



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
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January 22, 2008

Robert F. Janson
Acting Executive Director
Asset Management
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, NW
Room 3.4D
Washington, DC 20229

Subject: Draft Environmental Assessment for Construction, Operation, and Maintenance of the Proposed Tactical Infrastructure, U.S. Border Patrol El Centro Sector, California, U.S. Department of Homeland Security, U.S. Customs and Border Protection, U.S. Border Patrol

Dear Mr. Janson:

The U.S. Environmental Protection Agency (EPA) has reviewed the subject Draft Environmental Assessment (DEA) and draft Finding of No Significant Impact (FONSI) pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and our NEPA review authority under Section 309 of the Clean Air Act.

EPA feels strongly that the DEA does not provide sufficient information to support a FONSI. Specifically, the DEA does not fully disclose impacts to wetlands and waters of the U.S. or impacts to biological resources, including threatened and endangered species, and how these impacts will be mitigated to below levels of significance. The DEA also does not identify the type of primary pedestrian fence design that will be used for the 6 discreet fence segments, which will largely influence impacts. EPA recommends that specifics regarding water resource and wildlife impacts, alternatives to avoid or minimize these impacts, and mitigation be included in the Final EA, if a FONSI determination will be made, especially since impacts to waters and biological resources are deemed significant before mitigation.

Additionally, EPA believes a comprehensive mitigation strategy should be developed for cumulative impacts resulting from several border fence and infrastructure projects that are occurring along the border. We would like to meet with U.S. Customs and Border Protection (CBP) to discuss development of this strategy, and Karen Vitulano of my staff will contact your office regarding this possibility.

We understand that the Secretary of the Department of Homeland Security has authority to waive environmental laws for these border fence projects in its mission to secure the homeland and protect it against conventional and unconventional attacks. We urge the Department to avoid the use of waivers and make every effort to comply with environmental laws, while ensuring national security.

We appreciate the opportunity to review this DEA. If you have any questions, please contact me at (415) 972-3846 or Karen Vitulano, the lead reviewer for this project. Ms. Vitulano can be reached at 415-947-4178 or vitulano.karen@epa.gov.

Sincerely,

/S/

Nova Blazej, Manager
Environmental Review Office

cc: Charles McGregor, U.S. Army Corps of Engineers, Fort Worth District
Assistant Chief Patrol Agent Chris Wells, U.S. Border Patrol El Centro Sector
Patricia Sanderson Port, U.S. Department of the Interior
Robert Smith, U.S. Army Corps of Engineers, Los Angeles District
E²M Consultants, Fairfax, VA

Support of Finding of No Significant Impact (FONSI)

The draft FONSI concludes that the Proposed Action is not expected to have a significant effect on the environment, based on the results of the Draft Environmental Assessment (DEA) and the environmental design measures to be implemented (FONSI p. 4). The DEA, however, does not contain sufficient information to validate this conclusion. The DEA does not clearly identify the environmental impacts of the project on water and biological resources. Specifically, the DEA does not quantify the impacts to wetlands and waters of the U.S. or provide sufficient analysis to support the statement that no impacts to threatened or endangered species are expected. Additionally, the DEA does not identify the primary pedestrian fence design that will be used, which will largely influence impacts.

We appreciate that the U.S. Customs and Border Protection (CBP) recognizes the potential for significant impacts to soils, water resources, biological resources, and visual resources (Table 5.0-1), however, since the CBP proposes a finding of no significant impact, the details of and commitment to mitigation measures are essential to this finding. Identifying mitigation measures also allows agencies and the public to assist in evaluating their effectiveness and offer an opportunity to suggest additional mitigation as appropriate.

Recommendations:

The Final EA should include the primary pedestrian fence design as proposed.

The Final EA should include information supporting the conclusion that no impacts to threatened or endangered species are expected.

EPA recommends that all mitigation measures supporting the FONSI be identified and their effectiveness evaluated in the Final EA. Mitigation that will be enforceable as part of a subsequent permit condition should be clearly identified in the FONSI, and mitigation measures that are not imposed by statute or regulation should be identified in the FONSI and adopted as part of CBP's final decision.

Wetlands and Waters of the U.S.

The DEA states that construction will occur in the vicinity of potential wetlands (p. 2), but the DEA does not quantify an acreage estimate of wetlands losses or impacts. The DEA does indicate that low to moderate adverse impacts due to permanent shrub-scrub wetland removal will occur from the primary pedestrian fence across the Alamo River (p. 3-23) at Section B-4, two-thirds of which (approximately 5.7 miles according to Table 2-1) contain denser wetland and riparian vegetation communities. However, no other information is provided and there is insufficient information in the DEA to provide an estimate of wetlands acreage losses or impacts from the project. The DEA acknowledges this in its statement that "an unknown amount of wetlands could be permanently impacted by construction" (p. 4-9).

The DEA states that this unknown quantity of wetlands impacts is a significant impact under California Environmental Quality Act (CEQA) analysis criteria (p. 5-3) and that these impacts would be mitigated to less than significant through avoidance and adherence to a Construction, Mitigation, and Restoration (CM&R) Plan and compliance with Clean Water Act (CWA) Section 401 and 404 permit conditions. The CM&R Plan is not provided, however, and the assessment of whether this plan would sufficiently mitigate losses to these, as well as other resources, is not possible.

