

**DEPARTMENT OF HOMELAND SECURITY:
STATEMENT REGARDING EXERCISE OF WAIVER AUTHORITY**

For at least the past decade, illegal entry into the United States along the United States - Mexico border in southern Arizona has been a severe problem. The flow of illegal traffic through this region has not only jeopardized our ability to deter and prevent terrorism and terrorist entry into the United States, but it has also caused severe and profound impacts to the environment. In recent years, through the deployment of additional personnel, tactical infrastructure, and technology, the Department of Homeland Security (DHS) and its component agencies have made great strides toward obtaining operational control of the border and reducing the number of illegal entrants into the United States through this region. Despite its recent successes in southern Arizona, DHS must continue to look for better, more effective and more innovative ways to prevent illegal entry and achieve its goal of total operational control of the United States border.

DHS's Secure Border Initiative (SBI) is intended to meet this objective. As a part of SBI, DHS is developing a strategy to control the borders of the United States by transforming and improving technology, infrastructure, staffing, and response programs.

One area where DHS, through its SBI program, is actively working to address the problem of illegal entry is in and around the San Pedro Riparian National Conservation Area (SPRNCA) in Cochise County in southeastern Arizona. The profoundly negative impact of illegal entry in and around the SPRNCA is well-documented. In Fiscal Year 2007 alone, there were over 19,000 apprehensions of illegal entrants and over 21,000 illegal entries in the area, which was a significant increase compared to Fiscal Year 2006. Further, due to the inhospitable nature of the SPRNCA and surrounding area, 14 illegal entrants died in the SPRNCA in Fiscal Year 2007, including one discovered as recently as two weeks ago. In addition to the human cost of illegal entry, there are innumerable costs to the environment. For example, illegal roads divert the normal flow of water and rob native plant cover of the moisture it depends on to survive. Illegal entrants also leave trash and high concentrations of human waste, which impact wildlife, vegetation and water quality. Hundreds of wildfires caused by campfires of illegal entrants have caused a significant threat to human safety and the lands along the border, as well as increased impacts to soil, vegetation, cultural sites, and other sensitive resources. Indeed, illegal entry in and around the SPRNCA is such a problem that the Bureau of Land Management (BLM) has had to impose restrictions on public recreation in the SPRNCA due to high levels of smuggling activity, vehicle thefts, and assaults. Of course, illegal entry also poses a grave risk to our Nation's security. Approximately 11% of illegal entrants have a criminal background, and the potential always exists for a single individual or small group to cross the border at the SPRNCA undetected with biological or chemical weapons, weapons of mass effect, or other implements of terrorism.

Until recently, DHS has been working to address these problems by installing both tactical infrastructure and pedestrian fencing to stem the flow of illegal entrants in and around the SPRNCA. However, on October 10, 2007, the United States District Court for the District of Columbia, responding to a lawsuit filed by Defenders of Wildlife

and the Sierra Club, enjoined DHS from taking any further action to construct fencing and tactical infrastructure in the SPRNCA. While acknowledging that "there is a fence there now, it is not a pristine area and there is environmental damage being caused by illegal aliens", the court cited alleged deficiencies in an environmental assessment that was used by BLM in determining whether to authorize DHS to proceed with construction in the SPRNCA in issuing its restraining order.

DHS disagrees with the court's ruling and believes that if the litigation were to continue to move forward, the government ultimately would prevail on the merits. In fact, DHS believes that the government complied with all of the applicable environmental laws before proceeding with construction. For example, DHS conducted its own earlier environmental assessment, which was open to comment and review by both the public and federal, state, and local resource agencies, and like the BLM's environmental assessment, concluded that the project would not result in significant impacts to the environment. In fact, the court's ruling is at odds with the determination of two separate federal land management agencies, both of which had authorized DHS to proceed with construction. It is worth noting that these are the very agencies whose Congressionally-mandated mission includes administering and protecting the SPRNCA and its resources. Furthermore, DHS believes that its efforts to stem 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.

DHS considers any further delay in constructing the tactical infrastructure and fencing in and around the SPRNCA to present unacceptable risks to our Nation's security. As the court correctly noted in issuing its ruling, in addition to the mandate for additional roads, barriers, cameras, sensors, and lighting to deter illegal entry, pursuant to Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act, as amended (IIRIRA), Congress granted to the Secretary the authority to waive all legal requirements that the Secretary, in his sole discretion, determines necessary to ensure expeditious construction. "[T]he executive is in the position to exercise that waiver, to factor in the national security . . . so that if there is a national security issue and . . . the urgency of this construction is of national importance, Congress has allowed your client to take that into consideration," the court stated. Consistent with this Congressional authorization, Secretary Chertoff has determined that it is necessary to utilize this statutory waiver authority and has now done so 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.

Although the Secretary's exercise of authority under Section 102(c) of IIRIRA means that certain environmental laws will be waived, DHS is not compromising its commitment to responsible environmental stewardship. As a part of obtaining authorization to proceed from the federal land management agencies that administer and protect the SPRNCA and its resources, DHS agreed to implement a host of mitigation measures that would lessen the environmental impacts associated with the construction and operation of tactical infrastructure and fencing. For example, DHS has agreed to work with the Fish and Wildlife Service and a qualified biologist to respond to concerns

related to wildlife in the area: temporary barriers are to be erected in the river and will be removed during the flood season; DHS will take steps to prevent the introduction or spreading of invasive weeds and will, as necessary, restore temporarily disturbed areas with native plants; and, a Storm Water Pollution Prevention Plan has already been provided to BLM. Despite the issuance of a waiver, DHS intends to honor these commitments and will continue to work in close cooperation with such agencies as this and other DHS projects move forward.