



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 Acting 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 Pima County, Arizona, Santa Cruz County, Arizona, and Cochise County, Arizona.

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 Tucson Sector is an area of high illegal entry. In fiscal year 2019, the United States Border Patrol ("Border Patrol") apprehended over 63,000 illegal aliens attempting to enter the United States between border crossings in the Tucson Sector. Also in fiscal year 2019, there were over 1,200 drug-related events between border crossings in the Tucson Sector, through which Border Patrol seized over 59,000 pounds of marijuana, over 150 pounds of cocaine, over 155 pounds of heroin, over 2,700 pounds of methamphetamine, and over 12 pounds of fentanyl. Additionally, Pima County, Arizona, Santa Cruz County, Arizona, and Cochise County, Arizona, which are located in the Tucson Sector, have been identified as a High Intensity Drug Trafficking Area by the Office of National Drug Control Policy.

Due to the high levels of illegal entry of people and drugs within the Tucson Sector, I must use my authority under section 102 of IIRIRA to install additional physical barriers and roads in the Tucson Sector. Therefore, DHS will take immediate action to construct new primary and secondary fencing and replace existing pedestrian and secondary fencing in the Tucson Sector. The segments within which such construction will occur are referred to herein as the "project areas" and are more specifically described in Section 2 below.

The lack of adequate barriers, either due to a complete absence of barrier or ineffective primary or secondary fencing that no longer meet Border Patrol's operational needs, continues to be particularly problematic as it pertains to the trafficking of illegal narcotics in the Tucson Sector. The replacement of outmoded primary and secondary fencing and the construction of new primary pedestrian fencing will add much needed infrastructure in the Tucson Sector. The added impedance capability will slow or stop illegal activity, afford Border Patrol more time to

respond, and increase the likelihood of interdiction. Within the project areas roads will also be constructed or improved and lighting will be installed.

To support DHS's action under section 102 of IIRIRA, I requested that the Secretary of Defense, pursuant to 10 U.S.C. 284(b)(7), assist by constructing fence, roads, and lighting within the Tucson Sector in order to block drug smuggling corridors across the international boundary between the United States and Mexico. The 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 areas 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 Arizona within the United States Border Patrol's Tucson Sector, are areas of high illegal entry (the "project areas"):

- Starting two (2) miles north and west of Border Monument 140 and extending south and east to approximately one and one-half (1.5) miles east of Border Monument 124;
- Starting approximately one (1) mile west of Border Monument 116 and extending east to approximately one mile (1) east of Border Monument 100;
- Starting at approximately Border Monument 98 and extending east for approximately 10 miles;
- Starting approximately one-half (0.5) of a mile west of the Naco Port of Entry and extending east to approximately Border Monument 92;
- Starting approximately one-half (0.5) of a mile west of Border Monument 91 and extending east for approximately 16 miles;

- Starting approximately one-half (0.5) of a mile east of Border Monument 83 and extending west for two (2) miles; and
- Starting approximately one-half (0.5) of a mile west of Border Monument 74 and extending east to the Arizona – New Mexico state line.

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 areas 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 areas, 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 areas, 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 areas, 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, 128 Stat. 3094 (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, 93 Stat. 721 (Oct. 31, 1979) (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, 74 Stat. 220 (June 27, 1960) as amended, repealed, or replaced by Pub. L. 113-287, 128 Stat. 3094 (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 at 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); Wild and Scenic Rivers Act (Pub. L. 90-542, 82 Stat. 906 (Oct. 2, 1968) (16 U.S.C. 1271 et seq.)); the Farmland Protection Policy Act (7 U.S.C. 4201 et seq.); the Federal Land Policy and Management Act (Pub. L. 94-579, 90 Stat. 2743 (Oct. 21, 1976) (43 U.S.C. 1701 et seq.)); the Wilderness Act (Pub. L. 88-577, 78 Stat. 890 (Sept. 3, 1964) (16 U.S.C. 1131 et seq.)); sections 101(a)(14), 101(a)(17), and 101(b) of Title I of the Arizona Wilderness Act of 1984 (Pub. L. 98-406, 98 Stat. 1486 (August 28, 1984)); 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, 70 Stat. 1119 (Aug. 8, 1956) (16 U.S.C. 742a, et seq.)); the Fish and Wildlife Coordination Act (Pub. L. 73-121, 48 Stat. 401 (March 10, 1934) (16 U.S.C. 661 et seq.)); the National Trails System Act

(16 U.S.C. 1241 et seq.); the Administrative Procedure Act (5 U.S.C. 551 et seq.); the Wild Horse and Burro Act (16 U.S.C. 1331 et seq.); the Rivers and Harbors Act of 1899 (33 U.S.C. 403); the National Park Service Organic Act and the National Park Service General Authorities Act (Pub. L. 64-235, 39 Stat. 535 (Aug. 25, 1916) and Pub. L. 91-383, 84 Stat. 825 (Aug. 18, 1970) as amended, repealed, or replaced by Pub. L. 113-287, 128 Stat. 3094 (Dec. 19, 2014) (formerly codified at 16 U.S.C. 1, 2-4 and 16 U.S.C. 1a-1 et seq., now codified at 54 U.S.C. 100101 - 100102, 54 U.S.C. 100301-100303, 54 U.S.C. 100501-100507, 54 U.S.C. 100701-100707, 54 U.S.C. 100721-100725, 54 U.S.C. 100751-100755, 54 U.S.C. 100901-100906, 54 U.S.C. 102101 - 102102)); Arizona –Idaho Conservation Act of 1988 (Pub. L. 100-696, 102 Stat. 4571 (Nov. 18, 1988) (16 U.S.C. 460xx)); 16 U.S.C. 450y (Pub. L. 77-216, 55 Stat. 630 (Aug. 18, 1941), as amended by Pub. L. 82-478, 66 Stat. 510 (July 9, 1952)); 67 Stat. c18 (Nov. 5, 1952); National Forest Management Act of 1976 (16 U.S.C. 1600 et seq.); Multiple-Use and Sustained-Yield Act of 1960 (16 U.S.C. 528 - 531); 16 U.S.C. 472; 16 U.S.C. 551; 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 any other waiver determination made pursuant to section 102(c) of IIRIRA. Such waivers 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.

Dated: March 11, 2020.

Chad F. Wolf,
Acting Secretary of Homeland Security
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