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Barriers Along the U.S. Borders: Key Authorities and Requirements

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Summary

Securing the borders is an issue of perennial concern to Congress. Federal law authorizes the Department of Homeland Security (DHS) to construct barriers along the U.S. borders to deter illegal crossings. DHS is also required to construct reinforced fencing along at least 700 miles of the land border with Mexico (a border that stretches 1,933 miles), though Congress has not provided a deadline for its completion. Nor has Congress provided specific guidelines about the characteristics of such fencing (e.g., the height or material composition of the fencing) or other barriers that DHS may deploy. At this time, fence construction has largely been halted, though DHS still needs to deploy fencing along nearly 50 additional miles of the southwest border to satisfy the 700-mile requirement.

The primary statute authorizing DHS to deploy barriers along the international borders is Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA; P.L. 104-208, div. C). Congress made significant amendments to IIRIRA Section 102 through three enactments—the REAL ID Act of 2005 (P.L. 109-13, div. B), the Secure Fence Act of 2006 (P.L. 109-367), and the Consolidated Appropriations Act, 2008 (P.L. 110-161, div. E). These amendments required that DHS construct hundreds of miles of new fencing along the border, and they also provided the Secretary of DHS with broad authority to waive "all legal requirements" that may impede construction of barriers and roads under IIRIRA Section 102. These statutory modifications, along with increased funding for border projects, resulted in the deployment of several hundred miles of new barriers along the southwest border between 2005 and 2011. In recent years, DHS has largely stopped deploying additional fencing along the border, as the agency has altered its enforcement strategy in a manner that places less priority upon barrier construction.

Both during and immediately following the 2016 presidential campaign, President-elect Donald Trump stated that the construction of additional barriers along the U.S.-Mexico border would be a top priority for his Administration. Although interest in the framework governing the deployment of barriers along the international border during the Obama Administration typically focused on the stringency of the statutory mandate to deploy fencing along at least 700 miles of the southern border, attention may shift to those provisions in current law that allow, but do not require, the deployment of fencing or other physical barriers along additional mileage of the border. IIRIRA Section 102 authorizes DHS to construct additional fencing or other barriers along the U.S. land borders beyond the 700 miles specified in statute. Indeed, nothing in current statute would appear to bar DHS from potentially installing hundreds of miles of additional fencing or other barriers along the border, at least so long as the action was determined appropriate to deter illegal crossings in areas of high illegal entry. Moreover, IIRIRA Section 102 grants DHS authority to waive any legal requirement that would impede the expeditious construction of additional barriers and roads. DHS's current policy not to deploy a substantial amount of additional fencing, beyond what is expressly required by law, appears primarily premised on policy considerations and funding constraints, rather than significant legal impediments.

This report discusses the statutory framework governing the deployment of fencing and other barriers along the U.S. international borders. For more extensive discussion of ongoing activities and operations along the border between ports of entry, see CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, by (name redacted) .

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Securing the international borders of the United States has been an issue of perennial interest and importance to Congress. Federal law authorizes the Department of Homeland Security (DHS) to construct barriers along the U.S. borders to deter illegal crossings.[1] DHS is also required to construct reinforced fencing along at least 700 miles of the land border with Mexico,[2] though fencing is not required to be deployed at any "particular location" along that border.[3] Responsibility for carrying out these functions, and more generally securing the U.S. land borders between ports of entry, primarily falls to U.S. Border Patrol within DHS's Customs and Border Protection (CBP).[4] President-elect Donald Trump has identified the construction of additional barriers along the U.S.-Mexico border as a top priority for his Administration.[5] Although congressional interest in the legal framework governing fence deployment has, in recent years, tended to focus on the stringency of the statutory mandate to deploy fencing along at least 700 miles of the southern border, attention may shift to those provisions in current law which allow, but do not require, the deployment of fencing and other barriers along additional portions of the U.S. land borders.

The primary statute authorizing DHS to deploy barriers along the international borders is Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[6] Congress made significant amendments to IIRIRA Section 102 through three enactments—the REAL ID Act of 2005, the Secure Fence Act of 2006, and the Consolidated Appropriations Act, 2008.[7] These amendments established a mandate upon DHS to construct hundreds of miles of new fencing along the border, and also provided the Secretary of DHS with broad authority to waive "all legal requirements" that may impede construction of barriers and roads under IIRIRA Section 102.

These statutory modifications, along with increased funding for border projects, resulted in the deployment of several hundred miles of fencing and other barriers along the southwest land border between 2005 and 2011.[8] A portion of this infrastructure is fencing that is primarily intended to prevent illegal border crossings by foot (referred to by DHS as "pedestrian fencing"). Other types of barriers have been installed to impede vehicles from smuggling persons or

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[1] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, div. C, § 102(a)-(c), as amended by the REAL ID Act of 2005, P.L. 109-13, div. B, § 102; the Secure Fence Act of 2006, P.L. 109-367, § 3; and the Consolidated Appropriations Act, 2008 P.L. 110-161, div. E, §564(a). These requirements are codified at 8 U.S.C. § 1103 note. Unless otherwise indicated in this report, references in footnote citations to "IIRIRA § 102" refer to the current version of the statute. The current text of IIRIRA § 102 can be found at **Appendix A**.

[2] The U.S.-Mexico land border is approximately 1,933 miles. The U.S. border area includes California, Arizona, New Mexico, and Texas. For further information, see CRS Report RS21729, *U.S. International Borders: Brief Facts*, by (name redacted) .

[3] IIRIRA § 102(b).

[4] U.S. Customs and Border Protection (CBP) within DHS is the primary agency responsible for border security activities at U.S. land borders and ports of entry. Within CBP, the U.S. Border Patrol serves the lead role in border enforcement matters between ports of entry.

[5] *See* President-elect Donald Trump, Presidential Campaign Announcement Speech (Jun. 16, 2015), *in* TIME (online ed., Jun. 16, 2015), http://time.com/3923128/donald-trump-announcement-speech/ (proposing to "build a great, great wall on our southern border"); Interview with President-elect Donald Trump, 60 Minutes, CBS News (aired Nov. 13, 2016), http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/ (stating intent to pursue deployment of additional fencing and a "wall" along the U.S.-Mexico border).

[6] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, div. C, § 102(a)-(c).

[7] *See supra* note 1 (providing citations to provisions amending IIRIRA).

[8] For a graphic illustration of these changes, see CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, by (name redacted) , at "Figure 3. Tactical Infrastructure Appropriations and Miles of Border Fencing, FY1996-FY2016."

contraband into the United States (referred to by DHS as "vehicle fencing"),[9] but do not stop crossings by persons traveling on foot. In some instances, an additional layer of fencing (secondary fencing) may also be installed behind primary pedestrian fencing to further impede illegal crossings.

The efficacy of deploying additional fencing along the border has been the subject of debate among many policymakers, particularly regarding the cost, environmental impact, and effectiveness of border fencing in comparison to alternative means of deterring illegal crossings.[10] Largely on account of changes in DHS's border enforcement strategy and prioritization of resources,[11] the construction of additional fencing along the land border with Mexico has largely halted. In October 2014, DHS indicated that it had constructed a total of 352.7 miles of pedestrian fence (in addition 36.3 miles of secondary fencing), and 299 miles of vehicle fencing along the southwest border.[12] The total amount of pedestrian and vehicle fencing identified by DHS was slightly less than the 653 miles that U.S. Border Patrol had reportedly identified as appropriate for fencing and other barriers.[13] However, it appears that further fencing would need to be deployed in order for DHS to satisfy the statutory requirement that the agency construct fencing "along not less than 700 miles of the southwest border."[14]

IIRIRA Section 102(b), as most recently amended by the Consolidated Appropriations Act, 2008, provides that "notwithstanding" the requirement to deploy fencing along 700 miles of the southwest border, DHS is not obligated to install fencing at "any particular location." One way to construe this proviso is simply to indicate that, while DHS is required to install fencing along at least 700 miles of the border, it is not required to install any portion of the mandated fencing at

[9] DHS's use of the term "vehicle fence" to describe permanent vehicle barriers installed along the border appears to be of relatively recent vintage. *Compare* HOUSE COMMITTEE ON APPROPRIATIONS, DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS FOR FY2007, PT. IV, COMMITTEE PRINT, Apr. 6, 2006 (statement by DHS Secretary Michael Chertoff describing DHS plans to construct "an additional 40 miles of pedestrian fence and 140 miles of vehicle barriers") *with* DHS Secretary Jeh Johnson, "Border Security in the 21st Century," Remarks as Delivered and Accompanying Slide Presentation, Oct. 9, 2014, *available at* http://www.dhs.gov/news/2014/10/09/remarks-secretary-homeland-security-jeh-johnson-border-security-21st-century (discussing DHS's construction of "vehicle fencing" from FY2000 through FY2014). DHS's usage of the term "vehicle fencing" to describe types of permanent vehicle barriers installed along the border appears to go back at least since October 2007, when DHS announced plans to construct 300 miles of "vehicle fence" along the southwest border as part of the Vehicle Fence 300 (VF-300) initiative.

[10] For discussion of policy considerations which may inform decisions as to whether to deploy fencing and other barriers along the border, see archived CRS Report RL33659, *Border Security: Barriers Along the U.S. International Border*, by former CRS policy analyst (name redacted) and (name redacted), at 26 -34.

[11] See generally CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, supra note 8.

[12] *See* Remarks of DHS Secretary Jeh Johnson, *supra* note 9. Maps that roughly indicate the stretches of the U.S.-Mexico border where fencing was deployed as of June 2011 can be viewed at http://nemo.cbp.gov/borderpatrol/2435_southwest.pdf (last accessed on Nov. 16, 2016).

[13] *See* "The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744: Hearing Before the Senate Committee on the Judiciary," Apr. 23, 2013 (remarks by DHS Secretary Janet Napolitano in response to question, stating that the U.S. Border Patrol had identified 653 miles along the southwest border where fencing was appropriate), *transcript available at* http://www.c-span.org/video/?312302-1/dhs-sec-napolitano-testifies-immigration-reform.

[14] IIRIRA § 102(b)(1)(A). In identifying its proximity to achieving this 700-mile mandate, DHS has typically counted only primary pedestrian and vehicle fencing, but not any secondary fencing that may have been constructed behind such fencing. *See, e.g.*, DHS: THE PATH FORWARD, HEARING BEFORE THE HOUSE COMMITTEE ON HOMELAND SECURITY, SERIAL NO. 111-1, 111th Cong., 1st Sess. (2009), Written Responses by DHS Secretary Janet Napolitano to Questions Posed by Rep. Lamar Smith, at 65 (describing DHS as having "completed 611 miles of fence along the southwest border—301 miles of vehicle fence and 310 miles of primary pedestrian fence"). Indeed, the relevant statutory obligation refers to *mileage along the southwest border* where fencing is to be constructed, rather than *the total mileage of fencing deployed by DHS* along the border. *See infra* at "Miles Along the Border vs. Total Miles of Fencing."

any specific location (in contrast to the earlier requirement of the Secure Fence Act). An alternative interpretation of this proviso has also been suggested (including by some DHS officials, but not consistently), under which DHS could potentially construct fencing along *less than 700 miles* of the border and satisfy the statute's fencing requirements, if the agency determined additional fencing to be unwarranted. This broad interpretation of the proviso seems problematic, however, as it would render Section 102(b)'s provision requiring fencing "along not less than 700 miles" of the border meaningless. The legislative history behind the changes made to IIRIRA Section 102(b), along with the interpretation given to this provision by federal courts (albeit primarily in non-binding dicta), also favors the narrower interpretation.

