



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
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February 25, 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 and Draft Finding of No Significant Impacts for Construction, Operation, and Maintenance of the Proposed Tactical Infrastructure, U.S. Border Patrol Tucson Sector, Arizona, 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. Thank you for agreeing to accept our comments late, per the telephone conversation between Marthea Rountree of EPA Headquarters office and Dave Reese of Department of Homeland Security on February 13, 2008. Our detailed comments are enclosed.

EPA feels strongly that the analysis in the DEA is insufficient to support a FONSI determination. The document contains no analysis specific to the project corridor because rights-of-entry had not been obtained for biological and cultural surveys and delineations of jurisdictional waters of the U.S. to occur. Instead, the impact assessment was based entirely on projects in other areas, topographic maps, aerial photographs, and general knowledge of the area. The DEA acknowledges this deficiency in analysis when it states in Chapter 3 that subsequent NEPA documentation may be required to supplement the DEA. In addition, the DEA does not analyze all reasonable alternatives, identify specific mitigation that will reduce impacts to less than significant levels, or evaluate cumulative impacts.

EPA is concerned that potentially significant environmental impacts may result from the proposed project. This fence segment will cross the Santa Cruz River, an important perennial river in Arizona, and 26 other drainages. Fencing across the Santa Cruz River could impact flow and sediment transport, and will adversely impact the transboundary movement of the endangered jaguar. EPA recommends that specific information regarding impacts to hydrology, habitat, and wildlife be included in a subsequent NEPA document, such as a revised EA or EIS.

This document should also include a more detailed project description, an evaluation of alternatives to avoid or minimize impacts, and a revised cumulative impacts assessment.

We understand from your office that the tight project schedule has resulted in incomplete NEPA documents being released to the public. This approach of releasing incomplete NEPA documents is not consistent with the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (CEQ Regulations), which state that agencies may prepare an environmental assessment and then make its determination whether to prepare an EIS or a FONSI (40 CFR 1501.4 (c) and (e) and 40 CFR 1508.9). The incomplete information in the DEA does not facilitate or enable public comment concerning the agency's determination that the project does not significantly affect the environment. In fact, the CEQ regulations state that accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA (40 CFR 1500.1(b)). Even if these information deficits are resolved in the Final EA, the pre-set schedule for completion of construction does not allow agencies the opportunity to review the more complete document and comment on the severity of the impacts or potential opportunities to avoid and minimize them.

EPA believes a comprehensive mitigation strategy should be developed for cumulative impacts resulting from the many border fence and infrastructure projects that are occurring along the border. We understand that preliminary discussions with U.S. Fish and Wildlife Service (USFWS) have occurred at a senior staff level regarding a comprehensive programmatic mitigation agreement to address wildlife impacts. We encourage such an approach and are available to assist in identifying comprehensive mitigation for impacts to watersheds and waters of the U.S.

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, consistent with our national environmental policy (42 U.S.C. 4321).

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/ Connell Dunning for

Nova Blazej, Manager
Environmental Review Office

Enclosure: EPA's Detailed Comments

cc: Charles McGregor, U.S. Army Corps of Engineers, Fort Worth District
Patricia Sanderson Port, U.S. Department of the Interior

U.S. Fish and Wildlife Service, Tucson Sub-office
Robert Smith, U.S. Army Corps of Engineers, Los Angeles District
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Jaguar Conservation Team Chair, c/o Arizona Game and Fish Department
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Justification for Finding of No Significant Impacts

The Draft Environmental Assessment (DEA) contains insufficient information and analysis to support a Finding of No Significant Impact (FONSI) determination. An environmental assessment, in part, serves to: 1) briefly provide sufficient evidence and analysis for determining whether to prepare an Environmental Impact Statement (EIS) or a Finding of No Significant Impact (FONSI), and 2) aid an agency's compliance with the National Environmental Policy Act (NEPA) when an EIS is not necessary (See 40 CFR 1508.9).

Because rights of entry were not obtained prior to release of this DEA, no biological or cultural surveys were conducted for the project corridor (p. 3-3). Additionally, no delineation of jurisdictional waters of the U.S. was performed, and estimates of impacts to these resources were based on assumptions regarding the parameters of the drainages and of the perennial Santa Cruz River. Despite the high probability of prehistoric sites on the terraces along the Santa Cruz River and other major washes in the project corridor (p. 3-30), no pedestrian surveys were conducted for inclusion in the DEA. The Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (CEQ Regulations) state that the information in NEPA documents must be of high quality. "Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA" (40 CFR 1500.1(b)). EPA disputes the ability of this DEA to provide any meaningful input that could be useful for agency decision-making. The DEA acknowledges the deficient analysis when it states that subsequent NEPA documentation may be required to identify, evaluate, and disclose additional effects not disclosed in the DEA (p. 3-4, 3-28).

