2-22-23

The Honorable Alejandro Mayorkas

Secretary of Homeland Security

U.S. Department of Homeland Security

245 Murray Lane, S.W.

Washington, D.C. 20528

Dear Secretary Mayorkas:

We write to ask that you restore implementation of laws to any new barriers and roads at the U.S.-Mexico border. Your June, 2021 Plan states that, “*To the extent DHS, in its discretion, deems it warranted, it may rescind or revise waivers of environmental and other laws issued under IIRIRA by the Secretary of Homeland Security. For some segments, rescinding or revising prior environmental waivers will not be feasible.*”[[1]](#footnote-1)

To date, not a single one of the waivers of 84 federal laws has been rescinded or revised.[[2]](#footnote-2) These waivers exempt construction of border barriers, roads and associated infrastructure from environmental and natural resource protection laws as well as laws related to historic preservation, Native American sites, including burial sites, and for some segments, all procurement laws, thus denying the the borderlands, border communities, tribal communities and taxpayers critical protections. Additionally, past DHS Secretaries have stated that all related state, and local laws and other legal requirements are also waived, although those laws have never been identified by name in DHS waivers.

When asked in a meeting under what circumstances the rescission or revision of the waivers would not be “feasible”, quoting the words of the June, 2021 Plan, senior Customs and Border Protection (CBP) officials managing the border wall program indicated that waivers would not be rescinded for walls that have already been constructed or for urgent emergency repair and remediation efforts. However, there is no legal reason that the waivers could not be lifted for proposed construction actions and explicitly exclude past construction.

At this point in the administration’s term, it is appropriate and necessary to refocus on restoring protection of the laws to the Southwestern border. Despite the administration’s requests and much to our regret, Congress has failed to rescind existing border wall funding. Thus, the prospect of constructing the “approximately 69 miles of new border barrier and related system elements . . . including 30-foot high, six-inch square steel bollards” in Webb and Zapata counties, Texas and another 86 miles of the same work in Hidalgo, Cameron and Starr

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counties remains a real possibility.[[3]](#footnote-3) Much of this construction would run through the Lower Rio Grande Valley National National Wildlife Refuge. Further, some of the remediation measures being undertaken under the waivers do not appear to be urgent and involve discretionary choices that are moving ahead despite strong community opposition, such as the decisions related to replacing the barriers at Friendship Park in California with a 18’ or 30’ wall and do not appear to be treated as an emergency situation in the typical sense of the word.

The DHS Plan and a number of CBP statements say that even without rescission or revision of the waivers, most projects will go through the “standard environmental planning including taking certain actions consistent with the National Environmental Policy Act (NEPA) and other environmental planning and statutes.”[[4]](#footnote-4) Further, some of the nomenclature in CBP’s announcement make it sound as though the agency is complying with NEPA,[[5]](#footnote-5) but when asked directly, CBP officials state that the actions are coming under the waivers.

Unfortunately, CBP’s process is not consistent with NEPA and other environmental laws. Under CBP’s procedures implementing NEPA, the proposal to build almost 155 miles of new walls (functionally walling off the entire Rio Grande Valley) would normally require preparation of an environmental impact statement that included a statement of purpose and need, the analysis of alternatives that would achieve that purpose and need, and analysis of the environmental and related social and economic consequence of each alternative. Mitigation measures that would reduce adverse impacts would be identified and incorporated into the analysis. CBP would then publish the draft analysis for public review and comment, followed by publication of a final document that provided substantive responses to substantive comments. Instead, CBP is preparing what it terms an “environmental assessment” that does not include a purpose and need statement or any potential alternatives; provided for one short webinar; has not made its analysis available for public review and comment; has not provided the public with any information about

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compliance with other applicable laws such as the Clean Water Act or Endangered Species Act.[[6]](#footnote-6)

As Secretary of DHS, you have ample authority to rescind or revise the waivers, as stated in the DHS plan, to focus solely on new proposed actions.[[7]](#footnote-7) We ask that you take an important step towards restoring the rule of law in the U.S. borderlands.

Sincerely,

cc: [to be decided but likely would include OMB, CEQ, DOI at a minimum]

1. Department of Homeland Security, Border Wall Plan Pursuant to Presidential Proclamation 10142, June 9, 2021, Section III A. [↑](#footnote-ref-1)
2. These waivers were issued under authority of 8 U.S.C. § 1103(c) (note). [↑](#footnote-ref-2)
3. <https://www.cbp.gov/document/environmental-assessments/border-barrier-environmental-planning-webb-county-and-zapata> (posted 5/19/22); <https://www.cbp.gov/document/environmental-assessments/border-barrier-environmental-planning-starr-county-hidalgo-county> (posted 6/21/2022) [↑](#footnote-ref-3)
4. DHS Plan at Section III, B. [↑](#footnote-ref-4)
5. For example, “U.S. Customs and Border Protection (CBP) is developing an Environmental Assessment (EA) to evaluate the potential environmental impacts and project alternatives for the proposed construction, operation, and maintenance of border barrier and related system elements in the United States Border Patrol (USBP) Rio Grande Valley Sector in Starr, Cameron, and Hidalgo counties, Texas.”  An “environmental assessment” is the name of a NEPA document, 40 C.F.R. § 1508.1(h). Thus, readers assume this is coming under NEPA unless and until they ask a CBP official. [↑](#footnote-ref-5)
6. Please see the attached memo, “Comparing Environmental Analyses under the REAL ID Act Waivers for Construction of Border Wall and Roads with Compliance with Federal Environmental Laws”, June 13, 2022. [↑](#footnote-ref-6)
7. Please see the attached memo, Analysis of Rescission of Waivers of Law for Border Barrier and Road Construction at the U.S.-Mexico Border, Feb. 3, 2022. [↑](#footnote-ref-7)