Congress has not squarely addressed the appropriate interpretation of the fencing requirement in the following years. Members and congressional committees have arguably taken differing views regarding the nature of the fencing requirements in the years since the enactment of the most recent amendments to IIRIRA Section 102.[15]

Regardless of the appropriate interpretation of IIRIRA's requirement that DHS install fencing along 700 miles of the southwest border, the statute imposes no clear deadline for when DHS must deploy any contemplated fencing. In 2011, a legal challenge brought by the State of Arizona to compel completion of the fence along 700 miles of the border was dismissed by the reviewing federal district court on the ground that the Arizona's challenge concerned activities which were committed to agency discretion and not subject to judicial review.[16]

In recent years, legislation has perennially been introduced to modify the statutory authorities governing DHS's deployment of fencing and other infrastructure along or near the border.[17] In the 113th Congress, the Senate-passed immigration reform bill, S. 744, would have required DHS to develop and implement a border security strategy, which would have included the construction of at least 700 miles of pedestrian fencing along the Southwest land border. Benchmarks for the implementation of these strategies would have constituted "triggers" to be achieved before many unlawfully present aliens would be permitted to first obtain provisional legal status, and then become eligible for full-fledged legal immigrant status. For its part in the 113th Congress, the House passed legislation, H.R. 5230, intended to facilitate CBP's border security activities on federal lands within 100 miles of the international borders, including by exempting application of specific laws to CBP border construction projects on such lands.

Legislation introduced in the 114th Congress, including H.R. 399, as reported out of the House Committee on Homeland Security, would have established new fencing requirements along the southwest border or facilitated border construction projects on federal lands. Among other things, H.R. 399 would have effectively required fencing along 700 miles of the border to be completed

[15] *Compare* S.Rept. 113-40, at 7 (2013) (report of Senate Judiciary Committee on version of S. 744, the Border Security, Economic Opportunity, and Immigration Act, reported out of Committee, 113th Cong., 1st Sess., describing DHS as "having 651 miles of fencing out of nearly 652 miles mandated by Congress"); S.Rept. 113-40, at 44 (report of Senate Appropriations Committee, concerning homeland security appropriations legislation for FY2014 reported out of Committee, describing funds appropriated over the years as having "been used to construct the 651 miles of fencing and border infrastructure mandated by the Secure Fence Act, as amended"); *with* H.R. 2892, § 560 111th Cong., 1st Sess. (2009) (as passed by Senate with engrossed amendment, amending IIRIRA § 102 to impose additional specifications and deadlines "to meet the 700-mile fence requirement" of the section).

[16] United States v. Arizona, No. 2:10-cv-01413-SRB, Order Dismissing Az.'s Countercls. (D. Az., Oct. 21, 2011).

[17] *See, e.g.*, H.R. 399, 114th Cong., 1st Sess. (2015) (legislation reported by House Homeland Security Committee); S. 208, 114th Cong., 1st Sess. (2015); H.R. 4962, 113th Cong., 2d Sess. (2014).

within 18 months, and would also have identified specific areas along the border where such fencing would be installed.[18]

This report provides an overview of the key statutory authorities and requirements governing DHS's construction of barriers along the international borders of the United States. It also includes appendixes listing federal laws that have been waived by DHS in furtherance of border construction projects. The report, however, does not discuss proposals to modify this framework or fund an expansion of border fencing. For more extensive discussion of ongoing activities and operations by DHS to secure the border between ports of entry, see CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, by (name redacted) .

Key Statutory Authorities and Requirements

Prior to 1996, federal immigration statutes did not expressly authorize or require the construction of barriers along the U.S. international borders.[19] In the preceding years, authority to deploy any such barriers appears to have primarily derived from the general statutory responsibility of the Attorney General (and now the Secretary of Homeland Security)[20] to "guard the boundaries and borders of the United States against the illegal entry of aliens."[21] Perhaps the most prominent example of this general authority being employed to construct barriers occurred in the early 1990s, when the U.S. Border Patrol (with the assistance of the Department of Defense's Army

[18] *Id.* § 3(c)(1). The bill specified 48 miles along the border where double-layered pedestrian fencing would be required to be installed. If such fencing were installed, it would result in fencing having been deployed along a total of slightly more than 700 miles of the southwest border.

[19] Border construction activities had been previously authorized primarily for purposes such as boundary demarcation. For example, Congress had earlier authorized the executive branch "to construct and maintain fences, monuments and other demarcations of the boundary line between the United States and Mexico," in accordance with relevant boundary and water allocation treaties between the two countries. Act of August 19, 1935, 49 Stat. 660. Such authority was sometimes used to assist in immigration controls. *See also* S. REPT. 81-848, at 2 (discussing funds provided through FY1949 for the construction of ranch-type and chain-link fencing, as an aid to the Department of Agriculture, Immigration and Naturalization Service, and the Bureau of Customs "in maintaining their controls at the border and as an aid to demarking the boundary line"). Indeed, in the years immediately after World War II, legislative proposals were considered to fund two large-scale fencing projects proposed by the International Boundary and Water Commission (the international body responsible for overseeing implementation of the water and boundary treaties between the United States and Mexico). Together, these projects would have potentially covered over 1,000 miles of the southwest border with fencing. Some supporters of funding these projects suggested that, in addition to providing assistance in boundary demarcation, the proposed fencing could deter illegal border crossings by aliens and smugglers and also prevent the spread of disease from domesticated animals that grazed along the U.S.-Mexico border. Ultimately, however, Congress opted not to act on these proposals. For background, see S.REPT. 80-470 (1947) (report accompanying S.J. RES. 46, 80th Cong., 1st Sess., describing fencing projects that had been proposed by International Boundary and Water Commission and discussing potential benefits of funding the proposal); S.REPT. 83-2227 (1954) (report accompanying S.114, 83rd Cong., 2d Sess., discussing the scaling back of the International Boundary and Water Commission fencing proposal, and including written statements from executive officials opining that benefits of the fencing proposal did not warrant the expenditures necessary to complete the project).

[20] For several decades, the authority to interpret, implement, and enforce immigration laws was primarily vested with the Attorney General. The Attorney General, in turn, delegated authority over immigration enforcement and service functions to the Department of Justice's Immigration and Naturalization Service (INS), within which the U.S. Border Patrol was located. Following the establishment of DHS pursuant to the Homeland Security Act of 2002 (P.L. 107-296), the INS was abolished and its enforcement functions were generally transferred to DHS, along with Border Patrol. *See* 6 U.S.C. § 251. IIRIRA § 102 has been amended to specifically reference the DHS Secretary, rather than the Attorney General, as having responsibility for carrying out the construction of barriers along the border.

[21] Immigration and Nationality Act (INA), § 103(a)(5), 8 U.S.C. § 1103(a)(5).

Corps of Engineers) installed 10-foot-high, welded-steel fencing along roughly 14 miles of the border near San Diego.[22]

In 1996, Congress passed IIRIRA, which expressly instructed immigration authorities to construct barriers along the international land borders to deter unauthorized migration.[23] This requirement, contained in IIRIRA Section 102, has been amended on three occasions, and its current language can be viewed at **Appendix A**. Among other things, IIRIRA Section 102 in its current form

- generally authorizes DHS to construct barriers and roads along the international borders in order to deter illegal crossings at locations of high illegal entry;
- requires the construction of reinforced fencing covering at least 700 miles along the southwest border, though the Secretary is not required to install fencing at any particular location;
- requires a specified amount of fencing in priority areas along the southwest border, which DHS was instructed to have completed by December 31, 2008; and
- provides the Secretary of DHS with authority to waive any legal requirements which may impede construction of barriers and roads under Section 102.[24]

The following sections discuss each of these requirements, including how they have been modified over the years.

General Authority to Install Barriers and Roads to Deter Illegal Crossings

Section 102(a) of IIRIRA provides that the Secretary of Homeland Security "shall take such actions as may be necessary 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." Although this provision is fashioned as a statutory command, providing that the Secretary "shall" take action,[25] this command is qualified by the language that follows, which affords the Secretary the discretion to determine the appropriate amount of "additional" barriers to deploy, as well as the most appropriate locations to install such barriers "to deter illegal crossings."[26]

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[22] For additional background, see CRS Report RS22026, *Border Security: The San Diego Fence*, by (name redacted) and (name redacted) (citing fencing description contained in GEN. ACCOUNTING OFFICE, BORDER CONTROL—REVISED STRATEGY IS SHOWING SOME POSITIVE RESULTS, GAO/GGD-95-30, Jan.31, 1995), available upon request).

[23] P.L. 104-208, div. C., § 102.

[24] IIRIRA§ 102, as amended, also includes provisions concerning (1) the availability of judicial review of DHS waivers of legal requirements that constrain expeditious construction of fencing; (2) the acquisition of easements on private land to construct fencing; and (3) consultation requirements with federal, state, tribal, and private entities regarding the placement of fencing.

[25] A federal statute's use of the word "shall" in reference to authorized agency action is often construed as imposing a mandatory obligation upon the agency to perform such action. *See, e.g.*, Lopez v. Davis, 531 U.S. 230, 241 (2001) (describing statute's use of "shall" as imposing a "discretionless" obligation upon an agency, compared to the statute's separate use of "may" to provide permissive authority for agency action). However, the appropriate interpretation of "shall" in a provision ultimately depends upon the context. For additional discussion, see CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name redacted)

[26] It seems unlikely that a court would find it had jurisdiction to consider a legal challenge as to the adequacy of DHS's implementation of IIRIRA § 102(a). The Administrative Procedure Act (APA) authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(c), which the Supreme Court has (continued...)

