



# Border Security: The San Diego Fence

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## Summary

This report outlines the issues involved with DHS's construction of the San Diego border fence and highlights some of the major legislative and administrative developments regarding its completion; it will be updated as warranted. (For more analysis of border fencing and other barriers, please see CRS Report RL33659, *Border Security: Barriers Along the U.S. International Border*, by (name redacted), Yule Kim, and (name redacted).) Congress first authorized the construction of a 14-mile, triple-layered fence along the U.S.-Mexico border near San Diego in the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996. By 2004, only nine miles had been completed, and construction was halted because of environmental concerns. The 109<sup>th</sup> Congress subsequently passed the REAL ID Act (P.L. 109-13, Div. B), which contained provisions to facilitate the completion of the 14-mile fence. These provisions allow the Secretary of Homeland Security to waive *all legal requirements* determined necessary to ensure expeditious construction of authorized barriers and roads. In September 2005, the Secretary used this authority to waive a number of mostly environmental and conservation laws. Subsequently, the Secure Fence Act of 2006 (P.L. 109-367) *removed* the specific IIRIRA provisions authorizing the San Diego fence and added provisions authorizing five stretches of two-layered reinforced fencing along the southwest border. While the specific authorization of the San Diego fence was deleted, the project appears permissible under a separate, more general authorization provision of IIRIRA. In the 110<sup>th</sup> Congress, S. 1639, introduced by Senator Edward Kennedy on June 20, 2007, would amend § 102 of IIRIRA to once again expressly authorize the construction of the San Diego fence.

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## Background

The United States Border Patrol (USBP) is the lead federal agency charged with securing the U.S. international land border with Mexico and Canada. The USBP's San Diego sector is located north of Tijuana and Tecate, Mexican cities with a combined population of 2 million people, and features no natural barriers to entry by unauthorized migrants and smugglers.<sup>1</sup> As part of the "Prevention Through Deterrence" strategy, which called for reducing unauthorized migration by placing agents and resources directly on the border abutting population centers, in 1990 the USBP began erecting a physical barrier to deter illegal entries and drug smuggling in the San Diego sector using the broad powers granted to the Attorney General (AG) to control and guard the U.S. border.<sup>2</sup> The ensuing "primary" fence was completed in 1993 and covered the first 14 miles of the border, starting from the Pacific Ocean, and was constructed of 10-foot-high welded steel.<sup>3</sup> This fence (and the subsequent three-tiered fence, see discussion below) was constructed with the assistance of the Department of Defense's (DOD's) Army Corps of Engineers.

According to the Bureau of Customs and Border Protection (CBP), the primary fence, in combination with various labor-intensive USBP enforcement initiatives along the San Diego border region (i.e., Operation Gatekeeper), proved to be quite successful but fiscally and environmentally costly.<sup>4</sup> For example, as undocumented aliens and smugglers breached the primary fence and attempted to evade detection, USBP agents were often forced to pursue the suspects through environmentally sensitive areas. It soon became apparent to immigration officials and lawmakers that the USBP needed, among other things, a "rigid" enforcement system that could integrate infrastructure (i.e., a multi-tiered fence and roads), manpower, and new technologies to further control the border region. The concept of a three-tiered fence system was first recommended by a 1993 Sandia Laboratories study commissioned by the Immigration and Naturalization Service (INS). The study concluded that aliens attempting to enter the United States from Mexico had shown remarkable resourcefulness in bypassing or destroying obstacles in their path, including the existing primary fence, and postulated that "[a] three-fence barrier system with vehicle patrol roads between the fences and lights will provide the necessary discouragement."<sup>5</sup> Congress responded to these enforcement needs, in part, with the passage of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996.<sup>6</sup> This comprehensive law, among other things, expanded the existing fence by authorizing the INS to construct a triple-layered fence along the same 14 miles of the U.S.-Mexico border near San Diego.

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<sup>1</sup> U.S. Department of Justice, Office of the Inspector General, *Operation Gatekeeper: An Investigation Into Allegations of Fraud and Misconduct*, July 1998.

<sup>2</sup> See e.g., 8 U.S.C. §1103 (a)(5).

<sup>3</sup> U.S. Government Accountability Office, *Border Control—Revised Strategy is Showing Some Positive Results*, GAO/GGD-95-30, January 31, 1995.

<sup>4</sup> See California Coastal Commission, *W 13a Staff Report and Recommendation on Consistency Determination*, CD-063-03, October 2003, at 14-16 (stating that construction of the primary fence significantly assisted the USBP's efforts in deterring smuggling attempts via drive-throughs using automobiles and motorcycles). (Hereafter *CCC Staff Report*.)

