



Billing Code 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 in Luna County, New Mexico and Doña Ana County, New Mexico.

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

SUPPLEMENTARY INFORMATION: Important 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 mandated DHS to achieve and maintain operational control of the international land border. Secure Fence Act of 2006, Public Law 109-367, section 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, section 1. In order to achieve that end, the President directed, among other things, that I take immediate steps to prevent all unlawful entries into the United States, including the immediate construction of physical infrastructure to prevent illegal entry. Executive Order 13767, section 4(a).

Congress has provided to the Secretary of Homeland Security a number of authorities necessary to carry out DHS's border security mission. One of those authorities is found at section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended ("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, section 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, section 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 mandated 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. In fiscal year 2018, the United States Border Patrol ("Border Patrol") apprehended over 31,000 illegal aliens attempting to enter the United States between border crossings in the El Paso Sector. Also in fiscal year 2018, the Border Patrol had over 700 separate drug-related events between border crossings in the El Paso Sector, through which it seized over 15,000 pounds of marijuana, over 342 pounds of cocaine, over 40 pounds of heroin, and over 200 pounds of methamphetamine. Additionally, Luna County, New Mexico, and Doña Ana County, New Mexico, which are located in the El Paso Sector, have been identified as High Intensity Drug Trafficking Areas by the Office of National Drug Control Policy.

Due to the high levels of illegal entry of people and drugs within the El Paso Sector, I must use my authority under Section 102 of IIRIRA to install additional physical barriers and roads in the El Paso Sector. Therefore, DHS will take immediate action to replace existing vehicle barriers in the El Paso Sector. The project will occur within two segments of the border in the El Paso Sector. One segment is west of the Columbus, New Mexico Land Port of Entry, and the other segment is located to the east of the Columbus New Mexico Land Port of Entry. The segments within which such construction will occur are referred to herein as the "project area" and are more specifically described in Section 2 below.

The existing vehicle barriers within the project area no longer meet the United States Border Patrol's operational needs. The construction of vehicle barriers in the project area initially curtailed illegal vehicular crossings. However, transnational criminal organizations have adapted their tactics by smuggling illicit cargo by foot, cutting the barrier, or driving over it,

which has prompted the need for the construction of a more effective barrier. The existing vehicle barriers will be replaced with an eighteen to thirty foot barrier that employs a more operationally effective design. In addition, roads will be constructed or improved and lighting will be installed.

To support DHS's action under Section 102 of IIRIRA, DHS requested that the Department of Defense, pursuant to 10 U.S.C. 284(b)(7), assist by constructing fence, roads, and lighting within the El Paso Sector in order to block drug smuggling corridors across the international boundary between the United States and Mexico. The Acting Secretary of Defense has concluded that the support requested satisfies the statutory requirements of 10 U.S.C. 284(b)(7) and that the Department of Defense will provide such support in the project area described in Section 2 below.

Section 2

I determine that the following areas 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, are areas of high illegal entry (the "project area"):

- Starting at Border Monument 31 and extending east to Border Monument 23.
- Starting at approximately one (1) mile west of Border Monument 20 and extending east to Border Monument 9.

There is presently an acute and immediate need to construct physical barriers and roads in the vicinity of the border of the United States in order to prevent unlawful entries into the United States in the project area pursuant to sections 102(a) and 102(b) of IIRIRA. 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 IIRIRA.

Accordingly, pursuant to section 102(c) of IIRIRA, I hereby waive in their entirety, with respect to the construction of physical barriers and roads (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, safety features, lighting, cameras, and sensors) in the project area, all of 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 National Trails System Act (16 U.S.C. 1241 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 and 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 Wild Horse and Burro Act (16 U.S.C. 1331 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 revoke or supersede the previous waiver published in the Federal Register on April 8, 2008 (73 FR 19078), which shall remain in full force and effect in accordance with its terms. I reserve the authority to execute further waivers from time to time as I may determine to be necessary under section 102 of IIRIRA.

Dated: April 18, 2019.

Kevin K. McAleenan,
Acting Secretary of Homeland Security
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