

LEGAL STATUS

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

A Notice by the [Homeland Security Department](#) on [10/11/2018](#)

DOCUMENT DETAILS

Printed version:

PDF (<https://www.govinfo.gov/content/pkg/FR-2018-10-11/pdf/2018-22063.pdf>)

Publication Date:

10/11/2018 (/documents/2018/10/11)

Agency:

Department of Homeland Security (<https://www.federalregister.gov/agencies/homeland-security-department>)

Dates:

This determination takes effect on October 11, 2018.

Effective Date:

10/11/2018

Document Type:

Notice

Document Citation:

83 FR 51472

Page:

51472-51474 (3 pages)

Document Number:

2018-22063

DOCUMENT DETAILS

DOCUMENT STATISTICS

Page views:

1,563

as of 02/05/2019 at 2:15 pm EST

DOCUMENT STATISTICS

PUBLISHED DOCUMENT

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 in Hidalgo County in the State of Texas.

DATES:

This determination takes effect on October 11, 2018.

SUPPLEMENTARY INFORMATION:

Important mission requirements of the Department

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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 (<https://api.fdsys.gov/link?collection=plaw&congress=109&lawtype=public&lawnum=367&link-type=html>), § 2, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1701 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1701&type=usc&link-type=html>) 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, (</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, (</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 (<https://api.fdsys.gov/link?collection=plaw&congress=104&lawtype=public&lawnum=208&link-type=html>), Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C. 1103 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1103&type=usc&link-type=html>) note), as amended by the REAL ID Act of 2005, Public Law 109-13 (<https://api.fdsys.gov/link?collection=plaw&congress=109&lawtype=public&lawnum=13&link-type=html>), Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1103&type=usc&link-type=html>) note), as amended by the Secure Fence Act of 2006, Public Law 109-367 (<https://api.fdsys.gov/link?collection=plaw&congress=109&lawtype=public&lawnum=367&link-type=html>), § 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1103&type=usc&link-type=html>) note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161

(<https://api.fdsys.gov/link?collection=plaw&congress=110&lawtype=public&lawnum=161&link-type=html>), 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 Rio Grande Valley Sector is an area of high illegal entry. For the last several years, the Rio Grande Valley Sector has seen more apprehensions of illegal aliens than any other sector of the United States Border Patrol ("Border Patrol"). For example, in fiscal year 2017 alone, Border Patrol apprehended over 137,000 illegal aliens. In that same year Border Patrol seized approximately 260,000 pounds of marijuana and approximately 1,200 pounds of cocaine.

In order to satisfy the need for additional border infrastructure in the Rio Grande Valley Sector, DHS will take action to construct barriers and roads. DHS will construct barriers and roads within various segments of the border in the Rio Grande Valley Sector. The segments of the border within which such construction will occur are referred to herein as the "project area" and are more specifically described in Section 2 below.

Section 2

I determine that the following areas in the vicinity of the United States border, located in Hidalgo County in the State of Texas, within the United States Border Patrol's Rio Grande Valley Sector, are areas of high illegal entry (the "project area"):

- Starting approximately a quarter mile west of the location where the levee intersects Goodwin/Abram road and running east in proximity to the International Boundary and Water Commission ("IBWC") levee to approximately a quarter mile east of Anzalduas Dam Road, a total distance of approximately eight (8) miles.
- Starting at the eastern boundary of the Santa Ana National Wildlife Refuge and running east in proximity to the IBWC levee approximately two and four-tenths (2.4) miles to the western boundary of the Monterrey Banco Tract of the Lower Rio Grande Valley National Wildlife Refuge.
- Starting at the eastern boundary of the Monterrey Banco Tract of the Lower Rio Grande Valley National Wildlife Refuge and running south and east in proximity to the IBWC levee for approximately one and one-half (1.5) miles.
- Starting at the eastern boundary of the La Coma Tract of the Lower Rio Grande Valley National Wildlife Refuge and running east in proximity to the IBWC levee for approximately two and one-half (2.5) miles.
- Starting where South International Boulevard crosses the IBWC levee and running west and east in proximity to the IBWC levee approximately one-half (0.5) of a mile in both directions.
- Starting approximately one-quarter (0.25) of a mile west of the western boundary of the Mercedes Settling Basin and running northeast in proximity to the IBWC levee approximately two and one-half (2.5) miles.