<sup>5</sup> Peter Andreas, "The Escalation of U.S. Immigration Control in the Post-NAFTA Era," *Political Science Quarterly*, vol. 113, no. 4, winter 1998-1999, p. 595.

<sup>6</sup> See P.L. 104-208, Div. C. IIRIRA was passed as part of the Omnibus Consolidated Appropriations Act of 1997.

## Section 102 of IIRIRA—Improvement of Barriers at the Border

Section 102 of IIRIRA concerns the improvement and construction of barriers at our international borders. As described later, several of the provisions in §102 were amended in the 109<sup>th</sup> Congress to facilitate the construction of the San Diego fence, as well as other border barriers. The following paragraphs, however, discuss §102 as originally passed in IIRIRA to provide a historical perspective and comparative analysis.

Section 102(a) appears to give the AG<sup>7</sup> broad authority to install additional physical barriers and roads “in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.” The phrase *vicinity of the United States border* is not defined in the Immigration and Nationality Act (8 U.S.C. §1101 *et seq.*) or in immigration regulations. The section also does not stipulate what specific characteristics would designate an area as one of *high illegal entry*. This subsection has not been amended.

Section 102(b)—before its amendment in the Secure Fence Act of 2006 (P.L. 109-367)—mandated that the AG construct a barrier in the border area near San Diego. Specifically, §102(b) directed the AG to construct a three-tiered barrier along the 14 miles of the international land border of the United States, starting at the Pacific Ocean and extending eastward. Section 102(b) ensured that the AG would build a barrier, pursuant to his broader authority in §102(a), near the San Diego area. Other non-amended provisions in §102(b) provide authority for the acquisition of necessary easements, require that certain safety features be incorporated into the design of the fence, and authorize an appropriation not to exceed \$12 million.

Section 102(c)—before its amendment in the REAL ID Act as part of P.L. 109-13—waived the Endangered Species Act (ESA) of 1973 (16 U.S.C. §§1531 *et seq.*) and the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. §§4321 *et seq.*), to the extent the AG determined necessary, in order to ensure expeditious construction of the barriers authorized to be constructed under §102.<sup>8</sup> The waiver authority in this provision appears to apply both to barriers that may be constructed *in the vicinity of the border* under §102(a) and to the barrier that is to be constructed near the San Diego area under §102(b).

## San Diego Sector Apprehensions

Apprehension statistics have long been used as a performance measure by the USBP. However, the number of apprehensions may be a misleading statistic for several reasons, including the data’s focus on events rather than people<sup>9</sup> and the absence of reliable estimates for how many aliens successfully evade capture. These factors aside, however, apprehensions data remain the best way to gain a glimpse into the reality facing USBP agents and the trends in unauthorized

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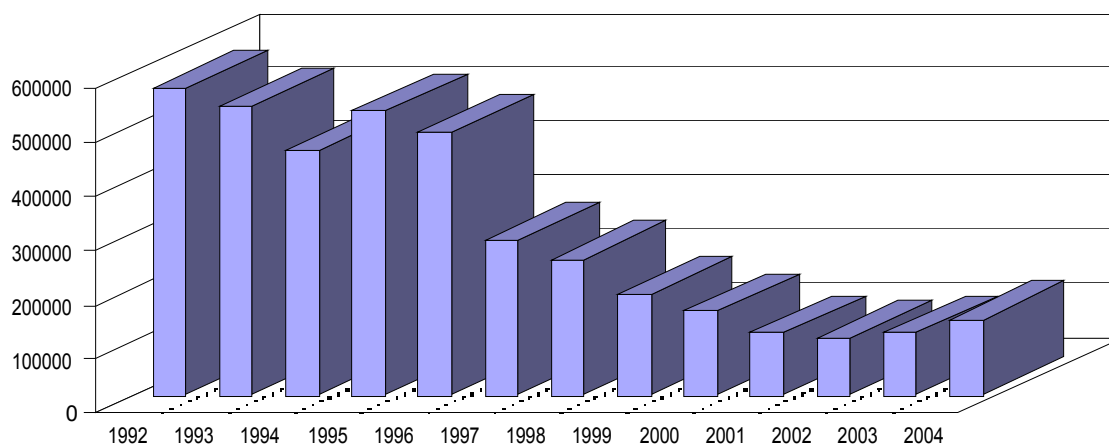
<sup>7</sup> Although the law still cites to the Attorney General, the authorities granted by this section now appear to rest with the Secretary of DHS. See P.L. 107-296, §§102(a), 441, 1512(d) and 1517 (references to the Attorney General or Commissioner in statute and regulations are deemed to refer to the Secretary).

