental Assessments or Environmental Impact Statements) for many planned projects as part of the Pedestrian Fence 225 (PF225) tactical infrastructure program; the initial program established by the Secure Border Initiative (SBI) to meet the Congress' mandate.

Although CBP had nearly completed the required NEPA documentation for the PF225 Tactical Infrastructure program by early 2008, it became apparent that ongoing negotiation with the U.S.

Fish and Wildlife Service (USFWS) under the Endangered Species Act and the likelihood of litigation jeopardized our ability to meet the Congressionally-mandated deadline of December 2008. In addition, existing laws governing Wilderness and Wildlife Refuge areas made it impossible for land managers to grant the permits required to construct tactical infrastructure in priority areas known for intense illegal activity.

As the Board is aware, on April 1, 2008, Secretary Chertoff exercised his authority under 102 (c) of IRRIRA and issued two waivers of certain environmental and land management laws in order to facilitate the expeditious construction of additional pedestrian and vehicle fence, towers, sensors, cameras, detection equipment, and roads in the vicinity of the border. In spite of the use of the waiver, Secretary Chertoff reiterated the Department's commitment to environmental responsibility and committed to continued coordination with the Department of Interior and other federal and state resources management agencies to ensure impacts to the environment, wildlife, and cultural and historic artifacts are analyzed and minimized. *See* http://www.dhs.gov/xnews/releases/pr_1207080713748.shtm.

Commitment to Environmental Stewardship

For all projects and activities, the Department remains committed to responsible environmental stewardship to include the comprehensive evaluation of potential environmental impacts, thorough consultation with stakeholders, and the identification of opportunities to avoid, minimize, and, where appropriate, mitigate for impacts to sensitive resources. Consistent with this commitment recent southwest border tactical infrastructure projects were subject to intense environmental review and scrutiny prior to construction activities.

The Department acknowledges that, as with any projects of this scope, impacts can occur to natural and cultural resources. Therefore, prior to initiating construction on any portion of fence subject to the waiver, CBP conducted extensive environmental surveys resulting in the identification of environmentally sensitive resources, as well as the development of a strategy for avoiding or minimizing impacts that could result from construction or maintenance activities. The strategy involved close coordination with Federal and State resource agencies, including State Historic Preservation Offices (SHPO) and Native American Tribes. Environmental Stewardship Plans (ESP) were developed in close coordination with the U.S. Fish and Wildlife Service (USFWS) and included the same level of environmental analysis that would have been performed before the waiver (in the "normal" NEPA process) to evaluate potential impacts to sensitive resources in the areas where fence was to be constructed. The Department published 18 NEPA documents and 22 ESPs. Consistent with the NEPA process, notice of availability of these reports was provided to the public and stakeholders through local newspapers and regional distribution.

CBP further instituted a comprehensive approach to avoid or minimize the extent of adverse effects on environmental resources. First, as a result of the coordination with resources agencies, design or alignment adjustments were made prior to construction, when possible, to accommodate specific sites or concerns. CBP also continued coordination with land managers and stakeholders during construction activities that resulted in numerous adjustments to fence and other tactical infrastructure to avoid impacting environmental resources or accommodate

specific land owner requests. Some examples of the collaborative nature of the process and adjustments are as follows:

- Numerous fence segments in the El Paso Sector were redesigned to include a four inch gap at the base of the mesh pedestrian fence to facilitate small animal movement.
- Basic bollard pedestrian fence has 4-5 inch spaces between each post, providing openings for many species of wildlife.
- In several segments, CBP used a “floating fence” design that does not require anchoring the fence deep in the ground, avoiding impacts in some areas where archeological sites were a concern.
- In Eagle Pass, Texas, CBP used an “aesthetic style” fence around a city golf course, as requested by the city.
- In Rio Grande Valley (RGV), CBP worked with the U.S Fish and Wildlife Service (USFWS) refuge manager to relocate an access road along the edge of, rather than through, the refuge despite previous approval on the originally planned road.
- In RGV, CBP continues to work with USFWS and The Nature Conservancy to salvage Sabal Palm trees. These trees are not an endangered species but a species of special interest.
- In New Mexico, CBP worked with ranchers and State and Federal agencies to develop a “deer friendly” fence design that accommodates concerns related to deer movement, while still meeting Border Patrol security requirements. These “deer friendly” panels were installed at various distances apart, in selected areas along the border, where the deer are known to travel.

Second, in collaboration with the USFWS, CBP developed extensive Best Management Practices (BMP) designed to minimize adverse effects to biological and cultural resources. The BMPs were implemented as a key component of all construction activities and, where applicable, will remain a standard requirement during subsequent maintenance activities.

And finally, CBP provided 36 environmental awareness training sessions to construction crews prior to any construction activities taking place. Each training session was designed to address natural and cultural resources known to occur in the area. CBP further contracted for and provided more than 90,000 labor hours of subject matter monitors during construction activities. These monitors were on site during construction activities to track and record implementation of BMPs, provide environmental awareness and training to construction crews, report any issues that could pose an environmental risk to a sensitive resource, recommend corrective actions, and manage wildlife encountered during construction. Additionally, CBP expended nearly 21,500 labor hours to conduct data recovery on several cultural sites. Reports are currently being prepared that summarize the results of the environmental monitoring activities as well as the results of cultural surveys and data recovery efforts. CBP intends to share these reports with the appropriate Federal and State resource agencies

Consultation with Stakeholders

For those projects that were the subject of the April 2008 waiver, CBP continued to engage the public in the process and worked collaboratively with State and Federal resources agencies, affected landowners, and other stakeholders, to identify and minimize potential impacts. To that

end, CBP held meetings along the Southwest Border both pre- and post- waiver, including: town hall meetings; public open houses; and meetings with public groups, and State and local officials. Public meetings were held in areas and communities affected by the fencing projects, with an overall attendance of more than 1,000 participants.