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 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=4321&type=usc&link-type=html>) *et seq.*)); the

Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1531&type=usc&link-type=html>) *et seq.*)); the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (33 U.S.C. 1251 (<https://api.fdsys.gov/link?collection=uscode&title=33&year=mostrecent§ion=1251&type=usc&link-type=html>) *et seq.*)); the

National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966), as amended, repealed, or replaced by Public Law 113-287 (<https://api.fdsys.gov/link?collection=plaw&congress=113&lawtype=public&lawnum=287&link-type=html>) (Dec. 19, 2014) (formerly codified at 16 U.S.C. 470 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=470&type=usc&link-type=html>) *et seq.*, now

codified at 54 U.S.C. 100101 (<https://api.fdsys.gov/link?collection=uscode&title=54&year=mostrecent§ion=100101&type=usc&link-type=html>) note and 54 U.S.C. 300101 (<https://api.fdsys.gov/link?collection=uscode&title=54&year=mostrecent§ion=300101&type=usc&link-type=html>) *et seq.*)); the Migratory Bird Treaty Act (16 U.S.C. 703 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=703&type=usc&link-type=html>) *et seq.*); the Migratory Bird Conservation Act (16 U.S.C. 715 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=715&type=usc&link-type=html>) *et seq.*); the Clean Air Act (42 U.S.C. 7401 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=7401&type=usc&link-type=html>) *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. 470 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=470&type=usc&link-type=html>) *et seq.*); the Federal Cave Resources Protection Act of 1988 (16 U.S.C. 4301 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=4301&type=usc&link-type=html>) *et seq.*); the Safe Drinking Water Act (42 U.S.C. 300 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=300&type=usc&link-type=html>) *f et seq.*); the Noise Control Act (42 U.S.C. 4901 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=4901&type=usc&link-type=html>) *et seq.*); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=6901&type=usc&link-type=html>) *et seq.*); the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=9601&type=usc&link-type=html>) *et seq.*)).

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collection=uscode&title=42&year=mostrecent§ion=9601&type=usc&link-type=html) *et seq.*); the Archaeological and Historic Preservation Act (Pub. L. 86-523, as amended, repealed, or replaced by Pub. L. 113-287 (<https://api.fdsys.gov/link?collection=plaw&congress=113&lawtype=public&lawnum=287&link-type=html>) (Dec. 19, 2014) (formerly codified at 16 U.S.C. 469 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=469&type=usc&link-type=html>) *et seq.*, now codified at 54 U.S.C. 312502 (<https://api.fdsys.gov/link?collection=uscode&title=54&year=mostrecent§ion=312502&type=usc&link-type=html>) *et seq.*)); the Antiquities Act (formerly codified at 16 U.S.C. 431 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=431&type=usc&link-type=html>) *et seq.*, now codified 54 U.S.C. 320301 (<https://api.fdsys.gov/link?collection=uscode&title=54&year=mostrecent§ion=320301&type=usc&link-type=html>) *et seq.*); the Historic Sites, Buildings, and Antiquities Act (formerly codified at 16 U.S.C. 461 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=461&type=usc&link-type=html>) *et seq.*, now codified at 54 U.S.C. 3201 (<https://api.fdsys.gov/link?collection=uscode&title=54&year=mostrecent§ion=3201&type=usc&link-type=html>)-320303 & 320101-320106); the Farmland Protection Policy Act (7 U.S.C. 4201 (<https://api.fdsys.gov/link?collection=uscode&title=7&year=mostrecent§ion=4201&type=usc&link-type=html>) *et seq.*); the Coastal Zone Management Act (Pub. L. 92-583 (16 U.S.C. 1451 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1451&type=usc&link-type=html>), *et seq.*)); the Federal Land Policy and Management Act (Pub. L. 94-579 (43 U.S.C. 1701 (<https://api.fdsys.gov/link?collection=uscode&title=43&year=mostrecent§ion=1701&type=usc&link-type=html>) *et seq.*)); the National Wildlife Refuge System Administration Act (Pub. L. 89-669, 16 U.S.C. 668 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=668&type=usc&link-type=html>)dd-668ee); National Fish and Wildlife Act of 1956 (Pub. L. 84-1024 (16 U.S.C. 742 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=742&type=usc&link-type=html>)a, *et seq.*)); the Fish and Wildlife Coordination Act (Pub. L. 73-121 (16 U.S.C. 661 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=661&type=usc&link-type=html>) *et seq.*)); the Administrative Procedure Act (5 U.S.C. 551 (<https://api.fdsys.gov/link?collection=uscode&title=5&year=mostrecent§ion=551&type=usc&link-type=html>) *et seq.*); the River and Harbors Act of 1899 (33 U.S.C. 403 (<https://api.fdsys.gov/link?collection=uscode&title=33&year=mostrecent§ion=403&type=usc&link-type=html>))); the Eagle Protection Act (16 U.S.C. 668 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=668&type=usc&link-type=html>) *et seq.*); the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 (<https://api.fdsys.gov/link?collection=uscode&title=25&year=mostrecent§ion=3001&type=usc&link-type=html>) *et seq.*); and the American Indian Religious Freedom Act (42 U.S.C. 1996 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=1996&type=usc&link-type=html>))).

This waiver does not revoke or supersede the previous waiver published in the **Federal Register** on April 8, 2008 (73 FR 19077 (/citation/73-FR-19077)), 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: October 4, 2018.

Kirstjen M. Nielsen,

Secretary of Homeland Security.

[FR Doc. 2018-22063 (/a/2018-22063) Filed 10-10-18; 8:45 am]

BILLING CODE 9111-14-P

PUBLISHED DOCUMENT
