



9111-14

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended

AGENCY: Office of the Secretary, Department of Homeland Security.

ACTION: Notice of determination.

SUMMARY: The Secretary of Homeland Security has determined, pursuant to law, that it is necessary to waive certain laws, regulations and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border of the United States near the Santa Teresa Land Port of Entry in the state of New Mexico.

DATES: This determination takes effect on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

SUPPLEMENTARY INFORMATION:

The principal mission requirements of the Department of Homeland Security (“DHS”) include border security and the detection and prevention of illegal entry into the United States. Border security is critical to the nation’s national security. Recognizing the critical importance of border security, Congress has ordered DHS to achieve and maintain operational control of the international land border. Secure Fence Act of 2006, Public Law 109-367, § 2, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. § 1701 note). Congress defined “operational control” as the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband. *Id.* Consistent with that mandate from

Congress, the President's Executive Order on Border Security and Immigration Enforcement Improvements directed executive departments and agencies to deploy all lawful means to secure the southern border. Executive Order 13767, § 1. To achieve this end, the President directed, among other things, that I take immediate steps to prevent all unlawful entries into the United States, to include the immediate construction of physical infrastructure to prevent illegal entry. Executive Order 13767, § 4(a).

Congress has provided the Secretary of Homeland Security with a number of authorities necessary to carry out DHS's border security mission. One of these authorities is found at section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Public Law 104-208, Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C 1103 note), as amended by the REAL ID Act of 2005, Public Law 109-13, Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 note), as amended by the Secure Fence Act of 2006, Public Law 109-367, § 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. § 1103 note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161, Div. E, Title V, § 564, 121 Stat. 2090 (Dec. 26, 2007). In section 102(a) of IIRIRA, Congress provided that the Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States. In section 102(b) of IIRIRA, Congress has called for the installation of additional fencing, barriers, roads, lighting, cameras, and sensors on the southwest border. Finally, in section 102(c) of IIRIRA, Congress granted to the Secretary of Homeland Security the authority to waive

all legal requirements that I, in my sole discretion, determine necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of IIRIRA.

DETERMINATION AND WAIVER:

Section 1

The United States Border Patrol's El Paso Sector is an area of high illegal entry. For example, in fiscal year 2016, the United States Border Patrol ("Border Patrol") apprehended over 25,000 illegal aliens and seized approximately 67,000 pounds of marijuana and approximately 157 pounds of cocaine. Since the creation of DHS, and through the construction of border infrastructure and other operational improvements, the Border Patrol has been able to make significant gains in border security within the El Paso Sector; however, more work needs to be done. In fact, in recent years, the El Paso Sector has seen an increase in apprehensions. The El Paso Sector therefore remains an area of high illegal entry for which there is an immediate need to construct border barriers and roads.

To begin to meet the need for enhanced border infrastructure in the El Paso Sector, DHS will take immediate action to replace existing vehicle barrier with bollard wall. Vehicle barrier replacement in the El Paso Sector is among DHS's highest priority border security requirements. The vehicle barrier replacement will take place along an approximately twenty mile segment of the border that starts at the Santa Teresa Land Port of Entry and extends westward. This approximately twenty mile segment of the border is referred to herein as the "project area" and is more specifically described in Section 2 below.

Although the existing vehicle barrier has aided border enforcement within the project area, Border Patrol must have a more effective means of deterring and preventing illegal crossings. The area within Mexico that is situated across the border from the project area has a population of almost two million people, including the city of Ciudad Juarez. The close proximity of this heavily populated area and its urban infrastructure creates opportunities for illegal entrants to gain quick and immediate access to the border. On the United States side of the border, the eastern portion of the project area includes developed areas where illegal aliens can quickly blend into the population and have ready access to roads, highways, and other infrastructure. The western portion of the project area is made up of desert areas where there is little to no natural terrain that deters illegal crossings and illegal aliens can quickly access state highways as a means of travel into the interior of the United States. Replacing the existing vehicle barrier with bollard wall within the project area will improve Border Patrol's operational efficiency and, in turn, further deter and prevent illegal crossings.

Section 2

I determine that the following area in the vicinity of the United States border, located in the State of New Mexico within the United States Border Patrol's El Paso Sector is an area of high illegal entry (the "project area"): Starting at the Santa Teresa Land Port of Entry and extending west to Border Monument 10.

There is presently a need to construct physical barriers and roads in the vicinity of the border of the United States to deter illegal crossings in the project area. In order to ensure the expeditious construction of the barriers and roads in the project area, I have

determined that it is necessary that I exercise the authority that is vested in me by section 102(c) of the IIRIRA as amended.

Accordingly, pursuant to section 102(c) of IIRIRA, I hereby waive in their entirety, with respect to the construction of roads and physical barriers (including, but not limited to, accessing the project area, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of physical barriers, roads, supporting elements, drainage, erosion controls, and safety features) in the project area, the following statutes, including all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of, the following statutes, as amended: The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 et seq.)), the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 et seq.)), the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (33 U.S.C. 1251 et seq.)), the National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966), as amended, repealed, or replaced by Pub. L. 113-287 (Dec. 19, 2014) (formerly codified at 16 U.S.C. 470 et seq., now codified at 54 U.S.C. 100101 note and 54 U.S.C. 300101 et seq.)), the Migratory Bird Treaty Act (16 U.S.C. 703 et seq.), the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), the Archeological Resources Protection Act (Pub. L. 96-95 (16 U.S.C. 470aa et seq.)), the Paleontological Resources Preservation Act (16 U.S.C. 470aaa et seq.), the Federal Cave Resources Protection Act of 1988 (16 U.S.C. 4301 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), the Noise Control Act (42 U.S.C. 4901 et seq.), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C.

6901 et seq.), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 et seq.), the Archaeological and Historic Preservation Act (Pub. L. 86-523, as amended, repealed, or replaced by Pub. L. 113-287 (Dec. 19, 2014) (formerly codified at 16 U.S.C. 469 et seq., now codified at 54 U.S.C. 312502 et seq.)), the Antiquities Act (formerly codified at 16 U.S.C. 431 et seq., now codified 54 U.S.C. § 320301 et seq.), the Historic Sites, Buildings, and Antiquities Act (formerly codified at 16 U.S.C. 461 et seq., now codified at 54 U.S.C. 3201-320303 & 320101-320106), the Farmland Protection Policy Act (7 U.S.C. 4201 et seq.), the Federal Land Policy and Management Act (Pub L. 94-579 (43 U.S.C. 1701 et seq.)), National Fish and Wildlife Act of 1956 (Pub. L. 84-1024 (16 U.S.C. 742a, et seq.)), the Fish and Wildlife Coordination Act (Pub. L. 73-121 (16 U.S.C. 661 et seq.)), the Administrative Procedure Act (5 U.S.C. 551 et seq.), the Eagle Protection Act (16 U.S.C. 668 et seq.), the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.), and the American Indian Religious Freedom Act (42 U.S.C. 1996).

This waiver does not repeal the previous waiver published in the Federal Register on April 8, 2008 (73 FR 19078). I reserve the authority to make further waivers from time to time as I may determine to be necessary under section 102 of the IIRIRA, as amended.

Dated: January 10, 2018.

Kirstjen M. Nielsen,
Secretary of Homeland Security.

[FR Doc. 2018-00996 Filed: 1/19/2018 8:45 am; Publication Date: 1/22/2018]