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# Statement of Secretary Michael Chertoff Regarding Exercise of Waiver Authority



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**Securing the Border: A Priority for DHS.** In order to secure our homeland, we have to secure our borders. For at least the past decade, illegal entry into the United States along our southwestern border has been a significant problem. The flow of illegal traffic through the border region imperils our ability to fight terrorism by stopping the illegal entry of terrorists, and exposes our border communities—and the rest of the United States—to the ill effects of drug smuggling, human smuggling, and gang activity. Illegal border traffic has also caused severe and profound impacts to the environment.

**Congress's Mandate.** Mindful of these things, Congress called upon the Department of Homeland Security (DHS) to construct—in the most expeditious manner possible—the infrastructure necessary to deter and prevent illegal entry on our southwestern border, including pedestrian and vehicle fencing, roads, and virtual detection technology. Section 102(b) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) requires installation of fencing, barriers, roads, lighting, cameras, and sensors on not less than 700 miles of the southwestern border. This total includes 370 miles of priority pedestrian fencing to be completed in 2008, in areas most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States. Congress has insisted, and I have promised, that DHS will meet this goal.

**DHS's Successes.** In recent years, through the deployment of additional personnel, tactical infrastructure, and technology, DHS and its components have made great strides in effectively securing the border and reducing the number of people that illegally enter the United States through this region. We already have constructed 309 miles of border fencing along the southwest border.

**Congressionally-Granted Waiver Authority: To Ensure Congress's Goal Is Met.** In addition to its mandate for additional roads and barriers, Section 102(c) of IIRIRA grants to me the authority to waive all legal requirements that I, in my sole discretion, determine necessary to ensure expeditious construction of this much-needed border infrastructure. As envisioned by Congress—and in order to meet DHS's congressionally-mandated timeline for completion—I exercised this authority today by signing two waivers to ensure the expeditious construction of the important border infrastructure projects that are underway or planned for completion. The waivers cover approximately 470 miles of border, on which we plan to construct and install the border barriers specified by Congress in Section 102 of IIRIRA. I employed this authority to ensure that these projects will proceed without unnecessary delays caused by administrative processes or potential litigation. These waivers should cover the remainder of additional fence construction that will be accomplished in 2008.

**DHS's Environmental Stewardship Has Been—And Will Be Continue to Be—Strong.** Although the exercise of my authority under Section 102(c) of IIRIRA means that certain laws will be waived, DHS is neither compromising its commitment to responsible environmental stewardship nor its commitment to solicit and respond to the needs of state, local, and tribal governments, other agencies of the federal government, and local residents.

For example, for the majority of the miles covered by the waiver, we have prepared either a draft environmental

assessment or an environmental impact statement. (For *all* of the miles on which we plan to build pedestrian fencing, we have prepared at least a draft environmental assessment or environmental impact statement.) For a number of these miles, it was determined that the proposed border infrastructure would have only insignificant impacts on the environment and cultural resources. DHS has also begun the environmental process for the roughly 22 miles covered by the Hidalgo waiver. We will continue to take the results of this work into account—even after the waivers—in our building and construction. For the rest of the area, DHS will continue to engage with federal and state resources management agencies and the local community to carefully identify natural, biological and cultural resources potentially affected by construction of border barriers, and we will identify ways to reduce and mitigate the impacts. In areas where no such discussion has already taken place, DHS will consult with appropriate groups and perform environmental work before significant construction is undertaken.

DHS has already shown that, even after use of my waiver authority, we do our best to plan and construct border infrastructure mindful of our obligation as stewards of the environment. For instance, DHS is currently negotiating an agreement with the U.S. Fish and Wildlife Service (USFWS) to transfer \$800,000 to help with mitigation and recovery efforts for two species—the endangered Sonoran Pronghorn and lesser long-nosed bat—on the Cabeza Prieta National Wildlife Refuge and Barry M. Goldwater Range (BMGR). DHS has taken this action even though the Endangered Species Act was waived for construction in the BMGR—a waiver that allowed expeditious construction of crucial pedestrian fencing and other infrastructure. I also issued a waiver in November 2007 that allowed border fencing to be built in and around the San Pedro National Riparian Conservation Area (SPRNCA) in southern Arizona. Since I signed that waiver, DHS has pursued several measures in cooperation with the USFWS to reduce the impact of the fencing. Specifically, DHS agreed to refrain from installing fence within the San Pedro River basin, unless and until we determined that lack of fencing affected our ability to deter illegal entry. DHS also delayed construction in order to excavate and study a culturally significant site at an expense of over \$1 million. In addition, DHS agreed to implement a number of measures designed to reduce and monitor invasive plant species, erosion, and sediment problems.

DHS will continue to take a similar approach here. As noted above, DHS has already invested substantial time and effort consulting with resource agencies and preparing documents to satisfy the National Environmental Policy Act (NEPA) and other environmental laws for the areas covered by this waiver.

It is our goal to implement measures to minimize the effects of construction on cultural, biological and natural resources wherever possible. For example, DHS has funded several excavation sites along the construction route in order to allow archaeologists to gather information about pre-historic and Native American culture. DHS has also partnered with the USFWS to develop best management practices that are tailored for specific locations and which can be incorporated into construction projects to minimize the impacts to wildlife and their habitat. As a result of these efforts, DHS has an understanding of potential environmental effects and how to minimize and mitigate them. For example, USFWS has provided advice on modification of certain projects to avoid or reduce effects on threatened and endangered species. In some cases, DHS was able to adjust the planned locations of fences, access roads and staging areas to reduce potential effects.