Recommendation:

The Final EA should include detailed, quantified information regarding direct, indirect, and cumulative impacts of the project on the function and acreage of wetlands and waters of the U.S. We recommend inclusion of a draft CM&R Plan in the Final EA to support the FONSI.

Alternatives Analysis

The DEA evaluated two alternatives and a no-action alternative (Alternative 1). The preferred Alternative 2 proposes a single fence and tactical infrastructure along 6 discreet sections totaling 44.6 miles. Alternative 3 evaluates two layers of fence – a primary and secondary fence constructed along the same sections as Alternative 2.

The Council on Environmental Quality Regulations directs agencies to use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment to the fullest extent possible (40 CFR 1500.2). The DEA states that it considered but dismissed alternatives that evaluate additional agents in lieu of tactical infrastructure and various forms of technology in lieu of tactical infrastructure (p. 2-8) and determined additional agents or technology alone would not meet the purpose and need of achieving effective border control. The DEA did not evaluate the use of these alternative methods in conjunction with fencing and tactical infrastructure, such as their use in certain environmentally sensitive areas to avoid impacts.

Additionally, we understand from Charles McGregor of the U.S. Army Corps of Engineers (Corps), Ft. Worth Office, that this NEPA document will support the analysis required for the Clean Water Act (CWA) Section 404 permit issued by the Corps. EPA co-administers the 404 program with the Corps, and, as such, EPA will review the project for compliance with the Federal Guidelines for Specification of Disposal Sites for Dredge or Fill Materials (404(b)(1) Guidelines). Pursuant to 40 CFR 230, any permitted discharge into waters of the U.S. must be the least environmentally damaging practicable alternative available to achieve the project purpose. The Final EA should include an evaluation of the project alternatives in this context to demonstrate the project's compliance with the 404(b)(1) Guidelines. Based on the alternatives analysis in the DEA, it appears that this analysis may not meet the statutory obligation of the 404(b)(1) Guidelines.

Recommendation:

EPA recommends expansion of the alternatives analysis, including evaluation of the use of additional agents and/or technology in environmentally sensitive areas in conjunction with primary fence and tactical infrastructure to avoid and minimize impacts. The additional alternatives analysis should be coordinated with the analysis required by the CWA 404 permit to streamline project permitting.

Cumulative Impacts

The cumulative impact analysis should describe the “identifiable present effects¹” to various resources attributed to past actions. The purpose of considering past actions is to determine the current health of resources. This information forms the baseline for assessing potential cumulative impacts and can be used to develop cooperative mitigation strategies for resource protection (CEQ's Forty Most Frequently Asked Questions #19). The cumulative impact analysis provided in the Draft EA does not adequately assess and quantify cumulative impacts associated with the project and does not link the projects effects to the health of these resources. Specifically, Table 4.0-1, last column, does not assess the severity of impacts from multiple sources, including the project, on resources.

Recommendations:

EPA recommends improvements to the cumulative impacts analysis. EPA recommends the use of the June 2005 Guidance for Preparers of Indirect and Cumulative Impacts Analysis developed jointly by Caltrans, FHWA, and EPA (Available: http://www.dot.ca.gov/ser/cumulative_guidance/purpose.htm). Although originally developed for transportation projects in California, the guidance is useful for non-highway projects and will assist in identifying cumulative impacts and preparing an analysis that is sound, well documented, and compliant with 404(b)(1) Guidelines.

To the extent that information is available and obtainable, include an analysis of reasonable foreseeable impacts to the environment and communities on the Mexican side of the border in the Final EA. EPA recommends using the July 1, 1997 Council on Environmental Quality Guidance on NEPA Analyses for Transboundary Impacts (Available: <http://www.nepa.gov/nepa/regs/transguide.html>).

Insufficient Information: Fence Maintenance, Water Use, Noise

¹Guidance on the Consideration of Past Actions in Cumulative Effects Analysis, CEQ, June 2005.
http://www.nepa.gov/nepa/regs/Guidance_on_CE.pdf

In addition to the comments above, EPA requests additional information regarding the following:

- Fence maintenance in waterways. The DEA states that design criteria to reduce impacts include avoiding construction of solid barriers in wetland/riparian areas and streambeds (p. ES-4). It also indicates that fence maintenance would initially be performed by the U.S. Border Patrol El Centro Sector but eventually would become a contractor performed activity (p. 2-4). It is not clear who would be responsible for ongoing maintenance of fences in wetland/riparian areas and streambeds to ensure flow. Please clarify in the Final EA who would be responsible for this maintenance and how it will be funded. This ongoing post-construction maintenance is important mitigation for impacts to waters and should be identified in the FONSI.
- Water use. The DEA indicates that under the proposed action, substantial quantities of water would be required for watering of road and ground surfaces for dust suppression during the approximately 9-month construction period (p. 3-10). EPA recommends that the Final EA estimate the quantity of water expected to be used, the source of this water, the measures of significance for evaluating water use, or whether water use for the project would result in significant impacts.
- Noise Impacts. The DEA does not fully address noise impacts from construction. It indicates that there will be more noise impacts to Mexico than the U.S., and the worst case scenario estimates 101 a-weighted decibels (dBA) resulting in short term moderate adverse impacts on local populations in Mexicali, Mexico, which are located 50 feet away. The DEA does not identify whether schools are located within this impact area or discuss potential noise impacts to schoolchildren, such as acoustical barriers to learning. We recommend the Final EA include information regarding potential impacts to sensitive receptors from noise and identify measures to ensure the worse case scenario noise impacts do not occur.