To the extent that IIRIRA Section 102(a) constitutes a discrete, judicially reviewable command for the Secretary to construct "additional" fencing,[27] immigration authorities seem to have satisfied this mandate by deploying hundreds of miles of additional barriers and roads along the border since IIRIRA was enacted in 1996. Accordingly, this provision perhaps most reasonably could be construed as conferring general authority to the Secretary of Homeland Security to construct barriers and roads along the international borders, so as to deter crossings in areas of "high illegal entry" (a term not defined by the statute).[28] As discussed later in this report, more specific requirements are imposed upon the Secretary by IIRIRA Section 102(b), which requires the Secretary, in exercising the authority conferred under Section 102(a), to ensure that fencing and other barriers are deployed along specified mileage of the southwest border.[29]

Section 102(a) generally authorizes the construction of roads and physical barriers, without specifying any particular form that such barriers may take (e.g., reinforced fencing, multilayered fencing, or concrete barriers). Barriers and roads are authorized to be installed along any of the international borders of the United States, at least so long as DHS determines their installation is appropriate to deter unauthorized crossings in areas of high illegal entry.

The provision's authorization for the installation of barriers and roads only applies to areas "in the vicinity of the United States border." The phrase "vicinity of the United States border" is not defined under IIRIRA, nor is it described in other federal immigration statutes. As a result, there may be some ambiguity as to the authorized distance from the border where roads and barriers may be constructed. The sole federal court to consider the usage of "vicinity" in IIRIRA Section

(...continued)

construed to apply to "*discrete* agency action that [the agency] is *required* to take." Norton v. S. Utah Wilderness All. (*SUWA*), 542 U.S. 55, 64 (2004) (italics in original). Writing for the unanimous Court in *SUWA*, Justice Scalia opined that the APA was not intended to enable "broad programmatic challenges" to the manner in which an agency carries out a statutory duty:

> The principal purpose of the APA limitations we have discussed—and of the traditional limitations upon mandamus from which they were derived—is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.… The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.

Id. at 66-67. *See also* United States v. Arizona, No. 2:10-cv-01413-SRB, Order Dismissing Az.'s Countercls., at *16 (D. Az., Oct. 21, 2011) ("While the construction of the fencing and infrastructure improvements may be phrased in mandatory language, the IIRIRA…leaves the Secretary and the DHS with a great deal of discretion in deciding how, when, and where to complete the construction. Moreover, [IIRIRA does] not mandate any discrete agency action with the clarity to support a judicial order compelling agency action.") (internal citations omitted).

[27] *SUWA*, 542 U.S. at 64 (APA claim to judicially compel agency action, on the ground that such action had been unlawfully withheld or unreasonably delayed by the agency, "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take.").

[28] *See* Save Our Heritage Org. v. Gonzales, 533 F.Supp.2d 58, 61 (D.D.C. 2008) (distinguishing the Secretary's "general authority" to install barriers under IIRIRA § 102(a) from the specific mandate under IIRIRA § 102(b) to construct fencing in certain areas).

[29] IIRIRA § 102(b)(1)(A) ("In carrying out subsection (a), the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest border.... ").

102 interpreted the term as including land "situated near the border," rather than only land directly adjacent to the border.[30]

Some DHS regulations unrelated to the border fence have described distances up to 25 miles from a location as being within its "vicinity."[31] The Supreme Court, in non-binding dicta, also once characterized a search occurring 25 miles from the border as being within the "general vicinity of the border,"[32] though it does not appear that the Court ascribed legal significance to that phrase. There is also no indication in the legislative history of IIRIRA, however, that Congress contemplated the term "vicinity of the United States border" as referring to a specific distance.[33]

Requirement for Installation of Fencing Along the Southwest Border

IIRIRA Section 102(b) imposes specific requirements upon the Secretary of Homeland Security to construct reinforced fencing along the southwest border. The nature of these requirements has changed over the years, including to expand the mileage along the border where fencing must be installed, and to afford the Secretary greater discretion in determining the type of fencing that may be employed and the particular location where fencing shall be installed.

Original Requirement to Augment the San Diego Border Fence

IIRIRA Section 102(b) directed immigration authorities to supplement the already existing 14-mile primary border fence near San Diego with two additional layers of fencing.[34] Environmental

[30] United States v. 1.16 Acres of Land, More or Less, Situate in Cameron Cty., Tex., 585 F.Supp.2d 901, 907 (S.D. Tex. 2008) (relying on dictionary definition of "vicinity" to interpret IIRIRA provision authorizing acquisition of lands "adjacent to or in the vicinity of an international land border when ... essential to control and guard the boundaries and borders of the United States").

[31] Regulations concerning the admission of non-citizens for purposes of transit to or from the United Nations Headquarters District generally provide that such persons remain "in immediate vicinity" of the District, which "is that area lying within a twenty-five mile radius of Columbus Circle, New York, NY." 8 C.F.R. § 214.2(c)(2). Regulations specifying the distance which holders of border crossing cards—a form of documentation that may be issued to eligible Mexican citizens, enabling the holders to briefly travel to and from the United States without having to be issued multiple arrival/departure records by CBP—generally apply to travel within 25 miles from the border, though exceptions have been made authorizing travel of 75 miles within Arizona and 55 miles in New Mexico. 8 C.F.R. § 235.1(h).

[32] United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) (characterizing a prior Supreme Court decision concerning the permissibility of a warrantless search of an automobile 25 air miles from the U.S.-Mexico border, *Almeida v. Sanchez*, 413 U.S. 266 (1973), as involving a search occurring "in the general vicinity of the border").

[33] Arguably, provisions in federal immigration law and other federal statutes may be relevant in assessing what may permissibly be deemed "the vicinity of the United States border" for purposes of IIRIRA Section 102. The Immigration and Nationality Act authorizes immigration enforcement officers to engage in warrantless searches of vessels and vehicles within a "reasonable distance" from the border for purposes of detecting illegal entrants. INA § 287(a)(3); 8 U.S.C. § 1357(a)(3). The term "reasonable distance" has long been interpreted under regulation to potentially cover distances up to 100 miles from the border. 8 C.F.R. § 287.1(a)(2). The INA also expressly provides that immigration officers may permissibly access private lands to detect unlawfully present aliens, provided that such lands are located "within a distance of twenty-five miles" from the boundaries of the United States. *Id.*

[34] P.L. 104-208, div. C, § 102(b). As originally enacted, IIRIRA § 102(b) also provided authority for the acquisition of necessary easements to facilitate fence construction, required that certain safety features be incorporated into the design of the fence, and authorized an appropriation not to exceed $12 million. The current version of IIRIRA has relocated the provisions concerning easements and safety features, and has revised the appropriations authorization to cover "such sums as may be necessary to carry out" the requirements of Section 102(b). *See* IIRIRA (as amended), § 102(b)(2)-(4).

concerns and litigation resulted in significant delays in fulfilling this requirement. Over eight years after IIRIRA was enacted, DHS had not completed the fencing project.[35]

As discussed later in this report,[36] subsequent expansion of the Secretary of Homeland Security's authority to waive legal requirements that impeded construction of fencing projects, facilitated DHS's efforts to complete a second layer of fencing along the San Diego border.[37] Other amendments made to IIRIRA, discussed below, removed the statutory requirement that DHS complete the San Diego fencing project that had been authorized by IIRIRA when it was originally enacted in 1996.[38]

Expansion of Fencing Requirements Under the Secure Fence Act of 2006

IIRIRA Section 102(b) was substantially revised by the Secure Fence Act of 2006.[39] Section 102(b)'s original requirement concerning fencing in the San Diego area was replaced with a much more expansive instruction to deploy "at least 2 layers of reinforced fencing, [and] the installation

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[35] *See* CRS Report RS22026, *Border Security: The San Diego Fence*, by (name redacted) and (name redacted) . In late 2003, the California Coastal Commission (CCC) essentially halted further construction of the San Diego Fence. The CCC determined that CBP had not demonstrated, among other things, that the project was "to the maximum extent practicable" consistent with the policies of the California Coastal Management Program—a state program approved under the federal Coastal Zone Management Act, 16 U.S.C. §§ 1451, *et seq*. *See* California Coastal Commission, *W8a Staff Report and Recommendation on Consistency Determination*, CD-063-03, Oct. 2003, *available at* https://documents.coastal.ca.gov/reports/2003/10/W8a-10-2003.pdf [hereinafter "CCC Report"]. According to the CCC Report, neither the CCC nor federal immigration authorities construed IIRIRA as mandating the construction of second and third layers of fencing along the entirety of the 14-mile fencing project, though the CCC Report does not discuss the reasons why this conclusion had been reached. *Id.* at 4 n.1.

[36] *See infra* at "Authority to Waive Legal Requirements Impeding Construction of Roads and Barriers."

[37] Dep't of Homeland Sec., "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005," 70 Fed. Reg. 55622-02 (2005) (waiving certain legal requirements to facilitate completion of San Diego fence project). Legislation has been introduced in the 114th Congress to compel improvements or modifications to current fencing in San Diego and other border areas. *See* H.R. 399, Secure Our Borders First Act of 2015, 114th Cong., 1st Sess. (as reported by the House Homeland Security Committee) (requiring replacement of certain fencing in San Diego border sector, along with construction of seven additional miles of double-layered fencing in the border sector).

[38] DHS could apparently still deploy additional fencing layers in the San Diego region pursuant to the general authority conferred to it under IIRIRA Section 102, if the agency deemed further fencing to be appropriate. Save Our Heritage Org. v. Gonzales, 533 F.Supp.2d 58, 61 (D.D.C. 2008) (although IIRIRA Section 102(b) was amended to remove earlier requirement that DHS construct fencing along the border near San Diego, DHS could still complete the fencing project pursuant to the general authority conferred by IIRIRA Section 102(a)).

[39] The Secure Fence Act also instructed the DHS Secretary, within 18 months, to "take all actions [he] determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime border," and provide Congress with annual reports on "progress made in achieving and maintaining operational control." P.L. 109-367, § 2. "Operational control" is defined 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." DHS has construed this mandate as not requiring that the agency have actually obtained operational control of the borders within 18 months of the Secure Fence Act's enactment. Rather, the executive branch has interpreted the act as requiring DHS to have, within 18 months of enactment, taken all steps it determined necessary to achieve operational control, and keep Congress regularly informed of the steps it was taking through the submission of annual reports. *See* United States v. Arizona, No. 2:10-cv-01413-SRB, Counterdefendants' Reply in Support of Motion to Dismiss Counterclaims, at 5-6 (D. Az., Jul. 12, 2011). *See also* Department of Homeland Security Appropriations Act, 2010, P.L. 111-83, 123 Stat. 2142, 2146 (requiring, as a condition to the obligation of certain funds, that the DHS Secretary provide a report on the "progress made ... in terms of obtaining operational control of the entire border of the United States.) A legal challenge by the State of Arizona, which alleged that DHS had failed to comply with the requirements of the Secure Fence Act, was dismissed on jurisdictional grounds, as the reviewing district court found that the act's requirement concerning "operational control" did not mandate a discrete action that the court could compel. United States v. Arizona, No. 2:10-cv-01413-SRB, Order Dismissing Az.'s Countercls., at 15. (D. Az., Oct. 21, 2011).

of additional physical barriers, roads, lighting, cameras, and sensors" along five specified stretches of the southwest border.[40] CBP estimated that this mandate covered roughly 850 miles.[41] The fencing mandate imposed by the Secure Fence Act was somewhat limited by a specification that "other means" could be used to secure an area where "the topography ... has an elevation grade that exceeds 10 percent.... "[42]

In addition to this general mandate, the Secure Fence Act also provided deadlines for the completion of certain border projects. In particular, the act amended IIRIRA Section 102(b) to designate a stretch of border between Calexico, CA, and Douglas, AZ, as a priority area. It directed DHS to ensure that "an interlocking surveillance camera system" would be installed along this area by May 30, 2007, and to provide for the completion of fencing along this stretch by May 30, 2008.[43] A separate 30-mile stretch of fencing near Laredo, TX, was required to be deployed by December 31, 2008.[44] No timetable was specified, however, for DHS to complete double-layered fencing in the remaining stretches of the border.