Recommendation: We recommend that Customs and Border Patrol (CBP) prepare a NEPA document, such as a revised EA or Environmental Impact Statement, that includes the information necessary to evaluate impacts of the project, per 40 CFR 1500.3.

Alternatives Analysis

The subject DEA does not evaluate all reasonable alternatives. 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. 2-12) 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. In fact, the DEA quotes a Congressional Research Service Report stating that a "rigid enforcement system that could integrate infrastructure, manpower, and new technologies to further control the border region" was needed (p. 2-14); yet such an integrated alternative was not included for analysis.

Recommendation: EPA recommends an additional alternative be evaluated in the subsequent NEPA document for this project that integrates infrastructure, manpower, and new technologies, consistent with the Congressional Research Service Report.

Cumulative Impacts

The DEA does not evaluate cumulative impacts. While the assessment identifies some reasonably foreseeable future projects within and near the project corridor, it does not identify their impacts to resources that will also be affected by the proposed project (40 CFR 1508.7). The assessment also does not include any discussion of past actions that have affected these resources and contributed to their current health. The resource-specific discussions largely repeat project impacts and do not provide an assessment of cumulative impacts to these resources that would reveal the ability of these resources to withstand additional stressors. A sufficient cumulative impact assessment is important for this project, especially considering the piecemeal nature of the impact assessments for this and other border fence projects.

Recommendation: EPA recommends substantial improvements be made to the cumulative impacts assessment and that this assessment be included in a revised NEPA document and made available for public and agency review. EPA recommends the *Guidance for Preparers of Cumulative Impact Analysis* (June 2005), (Available: http://www.dot.ca.gov/ser/cumulative_guidance/purpose.htm), as a useful methodology¹.

Impacts to Special Status Species and Cross-border Wildlife Corridors

We have concerns regarding impacts to wildlife since it appears that the proposed project has the potential to impact several federally listed species, including the endangered jaguar. Southeast Arizona is the most likely area for future jaguar occurrence in the U.S. (p. 3-26). The DEA includes only a superficial impact assessment to this resource and cumulative impacts have not been assessed at all, including impacts to wildlife corridors in the project area. The DEA states that even with the completion of this segment, corridors for wildlife movement would still exist (p. 3-21), but CBP has not demonstrated this. There is no map in the DEA showing existing and proposed fencing in relation to wildlife movement corridors, including corridors in jaguar habitat that remain. Preserving key linkages connecting habitat on both sides of the border is essential to keep species moving within their habitat and range, and will be critical for species' adaptation to the effects of climate change.

We understand that CBP is coordinating with the U.S. Fish and Wildlife Service regarding project impacts to threatened and endangered species. The DEA relies on implementation of conservation and avoidance measures as mitigation for significant impacts and as a basis for a FONSI determination, and the DEA states that CBP will implement any conservation recommendations as appropriate (p. 5-5). We understand from USFWS however, that CBP's adherence to a preset schedule could eliminate the possibility of avoidance and mitigation, such as when a sensitive life stage interferes with construction timeline goals. The final decision document should clearly identify which mitigation and conservation measures CBP is committing to and using as a basis for a FONSI determination.

Recommendation: The CBP should ensure that corridors are available for transboundary

¹ This guidance, developed jointly by Caltrans, FHWA, and EPA, focuses on transportation projects in California; however, it 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 requirements of Section 404 of the Clean Water Act.

movement of wildlife, including the endangered jaguar. Include the map of all existing fence segments in the cumulative impacts section and clearly identify where key animal movement corridors lay. EPA strongly recommends the use of wildlife-friendly vehicle barriers in conjunction with virtual fencing components such as laser barriers, motion sensors, etc. at critical intervals to ensure transboundary wildlife movement. We also recommend the U.S. Border Patrol participate on the Jaguar Conservation Team and assist in implementing the Jaguar Conservation Framework, as the U.S. Border Patrol agreed to do for the Fence and Road Construction Project at Limestone Ridge.²

EPA recommends CBP comply with all avoidance and conservations measures identified by USFWS. If conservation measures will not be followed, it is important that they be identified so that the FONSI determination can be assessed based on mitigation that CBP has committed to provide. We also urge continued talks regarding a programmatic mitigation agreement with USFWS, and that progress on any agreements is included in the final decision documents.

² Per U.S. Border Patrol's response to comments on the Environmental Assessment, Road and Fence Construction Project, Limestone Ridge, Cochise County, Arizona, U.S. Border Patrol Tucson Sector, February 2008, Review Comments Matrix, Appendix A