



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 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:**

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, § 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. 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, § 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, § 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 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 San Diego Sector is an area of high illegal entry. For example, in fiscal year 2018 alone, the United States Border Patrol ("Border Patrol") apprehended over 38,000 illegal aliens in the San Diego Sector. In that same year Border Patrol seized approximately 8,700 pounds of marijuana and approximately 1,800 pounds of cocaine in the San Diego Sector.

In order to satisfy the need for additional border infrastructure in the San Diego Sector, DHS will take action to construct barriers and roads. Specifically, construction of secondary barriers and roads will occur within an approximately fourteen mile segment of the border within the San Diego Sector that starts at approximately the Pacific Ocean and extends eastward. The segment of the border within which such construction will occur is referred to herein as the "project area" and is more specifically described in Section 2 below.

### **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, is an area of high illegal entry (the "project area"): Starting at approximately the Pacific Ocean and extending eastward to approximately Border Monument 251.

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. 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 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, 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 Federal Cave Resources Protection Act of 1988 (16 U.S.C. 4301 et seq.); the National Trails System Act (16 U.S.C. 1241 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 Wild and Scenic Rivers Act (Pub. L. 90-542 (16 U.S.C. 1281 et seq.)); the Farmland Protection Policy Act (7 U.S.C. 4201 et seq.); the Coastal Zone Management Act (Pub. L. 92-583 (16 U.S.C. § 1451 et seq.)); the Wilderness Act (Pub. L. 88-577 (16 U.S.C. 1131 et seq.)); the Federal Land Policy and Management Act (Pub L. 94-579 (43 U.S.C. 1701 et seq.)); the National Wildlife Refuge System Administration Act (Pub. L. 89-669 (16 U.S.C. 668dd-668ee)); the National Wildlife Refuge System Improvement Act of 1997 (Pub. L. 105-57); 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.); an Act of Oct. 30, 2000, Pub. L. 106-398, § 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.); and the American Indian Religious Freedom Act (42 U.S.C. 1996).

This waiver does not revoke or supersede previous waivers published in the Federal Register on September 22, 2005 (70 FR 55622), and August 2, 2017 (82 FR 35984), which shall remain in full force and effect in accordance with their 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.

---

Kirstjen M. Nielsen,  
*Secretary of Homeland Security.*

[FR Doc. 2019-01379 Filed: 2/7/2019 8:45 am; Publication Date: 2/8/2019]