Modification of Fencing Requirements Pursuant to the Consolidated Appropriations Act, 2008

The most recent revisions to IIRIRA Section 102 were enacted slightly more than a year after Congress passed the Secure Fence Act (and prior to the statutory deadlines for the deployment of double-layered fencing under the earlier act). The Consolidated Appropriations Act, 2008 (2008 Appropriations Act) amended IIRIRA Section 102(b) to significantly increase the Secretary of Homeland Security's discretion as to where to construct fencing along the southwest border. In particular, the 2008 Appropriations Act modified IIRIRA Section 102(b) in four ways:

- **Eliminated earlier requirement of double-layered fencing—**Whereas the prior language of IIRIRA Section 102(b), as amended by the Secure Fence Act, had generally required "at least 2 layers of reinforced fencing" be deployed in specified areas, Section 102(b) now mandates only a single layer of reinforced fencing (while not precluding additional layers from being deployed, if deemed appropriate).
- **Provided more flexible requirements concerning location of fencing and other border infrastructure—**While the Secure Fence Act required fencing to

[40] Secure Fence Act, P.L. 109-367, § 3. The act mandated fencing:

> (i) extending from 10 miles west of the Tecate, California, port of entry to 10 miles east of the Tecate, California, port of entry;
>
> (ii) extending from 10 miles west of the Calexico, California, port of entry to 5 miles east of the Douglas, Arizona, port of entry;
>
> (iii) extending from 5 miles west of the Columbus, New Mexico, port of entry to 10 miles east of El Paso, Texas; (iv) extending from 5 miles northwest of the Del Rio, Texas, port of entry to 5 miles southeast of the Eagle Pass, Texas, port of entry; and
>
> (v) extending 15 miles northwest of the Laredo, Texas, port of entry to the Brownsville, Texas, port of entry.

[41] 153 CONG. REC. 9890 (2007) (statement by Sen. Jeff Sessions, observing that DHS had found that, because of topographical issues along the border, the Secure Fence Act effectively required deployment of fencing along "close to 854 topographical miles").

[42] Secure Fence Act, P.L. 109-367, § 3.

[43] *Id.*

[44] *Id.*

be installed along specific stretches of the southwest border, potentially totaling roughly 850 miles, the 2008 Appropriations Act replaced this specification with a more general requirement that fencing be deployed "along not less than 700 miles of the southwest border where fencing would be most practical and effective."[45] DHS was also instructed to construct "additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border." The Appropriations Act also amended IIRIRA Section 102(b) to provide that the Secretary was not obligated to deploy fencing or other border security infrastructure "in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location."[46]

- **New deadline for construction of fencing in "priority areas"**—The earlier version of IIRIRA Section 102(b) required the construction of fencing along specified stretches of the border, totaling roughly 370 miles, by May 2008, and fencing along another 30-mile section by December 2008.[47] This was replaced with a new requirement that the Secretary of Homeland Security identify 370 miles "or other mileage" along the southwest border where fencing would be "most practical and effective," and complete construction of such fencing by December 31, 2008.[48]
- **New consultation requirements**—As amended, Section 102(b) of IIRIRA now requires the Secretary to consult with the Secretaries of the Interior and Agriculture, state and local governments, Indian tribes, and property owners "to minimize the impact on the environment, culture, commerce, and quality of life" in areas near where fencing is to be constructed.[49] The provision further provides that this consultation requirement does not create or negate any right to legal action by an affected person or entity.[50]

Select Issues Concerning Current IIRIRA Section 102(b)

As noted above, the 2008 Appropriations Act substantially modified IIRIRA Section 102(b) just over a year after the Secure Fence Act had done the same. These revisions, along with sometimes conflicting statements made by DHS officials to Congress concerning the agency's interpretation of its duties under Section 102(b), have potentially contributed to some disagreement regarding the nature of DHS's obligations under IIRIRA Section 102(b). The following paragraphs detail the legislative history of the most recent revisions to IIRIRA Section 102(b), the key elements of the requirements it imposes, and potential constraints on judicial review of implementation of the statute's fencing requirements.

[45] IIRIRA § 102(b)(1)(A).

[46] IIRIRA § 102(b)(1)(D).

[47] Secure Fence Act, P.L. 109-367, § 3.

[48] IIRIRA § 102(b)(1)(B).

[49] IIRIRA § 102(c)(i). The Consolidated Appropriations Act further provided that funds appropriated for FY2008 could not be expended for border construction activities under IIRIRA Section 102, unless DHS satisfied this consultation requirement. P.L. 110-161, div. E, § 564(b).

[50] IIRIRA § 102(c)(ii).

Legislative History

The legislative history behind the 2008 Appropriations Act's amendment to IIRIRA Section 102(b) is convoluted, and the explanatory materials for the enacted omnibus do not elaborate upon the amendment's purpose.[51] Nonetheless, materials in the *Congressional Record* may shed some light as to the sponsors' intended purpose, along with the context in which the proposed amendment was being considered.

The modifications to IIRIRA Section 102(b) appear to derive from language originally contained in a floor amendment offered during Senate consideration of the FY2008 homeland security appropriations bill. The floor amendment, offered by Senator Lindsey Graham and co-sponsored by a number of other Senators, would have added a new division entitled the "Border Security First Act of 2007" to the appropriations legislation.[52] In addition to modifying the fencing requirements contained in IIRIRA Section 102(b), the amendment would have required the deployment of 300 miles of vehicle barriers and 700 linear miles of fencing along the U.S.-Mexico border within two years; provided additional resources and requirements for DHS immigration enforcement programs at the border and within the interior of the United States; and made several substantive changes to the Immigration and Nationality Act and the U.S. Criminal Code.[53]

Senator Graham and a number of co-sponsors thereafter spoke in favor of the amendment, with three Senators specifically commenting upon the amendment's fencing provisions. Both Senator Graham and Senator Jeff Sessions, an amendment co-sponsor, characterized the amendment as providing for 700 miles of border fencing.[54] Senator John Cornyn, another co-sponsor, highlighted the amendment's proposed change to IIRIRA Section 102(b) as ensuring that DHS consulted with local officials and property owners regarding proposed fencing in a given area.[55]

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[51] *See* HOUSE COMMITTEE ON APPROPRIATIONS, COMMITTEE PRINT ON CONSOLIDATED APPROPRIATIONS ACT, 2008, 110th Cong., 2d Sess. (2008).

[52] S.Amdt. 2412, offered as an amendment to S.Amdt. 2383, proposed by Sen. Robert Byrd in the nature of a substitute to H.R. 2638, Department of Homeland Security Appropriations Act, 2008, 110th Cong., 1st Sess.

[53] *See* 153 CONG. REC. S9948-9961 (daily ed., Jul 25, 2007) (reprinting text of amendment).

[54] *See id.* at 9871 (statement by Sen. Graham that, "The goal of this amendment is to provide complete operational control of the U.S.-Mexican border. It will … [among other things] … allow us to appropriate … 300 miles of vehicle barriers … [and] 700 miles of border fencing."), and 9878 (statement by Sen. Sessions describing the amendment as ensuring the funding of 700 miles of border fencing).

[55] *Id.* at 9891 (statement by Sen. Cornyn). With respect to DHS decisions regarding the location of fencing, Sen. Cornyn stated:

> Coming from a border State with 1,600 miles of common border with Mexico, this is a personal issue to many of my constituents, particularly. While some, such as [fellow amendment co-sponsor Sen. Sessions], believe strongly in the need for more fencing along the border, it is controversial along the border in south Texas….I noticed most of the property abutting the Rio Grande River is private property. I am not sure the Border Patrol or the Department of Homeland Security has really thought through the fencing idea and what it would mean to condemn through eminent domain proceedings private property along the border in Texas. I am informed that in Arizona and other places, much of the property along the border is already owned by the Federal Government, so we don't have that issue. But I have found in Texas, this is a controversial issue. I have been pleased to work with my colleague, Senator Hutchison, to make sure that in this amendment and in every opportunity, we have insisted upon consultation with local elected officials and property owners to achieve the most effective means of border security, recognizing that result is nonnegotiable but how we get there should be the subject of consultation and negotiation.

Id.

The proposed amendment was later ruled by the Senate chair to be out of order, because some topics of the amendment were deemed non-germane to the appropriations bill being considered.[56]

The following day, Senator Graham offered a new amendment that was more limited in scope.[57] The new amendment did not include the original amendment's proposed modification of IIRIRA Section 102(b), or those provisions of the earlier amendment that would have substantively modified federal immigration and criminal statutes. However, the new amendment contained the earlier version's provision requiring DHS to deploy 300 miles of vehicle barriers and 700 linear miles of fencing along the southwest border within two years, along with a related provision appropriating funds for the completion of this project.[58] The amendment to the homeland security appropriations bill was adopted by a vote of 89-1.[59]

Separately, Senator Patty Murray offered an amendment on behalf of Senator Kay Bailey Hutchison to revise IIRIRA Section 102(b).[60] The revisions proposed in the Hutchison amendment were for the most part identical to those found in the amendment offered by Senator Graham the previous day.[61] The Hutchison amendment was approved by a voice vote,[62] and both it and the second Graham amendment (which Senator Hutchison also co-sponsored)[63] were included in the Senate-passed version of the homeland security appropriations bill.[64]

Later in the year, 11 regular appropriations measures for FY2008, including appropriations for homeland security, were combined into an omnibus bill that became the 2008 Appropriations Act.[65] The omnibus legislation reconciled differences between the competing House- and Senate-passed homeland security appropriations bills. The final act included the provision in the Senate-passed bill that revised IIRIRA Section 102(b), which had been added by the Hutchison amendment.[66] However, the final act did not retain the Senate-passed bill's provisions that had been added by the Graham amendment, which would have separately imposed a two-year deadline for the completion of 700 linear miles of fencing and 300 miles of vehicle barriers, and provided appropriations to ensure that these deadlines were met.[67]

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[56] *See id.* at 9895-9897 (concerning deliberations on decision to rule amendment out of order). The Senate voted to sustain the decision of the chair by a vote of 52-44.

