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 city of San Diego in the state of California.

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

SUPPLEMENTARY INFORMATION:

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. Secure Fence Act of 2006, Public Law 109-367, § 2, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. § 1701 note). 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).

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 San Diego Sector is one of the busiest Sectors in the Nation. For example, in fiscal year 2016 alone, the United States Border Patrol apprehended over 31,000 illegal aliens and seized approximately 9,167 pounds of marijuana and approximately 1,317 pounds of cocaine in the San Diego Sector. To be sure, the construction of border infrastructure and other operational improvements have improved border security in the San Diego Sector; however, more work needs to be done. The San Diego Sector remains an area of high illegal entry for which there is an immediate need to construct additional border barriers and roads.

To begin to meet the need for additional border infrastructure within the San Diego Sector, DHS will immediately implement various border infrastructure projects. These projects will focus on an approximately fifteen mile segment of the border within the San Diego Sector that starts at the Pacific Ocean and extends eastward. This
approximately fifteen mile segment of the border is referred to herein as the “Project Area” and is more specifically described in Section 2 below.

All of the projects that DHS will undertake within the Project Area will further Border Patrol’s ability to deter and prevent illegal crossings. For example, DHS will replace existing primary fencing in the Project Area. The majority of the existing primary fence in the Project Area was built in the early 1990s using a fence design that is no longer optimal for Border Patrol operations. The new primary barrier will use an operationally effective design that is intended to meet Border Patrol’s current requirements. DHS will also build prototype border wall in the Project Area near the eastern terminus of the existing secondary barrier. The construction of border wall prototypes in the Project Area and the robust physical characteristics that are to be incorporated into the border wall prototypes are intended to deter illegal crossings. In addition to deterring illegal crossings in the Project Area, DHS will use the border wall prototypes to evaluate various design features for potential inclusion in a border wall standard that will be developed by the Government and utilized as a part of border wall construction going forward. Importantly, construction of the border wall prototypes in the Project Area also means that DHS can evaluate various design features in the border environment under actual operational conditions. As such, the construction of border wall prototypes will not only deter illegal entry in the Project Area, but evaluation of the border wall prototypes is also critical to and necessary for future border wall design and construction.
Section 2

I determine that the following area in the vicinity of the United States border, located in the state of California within the United States Border Patrol’s San Diego Sector, which is referred to herein as the Project Area, is an area of high illegal entry: Starting at the Pacific Ocean and extending to approximately one mile east of Border Monument 251.

There is presently a need to construct physical barriers and roads, including the infrastructure projects described in Section 1, 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 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
the National Wildlife Refuge System Improvement Act of 1997 (Pub. L. 105-57),
Fish and Wildlife Coordination Act (Pub. L. 73-121 (16 U.S.C. 661 et seq.)), the Wild
§ 1, 114 Stat. 1654 (enacting into law § 2848 of Part II of Subtitle D of Title XXVIII of
Division B of H.R. 5408 (114 Stat. 1654A-426), as introduced on Oct. 6, 2000), the
Administrative Procedure Act (5 U.S.C. 551 et seq.), the Otay Mountain Wilderness Act
of 1999 (Pub. L. 106-145), sections 102(29) and 103 of Title I of the California Desert
Protection Act (Pub. L. 103-433), the Rivers and Harbors Act of 1899 (33 U.S.C. 403),
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.), the American Indian Religious Freedom

This waiver does not repeal the previous waiver published in the Federal Register
on September 22, 2005 (70 FR 55622).

I reserve the authority to make further waivers from time to time as I may
determine to be necessary under section 102 of IIRIRA, as amended.

Dated: July 26, 2017.

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John F. Kelly,
Secretary of Homeland Security

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