<sup>8</sup> CBP never used this waiver authority and actually published a Final Environmental Impact Study and received a non-jeopardy Biological Opinion under the ESA. See Department of Homeland Security, Environmental Impact Statement for the Completion of the 14-mile Border Infrastructure System, San Diego, California (July 2003).

<sup>9</sup> If the same person is apprehended multiple times attempting to enter the country in one year, each apprehension will be counted separately by the USBP in generating their apprehension statistics. This means that apprehension statistics may overstate the number of aliens apprehended each year.

migration along the border. As **Figure 1** shows, apprehensions remained stable during the early 1990s in the San Diego sector despite the construction of the “primary” fence in 1993.

**Figure 1. USBP Apprehensions, San Diego Sector, FY1992-FY2004**



Source: CRS Presentation of CBP Data

After the IIRIRA’s mandate for increased enforcement along the Southwest border in 1996, including construction of the triple-fence, apprehensions dropped rapidly in the San Diego sector in the late 1990s—from 480,000 in FY1996 to 100,000 in FY2002. The reduction in apprehensions was even more marked in the areas where fencing was constructed within San Diego sector. The USBP’s Imperial Beach and Chula Vista stations saw their apprehensions decline from 321,560 in FY1993 to 19,035 in FY2004—a reduction of 94% over the 12 year period. Although much of this reduction in apprehensions in those stations and in San Diego sector may have been due to the construction of the triple-fence, the sector also saw an increase in other resources that may account for part of the reduction. For example, the number of agents assigned to the San Diego sector increased significantly during this period—from 980 agents in 1993 to 2,274 in 1998.<sup>10</sup> Additionally, the number of underground sensors deployed in the San Diego sector almost tripled from 1993 to 1998, and the fleet of vehicles increased by over 150% over the same period.<sup>11</sup>

The increase in manpower and resources reflected the USBP’s policy of re-routing unauthorized migration away from population centers to remote border regions where their agents have a tactical advantage over border-crossers. Other sectors, especially the remote Tucson sector in Arizona, saw apprehensions increase significantly in the late 1990s. Proponents of border fences point to the drastic reduction in apprehensions along the San Diego sector as tangible proof that these fences succeed in their goal of reducing cross-border smuggling and migration where they are constructed. Opponents attribute part of the decrease in apprehensions to the increase in manpower and resources in the sector and (pointing to the increase in apprehensions in less-populated sectors) contend that the fence only succeeds in re-routing unauthorized migration.

<sup>10</sup> CBP data provided to CRS on January 12, 2004.

<sup>11</sup> U.S. Citizenship and Immigration Services, “Operation Gatekeeper Fact Sheet,” July 14, 1998, available at <http://uscis.gov/graphics/publicaffairs/factsheets/opgatefs.htm>.

## Recent Developments

### The Controversy

By 2004, only nine miles of the 14 miles of fence authorized to be constructed had been completed. Two sections, including the final three-mile stretch of fence that leads to the Pacific Ocean, were not finished because of environmental concerns and litigation.<sup>12</sup> In order to finish the fence, the USBP proposed to fill a deep canyon known as “Smuggler’s Gulch” with over 2 million cubic yards of dirt. The triple-fence would then be extended across the filled gulch. California’s Coastal Commission (CCC), however, essentially halted the completion of the fence in February 2004. The CCC determined that the CBP had not demonstrated, among other things, that the project was consistent “to the maximum extent practicable” with the policies of the California Coastal Management Program—a state program approved under the federal Coastal Zone Management Act (CZMA) (16 U.S.C. §§1451-1464).<sup>13</sup> Specifically, the CCC was concerned with the potential for significant adverse effects on (1) the Tijuana River National Estuarine Research and Reserve; (2) state and federally listed threatened and endangered species; (3) lands set aside for protection within California’s Multiple Species Conservation Program; and (4) other aspects of the environment. The CCC held that Congress did not specify a particular design in the IIRIRA and that the CBP failed to present a convincing argument that the less environmentally damaging alternative projects it rejected would have prevented compliance with the IIRIRA.