[57] S.Amdt. 2480, offered as an amendment to S.Amdt. 2383, proposed in the nature of a substitute to H.R. 2638, Department of Homeland Security Appropriations Act, 2008, 110th Cong., 1st Sess.

[58] *See* 153 CONG. REC. S10059 (daily ed., Jul 26, 2007) (reprinting text of amendment).

[59] *Id.* at S10061.

[60] S.Amdt. 2486, offered as an amendment to S.Amdt. 2383, proposed in the nature of a substitute to H.R. 2638, Department of Homeland Security Appropriations Act, 2008, 110th Cong., 1st Sess. The text of the amendment is reprinted in 153 CONG. REC. S10102-10103 (daily ed., Jul. 26, 2007).

[61] Whereas the original Graham amendment would have required the deployment of fencing along 370 miles of the southwest border by the end of 2008, the revised amendment introduced by Sen. Hutchison called for 370 miles "or other mileage identified" by the Secretary of Homeland Security to be constructed in that period. The Hutchison amendment also did not include the earlier amendment's requirement that DHS complete a triple-layered fence near San Diego.

[62] *Id.* at S10103.

[63] *Id.* at S10059.

[64] H.R. 2638, Department of Homeland Security Appropriations Act, 2008, 110th Cong., 1st Sess. (passed by Senate with engrossed amendment).

[65] Further discussion of the process by which the omnibus was enacted can be found in CRS Report RL34298, *Consolidated Appropriations Act for FY2008: Brief Overview*, by (name redacted).

[66] Consolidated Appropriations Act, 2008, P.L. 110-161, div. E, § 564(a).

[67] Explanatory materials produced for the enacted Appropriations Act do not address why the Hutchison amendment was included in the final version of the act, but not the Graham amendment. *See* HOUSE APPROPRIATIONS COMMITTEE (continued...)

Type of Fencing Required Under Current Law

The 2008 Appropriations Act amended IIRIRA in a manner that provides DHS with significant discretion as to the manner in which to install fencing—undoing some of the more specific requirements that had previously been imposed. Whereas the Secure Fence Act had amended IIRIRA Section 102(b) to provide that "at least 2 layers of reinforced fencing" were to be installed along specified stretches of the border, the 2008 Appropriations Act replaced this with a more general requirement that "reinforced fencing" be installed along the southwest border. In other words, IIRIRA Section 102(b) no longer requires DHS to install two or more layers of reinforced fencing at any location along the border—a single layer of reinforced fencing appears sufficient to satisfy the statutory mandate. DHS would appear to have discretion to construct additional layers of fencing pursuant to its general authority under IIRIRA Section 102(a), however, if it deems such fencing to be appropriate.[68]

Some disagreement has arisen over DHS's use of "vehicle fencing" to satisfy IIRIRA's fencing requirements.[69] Vehicle fencing is a type of barrier designed to inhibit the illegal crossing of vehicles into the United States, but not pedestrians.[70] Some Members of Congress have argued that the "fencing" referred to in IIRIRA Section 102 should be limited to the type that is effective at preventing all illegal entrants, whether traveling by vehicle or by foot.[71]

On the other hand, IIRIRA Section 102(b) does not mandate that any particular type of fencing must be deployed, beyond providing that such fencing be "reinforced."[72] The statute does not specify, for example, that deployed fencing must be of a particular height, or be constructed in a particular style (e.g., using bollard, wire mesh, or chain link).[73] In the absence of language specifying the use of a particular kind of fencing,[74] it would appear that DHS enjoys broad

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PRINT ON 2008 APPROPRIATIONS ACT, *supra* note 51.

[68] *See* Save Our Heritage Org. v. Gonzalez, 533 F. Supp. 2d 58 (D.D.C. 2008) (upholding authority of DHS to construct additional double-layered fencing along border near San Diego under IIRIRA Section 102(a)).

[69] *See, e.g.*, HEARING BEFORE THE HOUSE HOMELAND SECURITY COMMITTEE: THE CHALLENGE OF ALIGNING PROGRAMS, PERSONNEL, AND RESOURCES TO ACHIEVE BORDER SECURITY, SERIAL NO. 110-129, 110th Cong., 2d Sess., Prepared Statement of DHS Secretary Chertoff (distinguishing between pedestrian and vehicle fencing, but counting both types in discussing DHS efforts to satisfy IIRIRA Section 102(b)'s fencing requirements); HOUSE COMMITTEE ON HOMELAND SECURITY, DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS FOR 2010, PART 1A, COMMITTEE PRINT (2010), CBP Budget Request and Supporting Information, at 667 ("As of April 4, 2009 ... CBP has constructed fencing totaling 618.6 miles along the southwest border (316.6 miles of pedestrian and 302 miles of vehicle fence) and contracts for all fencing projects needed to complete the approximately 670 miles of pedestrian or vehicle fence have been awarded."). HOUSE COMMITTEE ON HOMELAND SECURITY, DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS FOR FY2011, PART 1A, COMMITTEE PRINT (2011), CBP Budget Justification for FY2011, at 781 ("As of January 1, 2010, CBP has constructed fencing totaling 642.8 miles along the southwest border (344.3 miles of pedestrian and 298.5 miles of vehicle fence).").

[70] Vehicle fencing is "used primarily in remote areas to prohibit vehicles engaged in drug trafficking and alien smuggling operations from crossing the border." GOV'T ACCOUNTABILITY OFFICE, SECURE BORDER INITIATIVE FENCE CONSTRUCTION COSTS, Jan. 9, 2009, at 2.

[71] *See, e.g.*, 155 CONG. REC. S7227-S7228 (daily ed., Jul. 8, 2009) (statement by Sen. James DeMint in support of amendment, approved by Senate by ultimately not enacted, requiring fencing under IIRIRA Section 102(b) to be pedestrian fencing).

[72] "Reinforced fencing" is not defined by statute, but is commonly used to refer to fencing which is constructed in a manner that makes it more durable and sturdy than a typical fence.

[73] Photos of various types of fencing that have been deployed by DHS along the southwest border can be viewed at http://nemo.cbp.gov/borderpatrol/2435_southwest.pdf (identifying locations of installed fencing as of June 2011).

[74] While IIRIRA Section 102(b) seems to distinguish "fencing" from other types of "physical barriers," it does not (continued...)

discretion to assess the appropriate type of fencing to deploy in order to achieve operational control of the southwest border.

Miles Along the Border vs. Total Miles of Fencing

While IIRIRA Section 102(b) is sometimes characterized as requiring DHS to deploy "700 miles of fencing," the express language of the text seems to impose a slightly different mandate. Section 102(b) requires DHS to deploy fencing "along not less than 700 miles of the southwest border." This seems to be a somewhat different requirement, which prioritizes the actual mileage of the border covered by fencing, rather than just the number of miles of fencing deployed. For example, if DHS hypothetically deployed 30 miles of fencing, but did so through the construction of a 10-layered, 3-mile-long fence, it would have only installed fencing along 3 miles of the border. On the other hand, if DHS deployed such fencing in a single layer of fencing, it would have deployed fencing along 30 miles of the border.

Likely because of the phraseology of IIRIRA Section 102(b), DHS seems to only count the mileage of primary layers of fencing deployed along the southwest border when discussing its efforts to satisfy its statutory mandate, and not the total amount of fencing that it has deployed (i.e., including secondary and tertiary layers of fencing that run behind some stretches of primary fencings).[75]

Priority Fencing Mandate

As amended by the 2008 Appropriations Act, IIRIRA 102(b) contains two distinct but related mandates. One of the mandates, which can be referred to as the *priority fencing mandate*, required DHS to identify and complete construction of fencing in priority areas of the southwest border by December 31, 2008. The second mandate, which can be referred to as the *general fencing mandate*, requires reinforced fencing to be deployed along "not less than 700 miles" of the southwest border, but contains no deadline for deployment.[76] The *general fencing mandate* is subject to a proviso that DHS is not required to install fencing or other infrastructure "at any particular location" along the border, if the use or placement of fencing at that location is not deemed by the Secretary of Homeland Security to be the most appropriate means to achieve and maintain control.

Section 102(b)'s *priority fencing mandate* required DHS, before December 31, 2008, to identify either 370 miles "or other mileage" along the southwest border where fencing would be most appropriate to deter unlawful migration and smuggling activities. Construction of the identified fencing was required to have also been completed by the end of 2008. Although DHS initially planned to deploy 670 miles of fencing pursuant to this mandate,[77] it subsequently revised these

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specify any particular features that deployed fencing must have, beyond being reinforced. Accordingly, at least so long as deployed barriers can reasonably be construed to constitute "fencing," as that term is ordinarily used, it seems that DHS would have considerable discretion to determine the appropriate type to be deployed at any particular location.

[75] *See* Written Responses by DHS Secretary Napolitano to Questions by House Homeland Security Committee, *supra* note 14, at 65 (identifying only primary pedestrian and vehicle fencing when identifying mileage of fencing deployed along southwest border pursuant to IIRIRA Section 102(b)).

[76] This second mandate also contemplates the construction of additional roads, barriers, and border infrastructure to achieve operational control, but these infrastructure requirements appear in a difference clause than the fencing requirement. The mileage requirement contained in IIRIRA Section 102(b) appears to apply only to fencing, and not to other infrastructure described in the subsection.

[77] *See, e.g.*, HEARING BEFORE THE HOUSE HOMELAND SECURITY COMMITTEE: THE CHALLENGE OF ALIGNING PROGRAMS,
(continued...)

plans prior to the reaching the deadline for priority fence construction.[78] According to a 2010 report by the Government Accountability Office (GAO), DHS opted to comply with the *priority fencing mandate* by ensuring that reinforced fencing had been deployed along 370 miles of the southwest border.[79]

General Fencing Mandate

Although the *priority fencing mandate* of IIRIRA Section 102(b) has been satisfied, the *general fencing mandate* has not yet been fulfilled. DHS has thus far deployed reinforced fencing along roughly 653 miles of the border.[80] At least on first look, it would appear that the agency would need to install additional fencing along nearly 50 miles of the southwest border to meet the requirements of Section 102(b).