It is also important to note that our partners at the Department of Interior suggested this waiver in order to construct on areas of high entry that are managed by DOI under the Wilderness Act and the National Wildlife Refuge System Administration Act. They wrote that “Interior managers have attempted to facilitate the construction of these facilities. . . . We have determined that we cannot, consistent with [our] legal obligations, provide the approvals that would be necessary to allow DHS to construct certain infrastructure on Interior lands that are subject to these laws. . . . As a result, we see the need for you to invoke a . . . waiver of Interior statutory requirements.” We will continue to work with DOI and other federal resource management agencies to reduce any impact of construction on the environment.

**Solicitation of Views From The Community.** As noted above, DHS will also continue to solicit and respond to the issues and needs of local border communities. As it has planned for the construction of additional border infrastructure, DHS has regularly consulted with state and local governments, federal land management and resource agencies such as DOI and USFWS as well as the local residents themselves. As a part of the NEPA process, DHS actively reached out to the public and stakeholders. DHS has distributed a number of draft NEPA documents for public comment and review, held numerous public meetings, and cooperated with various resource agencies. The environmental review process, however, is not the only means by which DHS has reached out to state and local stakeholders. As part of its outreach efforts, DHS contacted almost 600 different landowners and held meetings with state and local government officials, local law enforcement, Native American tribes, and concerned citizens and citizen groups. All of these efforts were focused on providing all interested stakeholders the opportunity to provide input and comments regarding proposed projects in their areas. DHS will continue to

engage stakeholders and border communities to address the needs of the local community.

**Hidalgo County: Working With The Local Community.** On February 8, 2008, I announced that DHS is committed to working with local officials in Hidalgo County, Texas—specifically, Hidalgo County Drainage District No. 01—to combine DHS's plans to construct border infrastructure with Hidalgo's project to address its flood control concerns by raising its levees. I noted that the proposed levee/barrier project is a prime example of how, through partnership, communication and cooperation, the federal government and local officials can accomplish two critical goals: securing America's borders and protecting people and their property from floods. It also demonstrates the value of collaboration between DHS and local governments.

Despite the critical importance of constructing fence at the border and the need to do so quickly, DHS listened and responded to issues raised by state, local, and tribal governments, local residents, and others, including federal land management and resources agencies, such as the Department of Interior and United States Fish and Wildlife Service, in developing plans for construction of barriers, roads, and virtual detection technology. The joint levee/barrier project with Hidalgo is the product of these efforts. As I said before, I commend Hidalgo for both alerting DHS to the fact that DHS's construction could potentially overlap with the County's flood control efforts, and offering a sensible solution which provides the opportunity for DHS and Hidalgo to work together to incorporate the construction of a concrete border barrier into its plans to raise the levees.

This project will allow DHS to move closer to the congressional mandate of operational control of the border, and at the same time provide the people of Hidalgo County with increased security from drug smugglers, human smugglers, and gangs—all of which bring added risk of border violence—as well as protection against the very real threat of Rio Grande floods. Of course, DHS and Hidalgo have not been alone in working to make this project a reality. The International Boundary and Water Commission (IBWC) has been an important partner in this effort, and USFWS is continuing to work with DHS to address potential environmental impacts.

We are working with Hidalgo to finalize the most appropriate vehicle for this effort. The department's authority to enter into such vehicles is found in § 102(b)(2) of the Homeland Security Act of 2002, P.L. 107-296. Through this anticipated arrangement, DHS will transfer funding, plans, and other resources, to allow Hidalgo to implement the project to meet its flood mitigation needs, while also satisfying DHS's requirements—and the mandates of the IIRIRA—to construct border infrastructure in an area of high illegal entry. DHS anticipates it will be substantially involved with Hidalgo and IBWC in accomplishing the activity that we expect to be approved in the agreement.

In addition to the waiver described earlier, I have also exercised this statutory authority to dispose of the legal impediments that threaten to impede or interfere with the expeditious construction of the joint levee/barrier project with Hidalgo. Even though I have executed this waiver, DHS is committed to carrying out this project in a way that protects the border, is environmentally responsible, and is protective of public funds. Indeed, a major impetus for the joint levee/barrier project is the cost savings that can be realized by constructing the border barrier with the levee improvements.

The 2008 Appropriations Act provides that “none of the funds under this heading may be obligated for any project or activity for which the Secretary has exercised waiver authority pursuant to section 102(c) [of IIRIRA] until 15 days have elapsed from the date of the publication of the decision in the Federal Register.” DHS will not expend any restricted funds until that time period has elapsed.

By utilizing my statutory waiver authority, I have ensured that DHS can meet its mandate of securing and maintaining operational control of the border in the most expeditious manner possible, and that DHS and Hidalgo County can move forward with a project that addresses the needs of both parties. DHS remains committed to protecting the Nation and deterring illegal entry and other crimes through control of the border, while acting to protect the environment, spend public funds wisely, and work closely with state and local stakeholders to understand and respond to the needs of border communities.

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