In the Board's advice letter, you make reference to allegations that have been made stating that fence projects have resulted in erosion issues, and modified or impeded hydrology in some areas. Specifically, these areas are: along an Arizonan segment of pedestrian fencing installed on the Organ Pipe National Monument (OPNM), in a San Diego regional area known as Smuggler's Gulch, and in the Tijuana River Valley. While allegations have been made, the facts do not support the basis of these allegations. The U.S. Army Corps of Engineers (USACE) conducted an analysis that found that fencing in the OPNM was not the cause of flooding that was experienced in this locality but instead Mexico Port of Entry and the Gringo Pass store flooded primarily because they are located in low lying areas within the floodplain and that both buildings reportedly have a history of flooding prior to the installation of the primary pedestrian fencing. Additionally, extensive sediment and erosion control devices have been in place and well maintained since the inception of tactical infrastructure construction activities in the Smuggler's Gulch area. Until the re-vegetated areas are fully mature, these temporary sediment and erosion controls are – and will continue to be – utilized to prevent significant erosion and sediment run-off. Lastly, independent analyses by three different environmental engineering firms have concluded that the Border Infrastructure System (BIS) will provide a net benefit to the Tijuana River and estuary because the hydraulic, hydro geologic, and sediment yield characteristics of the BIS footprint are all being improved relative to the pre-construction conditions.

Appropriate Mitigation

In January 2009, CBP and Department of the Interior (DOI) completed a formal Memorandum of Agreement (MOA) in which CBP committed to fund up to \$50 million to mitigate for unavoidable impacts attributable to the border security projects that were subject to the April 2008 waiver. In accordance with the terms of this MOA, CBP worked with DOI, leveraging their subject matter expertise, to develop mitigation projects designed to off-set unavoidable impacts to natural and cultural resources as a result of the construction activities associated with tactical infrastructure projects subject to the April 2008 waiver. The projects being proposed encompass border lands in Texas, New Mexico, Arizona, and California. CBP and DOI are currently in the process of finalizing the project lists and working to transfer the initial funding for this large scale mitigation effort. The Department believes that this level of mitigation is significantly more than would have been required for this effort under normal regulatory authorities, such as the Endangered Species Act, had they not been waived.

Continued Assessment

As a continuation of CBP's commitment to responsible environmental stewardship, Environmental Stewardship Summary Reports (ESSR) have been developed which compare final completed environmental actions relative to the originally planned actions described in the Environmental Stewardship Plans, as well as any additional changes made during construction activities, as identified through the change request process. Specifically, the ESSRs provide a comprehensive summary of the installation of tactical infrastructure, by assessing its final design

and footprint while taking into account changes that were made to alignment and design during construction. The reports also include any significant modifications made during construction that resulted in additional or reduced environmental impacts.

The environmental review process conducted as part of this border security effort resulted in numerous positive outcomes. CBP made significant investments in biological and cultural surveys to meet the spirit of all laws and statutes negated by the waiver. The result of these investments was the collection of important data and information on the natural and cultural environments from San Diego to the Gulf of Mexico. The scope of this monumental effort exceeded the sum of all previous efforts combined. For example, archaeologists examined over 13,000 acres along 1,000 miles of the border and recorded all cultural resources within the area. They found and recorded over 350 archaeological sites and excavated the best 56 archaeological sites. The excavations yielded important information on human occupation and climate change over the last 7,000 years and have provided archaeologists with much needed data on the history and prehistory of many remote regions. The archaeological data is being finalized and the results prepared for dissemination at the 2010 Society for American Archaeology annual conference.

CBP believes that the fence will also have positive impacts on habitats due to the decrease in illegal pedestrian and vehicle traffic through sensitive areas. Already, volunteers that survey the border areas on the Buenos Aries National Wildlife Refuge are reporting a significant decrease in trash from illicit traffic. In addition, CBP expects to begin to observe natural restoration of historically-used foot and vehicle trails due to a decline in traffic.

Like GNEB, CBP believes that long-term monitoring of the ecosystem in areas where border security activities occur and infrastructure exists, is critical in supporting ongoing environmental management along the southwest border and future border security planning efforts. In recognition of this need, CBP has funded and executed an Interagency Agreement with the United States Geological Service (USGS) to develop an environmental monitoring protocol in order to provide credible and defensible scientific data and information for the assessment and evaluation of any adverse or beneficial effects of present and future border security activities on the health of representative ecosystems. The USGS has convened a group of highly experienced and nationally known subject matter experts, who have already begun with an initial workshop December 8-11, 2009. Completion of the protocol is scheduled for spring 2010. Once the monitoring protocol is completed, we hope that you will join us in urging Congress to provide the funding necessary for the long-term implementation of the environmental monitoring along the southwest border.

Conclusion

In summary, even in the absence of specific regulatory requirements the Department continued engage the affected public and coordinated closely with stakeholder agencies throughout the planning process, took extensive steps to identify natural and cultural resources prior to initiating construction activities, and ensure that adverse effects to sensitive environmental resources were avoided, minimized, or mitigated.