There have been conflicting views among some policymakers as to the firmness of the *general fencing mandate*. Although one clause of IIRIRA Section 102(b) requires fencing "along not less than 700 miles" of the border, another clause in that subsection provides:

> Notwithstanding [the *general fencing mandate* of this section] nothing in this paragraph shall require the Secretary of Homeland Security to install fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.[81]

The meaning and effect of this proviso is arguably open to interpretation. One way to read the clause is simply to reflect the discretion that Congress intended to afford DHS in determining where to deploy at least 700 miles of fencing along the southwest border. As discussed previously, prior to amendments made by the 2008 Appropriations Act, the subsection had required DHS to deploy fencing along specific stretches of the southwest border that were identified within the statutory command.[82] The new proviso could be interpreted to emphasize the discretion that DHS was afforded as a result of the revisions made by the 2008 Appropriations Act. While DHS is required to construct fencing along at least 700 miles of the border, the agency

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PERSONNEL, AND RESOURCES TO ACHIEVE BORDER SECURITY, SERIAL NO. 110-129, 110th Cong., 2d Sess., Prepared Statement of DHS Secretary Chertoff ("We made a commitment to have in place a total of 670 miles of pedestrian and vehicle fencing—including 370 miles of pedestrian fence and 300 miles of vehicle fence-on the southern border by the end of this calendar year to disrupt the entry of illegal immigrants, drugs, and vehicles.").

[78] The Secretary's authority to identify "other mileage" for installation of priority fencing expired on December 31, 2008. IIRIRA § 102(b)(1)(B)(i).

[79] A 2009 GAO Report states:

> In September 2008, DHS revised its goal of completing the full 670 miles of fencing by December 31, 2008. As an interim step, DHS committed to have 661 miles either built, under construction, or under contract by December 31, 2008, but did not set a goal for the number of miles it planned to complete by December 31, 2008. As of December 31, 2008, DHS had completed 578 miles of fencing, meeting the interim statutory goal to complete 370 miles of fencing by that time.

GAO, *Secure Border Initiative: Technology Deployment Delays Persist and the Impact of Border Fencing Has Not Been Assessed*, Sept. 9, 2009, at p.8.

[80] *See* Remarks of DHS Secretary Jeh Johnson, *supra* note 9 (describing amount of fencing deployed by October 2014).

[81] IIRIRA § 102(b)(1)(D).

[82] Secure Fence Act, P.L. 109-367, § 3. *See also supra* note 40 (reprinting text of Secure Fence Act provision identifying particular stretches of the border where double-layered fencing was required to be deployed).

retains discretion to determine the most appropriate stretches along the 1,933 mile-land border where the fencing should be deployed.

Relatedly, the "notwithstanding" proviso to *the general fencing mandate* affords a potential response to claims that DHS did not place fencing at a location where it would be "most practical and effective." DHS is not required to install fencing at a location if "the Secretary determines that the placement of such resources is not the most appropriate means to achieve and maintain operational control ... at such location."[83] This is phrased in a manner that suggests that the Secretary's determination not to place fencing at a location would be afforded a very high degree of deference by a reviewing court.[84] In other words, the "notwithstanding" clause enables DHS to readily answer claims by parties seeking to compel some portion of the required border fencing at a location where the fencing would allegedly be "most practical and effective."

Arguably, however, the proviso could be interpreted more broadly, to signify something other than simply the discretion that DHS possesses in determining the stretches of the border along which to construct fencing. Although the proviso is not crafted as an express waiver,[85] the clause's usage of "notwithstanding" could be construed to supersede any conflicting requirements imposed by the *general fencing mandate*.[86] Under a broad interpretation of the "notwithstanding" proviso, it might be argued that the Secretary is not necessarily required to deploy fencing along 700 miles of the border, if the Secretary concludes that fencing is the appropriate means of achieving operational control along a lesser mileage of the border.

There are difficulties, however, with interpreting the "notwithstanding" proviso so broadly. As an initial matter, the proviso does not expressly state that DHS may opt to construct a lesser amount of fencing than is specified elsewhere in Section 102(b). Rather, the proviso states that DHS is not required to construct fencing "at a particular location," if the Secretary of Homeland Security determines that the installation of that infrastructure is not appropriate for "such location." As noted above, this provision could reasonably be construed to mean that, in carrying out its *general fencing mandate* to deploy fencing along 700 miles of the southwest border, DHS is not legally required to install any portion of this required fencing at "any particular location."

The ability to construe the proviso in more than one way may be significant. Courts typically follow the interpretive principle that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.... "[87] If Section 102(b)'s proviso is construed to mean that DHS is only required to deploy the amount of fencing along the border that it deems appropriate, the clause would render Section 102(b)'s mandate that fencing be deployed "along at least 700 miles of the border" superfluous. On the other hand, if the proviso is interpreted to mean that, in carrying out its mandate to construct fencing along at least 700 miles of the border the border, DHS is not legally required to install the required fencing at any particular location, every provision of IIRIRA Section 102(b) can be given effect.

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[83] *Id*. at § 102(b)(1)(A).

[84] *See* Webster v. Doe, 486 U.S. 592, 600 (1988) (describing statute, providing that CIA Director may terminate employment of personnel whenever the Director "deems such termination necessary or advisable in the interests of the United States," as "exud[ing] deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review.").

[85] The provision is entitled a "Limitation on requirements."

[86] *See, e.g.*, Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 19 (1993) ("As we have noted previously in construing statutes, the use of ... a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section.").

[87] Hibbs v. Winn, 542 U.S. 88, 101 (2004) (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, (rev. 6th ed. 2000)).

The legislative history behind IIRIRA Section 102(b)'s fencing requirements also seems to support a narrow construction of Section 102(b)'s "notwithstanding" clause. As discussed previously, the amendments made to IIRIRA Section 102(b) by the 2008 Appropriations Act were originally part of a package of amendments, approved by the Senate as part of a homeland security appropriations bill, which were intended to ensure that fencing along 700 miles of the border would be constructed expeditiously.[88] The legislative history of these amendments' consideration, along with their plain text, seems to indicate that the amendments' purpose was to ensure that fencing was deployed along 700 miles of the border within two years. Indeed, the Senator who offered the amendment to IIRIRA Section 102(b) also co-sponsored these related amendments.[89] While Congress ultimately opted to enact one of these amendments into law but not the other, presumably the Senate would not have originally approved both amendments if they were understood to be conflicting.

To date, it appears that every federal court which has discussed IIRIRA Section 102(b) has described the provision in mandatory terms: DHS is required to deploy fencing along 700 miles of the southwest border, but it retains discretion to determine the appropriate locations in which to deploy the required fencing.[90] It should be noted, however, that no court has definitively ruled that an alternative interpretation is not permissible, or closely examined the interplay between the "notwithstanding" proviso and the general fencing requirement. But the uniform interpretation may suggest that, as a matter of first impression, Section 102(b) may be most reasonably construed as establishing a mandate to deploy fencing along at least 700 miles of the border.

For its part, DHS has appeared to take conflicting views regarding the firmness of IIRIRA Section 102(b)'s *general fencing mandate*. Initially, DHS appeared to construe the 700-mile specification as a firm requirement. In notices issued in the *Federal Register* in 2008 describing border fencing projects undertaken under IIRIRA Section 102(b), Secretary of Homeland Security Michael Chertoff stated that "Congress has called for the installation of fencing, barriers, roads, lighting, cameras, and sensors on not less than 700 miles of the southwest border …."[91]

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[88] *See supra* at "Legislative History."

[89] 153 CONG. REC. S10059 (daily ed. Jul. 26, 2007) (adding Sen. Hutchinson as co-sponsor to Graham amendment to homeland security appropriations bill, approved same day as amendment to IIRIRA Section 102(b), requiring completion of 700 miles of fencing within two years).

[90] *See* Gilman v. Dep't of Homeland Sec., 32 F.Supp.3d 1, 5 (D.D.C. 2014) (describing IIRIRA Section 102(b) as having been "amended to mandate 'reinforced fencing along not less than 700 miles of the southwest border' and [to charge] the Secretary of Homeland Security with completing ... reinforced fencing [in priority areas] by the end of 2008. The precise location of the fence, however, was left to ... [DHS] to determine 'where fencing would be most practical and effective.... '"); United States v. Arizona, No. 2:10-cv-01413-SRB, Order Dismissing Az.'s Countercls., at 16 (D. Az., Oct. 21, 2011) ("[A]s amended by the 2008 Appropriations Act, [IIRIRA Section 102(b)] provides for the construction of 700 miles of fencing and additional infrastructure along the border 'where [it] would be most practical and effective.'"); United States v. 1.04 Acres of Land, More or Less, Situate in Cameron Cty., Tex., 538 F.Supp.2d 995, 1004 (S.D. Tex. 2008) (describing the most recent amendments to IIRIRA Section 102(b) as "remov[ing] references to specific areas for the construction of the fence, giving the Secretary discretion on where to put the fencing. The Secretary of Homeland Security now has a general mandate to construct at least 700 miles of fencing along the United States-Mexico border where fencing would be most practical and effective."). *See also* United States v. 1.16 Acres of Land, More or Less, Situate in Cameron Cty., Tex., 585 F.Supp.2d 901, 907 n.3 (S.D. Tex. 2008) "[IIRIRA] Section 102(b) requires the Secretary of Homeland Security to construct a minimum number of miles of fencing in identified areas in the country.").

[91] Dep't of Homeland Sec., "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," 73 Fed. Reg. 18294 (Apr. 3, 2008), republished with additional document in 73 Fed. Reg. 19077 (April 8, 2008); "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," 73 Fed. Reg. 18293 (April 3, 2008), republished with additional document in 73 Fed. Reg. 19078 (Apr. 8, 2008).

In March 2009, Secretary of Homeland Security Janet Napolitano wrote to the House Homeland Security Committee in response to questions regarding DHS's obligations to deploy fencing along the southwest border. Secretary Napolitano described IIRIRA as mandating that DHS construct at least 700 miles of fencing, but at least for the immediate future, DHS would focus on fence deployment in priority areas:

> As amended, the Act mandates the completion of 700 total miles of fence. It also mandates that the Secretary identify priority areas "where fencing would be the most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States." As of March 6, 2009, DHS has completed approximately 611 of the 661 miles of fence identified by the Border Patrol as priority areas. While fencing remains an important tool in achieving effective control, it is only one element of our overall border security strategy that incorporates the proper mix of technology, personnel, and tactical infrastructure. Currently, there are no immediate funded plans to construct additional fencing.[92]

DHS later appeared to modify its interpretation of the IIRIRA Section 102(b), and began to describe the "notwithstanding" proviso as permitting it to deploy fencing along less than 700 miles of the border, if the agency deemed a lesser amount of fencing to be appropriate to achieve operational control.[93] Indeed, four years after describing IIRIRA Section 102(b) as imposing a firm mandate, Secretary Napolitano gave testimony before the Senate Judiciary Committee in which she appeared to take the view that DHS was legally permitted to construct a lesser amount of fencing.[94]

To date, DHS has not publicly released a formal legal opinion describing its interpretation of the fencing mandate established by IIRIRA Section 102(b), or announced whether or how its opinion has changed over the years. In defending DHS against a legal challenge by the State of Arizona in 2011,[95] in which Arizona sought to compel DHS to complete construction of fencing along 700 miles of the border (and undertake other immigration enforcement actions), the Department of Justice did not dispute the existence of this mandate, but instead argued that DHS decisions as to

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[92] Written Responses by DHS Secretary Napolitano to Questions by House Homeland Security Committee, *supra* note 14, at 65. Although Secretary Napolitano's written statement refers to DHS's obligation to complete "700 total miles of fence," rather than fencing along "700 miles of the border," it is not clear that this was a purposeful distinction. As previously noted, DHS has appeared to consistently count only primary pedestrian and vehicle fencing towards its efforts to fulfill the mandates of IIRIRA Section 102(b), rather than any secondary or tertiary fencing that may be deployed behind it. *See id*. (describing DHS as having "completed 611 miles of fence along the southwest border—301 miles of vehicle fence and 310 miles of primary pedestrian fence").