### Congressional Action

Although the IIRIRA initially allowed DHS to waive two major environmental laws, it did not include the CZMA in its purview. Congress, accordingly, attempted to pass legislation to facilitate the completion of the fence. The 107<sup>th</sup> Congress, in §446 of the Homeland Security Act (P.L. 107-296), expressed its sense that completing the 14-mile border project should be a priority for the Secretary of DHS. The 108<sup>th</sup> Congress considered measures that would have allowed the Secretary of DHS to waive the CZMA and other environmental laws, but no bill passed both chambers.<sup>14</sup> However, the 109<sup>th</sup> Congress subsequently passed the REAL ID Act of 2005 (P.L. 109-13, Div. B), which authorized the Secretary of Homeland Security to waive *all legal requirements* determined necessary to ensure expeditious construction of barriers and roads authorized under IIRIRA § 102. Such waivers are effective upon publication in the Federal Register. Federal district courts are provided with exclusive jurisdiction to review claims alleging that the actions or decisions of the Secretary violate the U.S. Constitution, and district court rulings may only be reviewed by the Supreme Court. Because the REAL ID Act amended only the waiver provision of §102 of IIRIRA, the new waiver authority appears to apply to all the barriers that may be constructed under IIRIRA—that is, both to barriers constructed in the vicinity of the border and to the barrier that is to be constructed near the San Diego area.

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<sup>12</sup> A coalition of environmental groups had filed a lawsuit alleging that the government had not issued a proper environmental impact statement. The lawsuit was later dismissed because of the use of DHS’s new waiver authority (see later discussion). *Sierra Club v. Ashcroft*, 04-CV-272 (S.D. Cal. February 10, 2004).

<sup>13</sup> See CCC, *Staff Report*, at 5-7. The CZMA requires federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone to be carried out in a manner that is consistent to the maximum extent practicable with the policies of an approved state management program. 16 U.S.C. §1456(c).

<sup>14</sup> See, e.g., S. 2845 (108<sup>th</sup> Cong.), as passed by the House.

The 109<sup>th</sup> Congress also passed the Secure Fence Act of 2006 (P.L. 109-367), which *removed* the specific provisions authorizing the San Diego fence and added provisions authorizing five stretches of two-layered reinforced fencing along the southwest border. CBP has estimated that this fencing will total roughly 850 miles.<sup>15</sup> While the specific authorization of the San Diego fence was deleted, the project appears permissible under the general fence authorization in §102(a) of IIRIRA. In the 110<sup>th</sup> Congress, S. 1639, introduced by Senator Edward Kennedy on June 20, 2007, would amend § 102 of IIRIRA to once again expressly authorize the construction of the San Diego fence.

### **Waivers, Costs, and Construction**

CBP, in conjunction with the Army Corps of Engineers and the National Guard, have now begun the process of acquiring the land required to finish building the San Diego border fence. On September 22, 2005, DHS published a *Federal Register* notice declaring the waiver of, in their entirety: (1) the NEPA; (2) the ESA; (3) the CZMA; (4) the Federal Water Pollution Control Act (33 U.S.C. §§1251 *et seq.*); (5) the National Historic Preservation Act (16 U.S.C. §§470 *et seq.*); (6) the Migratory Bird Treaty Act (16 U.S.C. §§703 *et seq.*); (7) the Clean Air Act (42 U.S.C. §§7401 *et seq.*); and (8) the Administrative Procedure Act (5 U.S.C. §§551 *et seq.*).<sup>16</sup> DHS predicts that the San Diego fence will have a total cost of \$127 million for its 14-mile length when it is completed—roughly \$9 million a mile.<sup>17</sup> Construction of the first 9.5 miles of fencing cost \$31 million, or roughly \$3 million a mile, while construction of the last 4.5 miles of fencing is projected to cost \$96 million, or roughly \$21 million a mile.<sup>18</sup> DHS is proposing to hire private contractors to expedite the construction of the remaining 4.5 miles of fencing; this fact, and the complex construction project of filling Smuggler's Gulch, may account for part of the difference in cost. The FY2006 DHS Appropriations Act (P.L. 109-90) provides \$35 million for the construction of the border fence in San Diego. For FY2007, conferees for the DHS Appropriations Act (P.L. 109-295) recommended \$30.5 million be allocated to the San Diego fence. Since 1990, Congress has also included language in DOD appropriations bills allowing the DOD to assist federal agencies in counter-drug activities, including the construction of fencing and roads to reduce the flow of narcotics into the country.<sup>19</sup>

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<sup>15</sup> From CBP Congressional Affairs, September 25, 2006.

<sup>16</sup> The waiver also includes all federal, state, or other laws and regulations deriving from the listed laws.

<sup>17</sup> See DHS FY2007 Congressional Budget Justifications.

<sup>18</sup> From the DHS FY2006 and FY2007 Congressional Budget Justifications.

<sup>19</sup> See P.L. 101-510, Div. A, Tit. X, §1004; codified, as amended, at 10 U.S.C. §374 nt. This authorization was recently extended through FY2011. See P.L. 109-364, Div. A, Tit. X, §1021.



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