[93] *See* GAO Report, *supra* note 79, at 8. HOUSE COMMITTEE ON APPROPRIATIONS, DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS FOR 2011, PT. 3, COMMITTEE PRINT, Written Responses by Chief David Aguilar, CBP Acting Deputy Commissioner, to Questions Posed by Rep. Sam Farr, at 210 ("To date, DHS has completed 645.8 miles of fencing out of nearly 652 planned miles, including 298.5 miles of vehicle barriers and 347.3 miles of pedestrian fence (the Border Patrol has determined after extensive study that only 652 miles—not 700 miles—of fencing is operationally necessary to secure the southwest border).").

[94] COMPREHENSIVE IMMIGRATION REFORM, SENATE COMMITTEE ON THE JUDICIARY, SERIAL NO. J–113–4, Feb. 13, 2013, at 11 (Secretary Napolitano responded to a question regarding fence deployment by stating, "On the fence, the original act was for 700 miles. There was a subsequent amendment or adjustment to that—I think it was proposed by Senator Hutchison—to 655 miles. All but one mile of that is now complete, and the one mile or different little sections, most of them are in some litigation or another with private property owners. But the fence, to the extent it has been appropriated for, is complete.").

[95] For more extensive discussion of this litigation, as well as other lawsuits brought by U.S. states which challenge federal immigration enforcement policies, see CRS Report R43839, *State Challenges to Federal Enforcement of Immigration Law: From the Mid-1990s to the Present*, by (name redacted).

where to locate such fencing and the speed by which fencing was to deployed were committed to agency discretion.[96]

It should be noted that, in assessing the permissibility of an agency's interpretation of the laws it administers, reviewing courts typically accord the agency's interpretation of these statutes with some degree of deference, so long as the construction is reasonable.[97] In determining whether an agency's construction of a statute is reasonable, legislative intent is a touchstone for a reviewing court's analysis—an agency's interpretation might be entitled to deference when congressional intent is ambiguous and the agency's construction of the statute is reasonable.[98] Moreover, agency interpretations of statutory requirements are usually afforded a lesser degree of deference when the agency interpretation is not the result of a notice-and-comment rulemaking process or formal adjudication.[99] In such circumstances, the level of deference given to the agency's interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[100] The appropriate degree of deference to which DHS's

[96] *Arizona*, No. 2:10-cv-01413-SRB, Counterdefendants' Reply in Support of Their Motion to Dismiss Counterclaims, at 9 (D. Az., Jul. 12, 2011) ("DHS has already completed 649 of the 700 miles—over 92% of the target that Congress set a little over three years ago without a deadline—and that much of this fencing covers the Arizona border."); Counterdefendants' Motion to Dismiss Counterclaims and Memorandum of Law in Support Thereof, at 22 (D. Az. Apr. 12, 2001) ("Section 102 of the IIRIRA (as amended) vests in the Secretary complete discretion for determining how to gain operational control of the border and where fencing and additional measures should be utilized in that effort.... Further, the Act prescribes no deadline for completing the construction of 700 miles of fencing or installing additional physical barriers, roads, lighting, cameras, and sensors along the southwest border, despite the fact that the Act prescribed deadlines in other instances.").

[97] *See, e.g.,* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[98] *Id.* at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); United States v. Shimer, 367 U.S. 374, 383 (1961) (observing that when an agency is tasked with "accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned").

[99] In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 844 (1984), the Supreme Court recognized situations where Congress has expressly or impliedly delegated interpretative authority over a statute to an agency, a reviewing court will typically oblige to an agency's interpretation so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. Typically, a reviewing court will find an express or implied delegation of interpretive authority warranting *Chevron* deference in situations where there is "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." United States v. Mead Corp., 533 U.S. 218, 229-30 (2001). *See also* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000 ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.")

[100] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). In some instances, the Supreme Court has recognized that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." INS v. Cardoza-Fonseca, 480 U.S. 421, 446, n.30 (1987) (internal quotations omitted). However, a change in agency interpretation is not itself a ground to view the later construction as impermissible, at least so long as reasons for the change in policy are adequately explained. *See, e.g.*, National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. For if the agency adequately explains the reasons for a (continued...)

interpretation of the statutory requirements imposed by IIRIRA should be afforded may be subject to differing views.[101]

Assuming that DHS's interpretation of the requirements under IIRIRA Section 102(b) is subject to legal challenge, the degree of deference that a reviewing court gives to the agency's interpretation may be informed by a number of factors, including whether (1) the plain text of the statute is ambiguous, and DHS's interpretation is reasonable; (2) other indicia of legislative intent favor a particular interpretation; and (3) the agency's apparent modification of its interpretation of IIRIRA Section 102(b) entitles its current interpretation to a lesser degree of deference.

Potential Constraints on Judicial Review

Regardless of the appropriate interpretation of Section 102(b)'s general fencing mandate and the "notwithstanding" proviso, the statute imposes no clear deadline for when the contemplated fencing must be deployed. In the 2011 litigation in which Arizona sought to compel DHS to complete construction of fencing required under IIRIRA Section 102(b), the reviewing federal district court dismissed Arizona's motion, in part because "no deadline mandates completion of the fencing and infrastructure developments or any required discrete action by a specified time."[102] The court further observed that, although "the construction of the fencing and infrastructure improvements may be phrased in mandatory language," IIRIRA affords DHS "a great deal of discretion in deciding how, when, and where to complete the construction."[103]

The absence of a deadline for the completion of the fencing requirements of IIRIRA Section 102(b) does not necessarily mean that DHS has no judicially enforceable legal obligation to complete any remaining fencing. The Administrative Procedure Act (APA), for example, provides courts with the authority to compel agency action, when such action has been "unlawfully withheld or unreasonably delayed."[104] Determining whether an agency has unreasonably delayed undertaking a required action is a fact-specific determination made on a case-by-case basis, with reviewing courts typically showing more deference to an agency when there is not a statutory deadline for agency action.[105]

(...continued)

reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.") (internal quotations and citations omitted).

[101] In *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co*., 513 U.S. 251 (1996), the Supreme Court afforded *Chevron* deference to the Comptroller of Currency's "deliberative conclusions" regarding the interpretation of banking laws, on account of the Comptroller being "charged with the enforcement of banking laws to an extent that warrants the invocation" of a high standard of deference to his interpretations. Subsequently in *United States. v. Mead Corp*., the Supreme Court seemed to suggest that the conclusion it reached in *NationsBank* was at least partially on account of "longstanding precedent" recognizing the Comptroller's interpretative authority. *Mead Corp*., 533 U.S. at 231 n.13. Accordingly, the possible relevance of *NationsBank* to decisions outside the banking context, including with respect to DHS interpretations of fencing requirements of IIRIRA, is unclear.

[102] United States v. Arizona, No. 2:10-cv-01413-SRB, Order Dismissing Az.'s Countercls., at 16 (D. Az., Oct. 21, 2011).

[103] *Id.*

[104] 5 U.S.C. § 706(1).

[105] For further discussion, see CRS Report R43013, *Administrative Agencies and Claims of Unreasonable Delay: Analysis of Court Treatment*. See also Telecomms. Research and Action Ctr. v. FCC, 750 F.2d 70. 79-80 (D.C. Cir. 1984) (observing that "the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant mandamus," and identifying several factors that should be appropriately considered when assessing an agency delay claim). In situations where a statutory provision requiring agency action does not contain a statutory deadline for completion of such action, some reviewing courts considering APA-based challenges to the agency inaction will assess (continued...)

If a court determined that DHS had unreasonably delayed fulfillment of its obligations under IIRIRA Section 102(b), it might deem the completion of at least 700 miles of fence along the southwest border to constitute "a discrete agency action" that it would potentially have the power to compel.[106] The district court in the *Arizona* case found that completion of the border fence was not a "discrete agency action" that it could compel DHS to take, but it did not explain the basis for this conclusion.[107]

Moreover, even assuming that a court might have jurisdiction to review a claim that DHS has unreasonably delayed fence construction, it is not clear who would have standing to make such a claim.[108] To demonstrate standing, a plaintiff must (1) show a concrete and particularized, actual or imminent injury; (2) demonstrate a fairly traceable, causal connection between the injury and the defendant's conduct; and (3) demonstrate that it is likely that the injury will be redressed by a favorable court decision. It may be difficult for a plaintiff to identify a concrete, particularized injury that would be effectively remedied if DHS deployed fencing along an additional 50 miles of the border. In the *Arizona* case, the district court presumed without deciding that Arizona had standing but dismissed its claims.[109]

Authority to Waive Legal Requirements Impeding Construction of Roads and Barriers

Section 102(c) of IIRIRA confers the Secretary of Homeland Security with broad authority to waive legal requirements that may impede the construction of barriers and roads along the border. The nature and scope of this waiver authority changed significantly pursuant to modifications made by the REAL ID Act of 2005. In the years following, the Secretary of Homeland Security employed this waiver authority to facilitate the construction of hundreds of miles of fencing and other infrastructure along several sections of the southwest border. More recently, however, this waiver authority has not been employed to facilitate further large-scale border projects.

Original Waiver Authority

When initially enacted in 1996, IIRIRA Section 102(c) expressly authorized the waiver the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA),[110] to the extent that such waivers were determined necessary by the Attorney General to expeditiously

(...continued)

whether the action was "unreasonably delayed" rather than "unlawfully withheld." See Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999).

[106] *SUWA*, 542 U.S. at 64. Even assuming that the deployment of fencing "along not less than 700 miles of the border where it would be most practical and effective" could be considered a discrete agency action that a court could compel, a court would unlikely be able to direct DHS to deploy such fencing at a specific location. *See id*. at 65 ("[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be."); IIRIRA § 102(b)(1)(D) (providing that DHS is not required to deploy fencing at "any particular location" when the DHS Secretary determines that other means are more appropriate for achieving operational control of that location).

[107] *Arizona*, No. 2:10-cv-01413-SRB, Order Dismissing Az.'s Countercls., at 16 (D. Az., Oct. 21, 2011) (in considering Arizona's motion seeking to compel completion of fencing, finding that IIRIRA, as amended, did "not mandate any discrete agency action with the clarity to support a judicial order compelling agency action," but not explaining reasoning for this conclusion).

[108] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[109] *Arizona*, No. 2:10-cv-01413-SRB, Order Dismissing Az.'s Countercls., at 4-5.

[110] P.L. 104-208, div. C, § 102c. A general overview of relevant NEPA and ESA requirements in found in **Appendix B**.

construct barriers and roads under Section 102. Other federal laws, however, remained applicable to border construction projects. Federal immigration authorities appear to have not employed IIRIRA Section 102(c), as originally enacted, to waive NEPA and ESA requirements.[111]

In 2004, eight years after IIRIRA mandated completion of a second and third layer of fencing along the San Diego border, fencing was still not completed due to litigation and concerns related to environmental statutes other than NEPA and the ESA.[112] The California Coastal Commission essentially halted the San Diego fencing project after determining that DHS 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, 16 U.S.C. §§ 1451, *et seq*.[113]

Expansion of Waiver Authority Under the REAL ID Act

In part due to delays in the construction of fencing near San Diego,[114] Congress amended IIRIRA Section 102(c) via the REAL ID Act of 2005. As amended, IIRIRA Section 102(c) permits the Secretary of DHS to waive "all legal requirements" necessary to ensure expeditious construction of these security barriers.[115] Such waivers are effective upon publication in the *Federal Register*.[116] 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 be reviewed only by the Supreme Court, whose review is discretionary.

The scope of this waiver authority is substantial—with some observers describing it as possibly having greater reach than any other waiver authority conferred by statute[117]—leading some to express concern over its breadth and the limited scope of judicial review available for waiver decisions.[118] Although IIRIRA Section 102(c), as amended by the REAL ID Act, could not properly be construed to permit the Secretary to waive application of the Constitution to fencing

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[111] *See* CCC Report, *supra* note 35, at 4.

[112] For further discussion, see CRS Report RS22026, *Border Security: The San Diego Fence*, by (name redacted) and (name redacted) , available upon request.

[113] *See* CCC Report, *supra* note 35, at 1-4.

[114] *See* H.Rept. 109-72, 109th Cong., 1st Sess. (2005) at 170-72 (conference report for emergency supplemental appropriations legislation to which the REAL ID Act was attached, describing purposes of the act).

[115] As initially introduced as H.R. 418, the REAL ID Act *required* the Secretary of DHS to waive "all laws" necessary to ensure expeditious construction of the security barriers. H.R. 418 was passed by the House as a stand-alone piece of legislation, but was subsequently attached as an amendment to House-passed H.R. 1268, the emergency supplemental appropriations bill for FY2005. During conference, language was revised in H.R. 1268, so that the Secretary was authorized, but not required, to waive "all legal requirements" deemed necessary to ensure construction of the security barriers. The conferees also added provisions to the REAL ID Act which made waiver decisions effective upon publication in the *Federal Register* and permitted federal court review of waiver decisions only in limited circumstances. *See* H.Rept. 109-72, 109th Cong., 1st Sess. (2005) at 170-72. The conference version of H.R. 1268 was enacted on May 11, 2005.

[116] IIRIRA § 102(c)(1).

[117] *See* David J. Barron and Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 290 (2013) (examining history of broad statutory waivers, and observing that "[a]s a matter of its formal reach…[the REAL ID Act] waiver may be the biggest Congress has yet passed").

[118] *See, e.g.*, Kate R. Bowers, *Saying what the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 HARV. ENVTL. L. REV. 257 (2010) (criticizing REAL ID Act's waiver expansion on policy grounds and on ground that it may represent a constitutionally impermissible delegation of legislative authority and result in the usurpation of judicial authority by the Executive); David J. Barron and Todd D. Rakoff, *supra* note 117, at 289-90, 337-39 (discussing modern usage of large-scale delegations of waiver authority to administrative agencies and generally defending their constitutionally, but expressing concern regarding the breadth of the REAL ID Act waiver).

projects,[119] the waiver potentially could be employed with respect to any other existing legal requirement—provided that the Secretary of Homeland Security concluded that compliance with the requirement would impede expeditious construction of barriers and roads. Waivers issued under IIRIRA Section 102(c) have not only targeted federal and state statutes, but also any regulations and requirements deriving from or relating to such laws.

Nonetheless, the waiver authority conferred by IIRIRA Section 102(c) is not absolute. The Secretary may only waive those legal requirements that, in effect, would impede the construction of barriers and roads under Section 102. The authority does not appear to permit the Secretary to waive legal requirements that only tangentially relate to, or do not necessarily interfere with, the construction of roads and barriers.[120] The decision of whether to waive a legal requirement is the responsibility of the Secretary of Homeland Security, and authority may be exercised in his discretion. Until such time as the Secretary waives an applicable law, however, DHS must generally follow all legal requirements normally imposed on federal agencies.[121]

To date, the Secretary of DHS has provided notice in the *Federal Register* on five occasions that he was invoking the waiver authority conferred under IIRIRA Section 102(c):

- **San Diego Border Sector—**On September 22, 2005, a notice was issued in the *Federal Register* indicating that waiver authority had been exercised over various legal requirements in order to ensure the expeditious construction of the San Diego border fence.[122] The waiver applies to "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject," of various federal statutes listed in **Appendix B**.
- **Barry M. Goldwater Range (BMGR) in Southwestern Arizona—**A *Federal Register* notice was published on January 19, 2007, indicating that the Secretary was waiving various legal requirements in order to ensure the expeditious construction of physical barriers and roads in the vicinity of the BMGR in southwestern Arizona.[123] The waiver applies to all "[f]ederal, [s]tate, or other

[119] *See, e.g.,* Williams v. Rhodes, 393 U.S. 23, 29 (1968) ("[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution."). Indeed, IIRIRA Section 102(c)(2)(A) expressly provides that federal district courts have jurisdiction to hear claims arising from border construction projects "alleging a violation of the Constitution of the United States."

[120] In exercising waiver authority under IIRIRA, the DHS Secretary appears to have construed it as applying to physical infrastructure projects built in connection with the construction of barriers and roads, such as radio towers. *See, e.g.,* Dep't of Homeland Sec., "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," 73 Fed. Reg. 19078 (Apr. 8, 2008) (waiving laws related to access, staging, and construction in the project area including "installation and upkeep of fences, roads, supporting elements, draining, erosion controls, safety features, surveillance, communication and detection equipment of all types, radar and radio towers and lighting").

[121] With respect to each of the fencing projects conducted between 2008 and 2011 in which the Secretary had exercised waiver authority, DHS's CBP prepared an environmental stewardship plan (ESP) concerning the potential environmental effects of the project. After a project was completed, CBP would prepare an environmental stewardship summary report (ESSR) "documenting the final 'footprint' of the sections built under the waiver to provide an "as built" summary for the public and regulatory agencies." CBP, *Environmental Stewardship Plans (ESPs) Environmental Stewardship Summary Reports (ESSRs), available at* http://www.cbp.gov/about/environmental-cultural-stewardship/nepa-documents/esp-essr.(providing links to ESPs and ESSRs).

[122] Dep't of Homeland Sec., "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005," 70 Fed. Reg. 55622-02, Sept. 22, 2005.

[123] Dep't of Homeland Sec., "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant (continued...)

laws, regulations and legal requirements of, deriving from, or related to the subject" of several federal statutes listed in **Appendix C**.

- **San Pedro Riparian National Conservation Area in Southeastern Arizona**—On October 5, 2007, Defenders of Wildlife and the Sierra Club brought suit seeking a temporary restraining order (TRO) enjoining DHS from border fence and road-building activities in the San Pedro Riparian National Conservation Area, located in the vicinity of the U.S. border in southeastern Arizona.[124] On October 10, 2007, the presiding district court judge issued a TRO halting fence construction activities in the Conservation Area, finding the relevant federal agencies had failed to carry out an environmental assessment as legally required under NEPA.[125] On October 26, 2007, a notice was published in the *Federal Register* indicating that the Secretary of Homeland Security had exercised waiver authority over various legal requirements in order to ensure the expeditious construction of physical barriers or roads through the San Pedro Riparian National Conservation Area (including any and all lands covered by the TRO),[126] thereby enabling DHS to resume fence construction. The waiver applies to "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject" of a collection of federal statutes listed in **Appendix D**.
- **Hidalgo County, Texas**—On April 3, 2008, notice was given in the *Federal Register* that the Secretary of Homeland Security had exercised his waiver authority under IIRIRA Section 102(c) to ensure the construction of barriers and roads in Hidalgo County, Texas.[127] The waiver applies to "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject" of various federal statutes listed in **Appendix E**.
- **Border Projects in California, Arizona, New Mexico, and Texas**—On April 3, 2008, the Secretary of Homeland Security gave notice in the *Federal Register* of the waiver of various laws in relation to border construction projects in California, Arizona, New Mexico, and Texas.[128] The waiver applies to "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject" of various federal statutes listed in **Appendix F**.

In multiple instances, lawsuits were brought challenging the constitutionality of an issued waiver. Constitutional claims raised in these collective cases included arguments that the waiver authority was an impermissible delegation of Congress's lawmaking authority; the waiver provision

(...continued)

Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006," 72 Fed. Reg. 2535-01, Jan. 19, 2007.

[124] Defenders of Wildlife v. Bureau of Land Management, Case 1:07-cv-01801-ESH (D.D.C. 2007).

[125] A description of NEPA's requirements is found in **Appendix B**.

[126] Dep't of Homeland Sec., "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006," 72 Fed. Reg. 60870-01, Oct. 26, 2007.

[127] Dep't of Homeland Sec., "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," 73 Fed. Reg. 18294 (April 3, 2008), *republished with additional document in* 73 Fed. Reg. 19077 (April 8, 2008).

[128] Dep't of Homeland Sec., "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," 73 Fed. Reg. 18293 (April 3, 2008), *republished with additional document in* 73 Fed. Reg. 19078 (April 8, 2008).

violated the Presentment Clause by effectively enabling the executive branch to "repeal" or "amend" existing laws to exempt border infrastructure projects from their coverage; and the waiver authority's application to state and local laws violated federalism and anti-commandeering principles. In each case, the reviewing federal district court upheld the exercise of waiver authority as constitutionally valid.[129] Parties in two of the cases sought Supreme Court review, but the Court declined to grant certiorari in either case.[130]

Conclusion

Pursuant to IIRIRA Section 102, Congress has conferred DHS with clear authority to construct barriers and roads along the international land borders to deter illegal crossings in areas of high illegal entry. More specifically, it has required fencing to be constructed along specified mileage of the southwest border. In recent years, legislative attention has primarily focused upon the fencing requirements contained in IIRIRA Section 102(b). Prior versions of Section 102(b) imposed specific requirements as to the location where fencing was to be installed and the layers of fencing to be constructed. The current provision affords DHS with significantly greater discretion to determine the appropriate location, layers, and types of fencing to be installed along the southwest border.

Whether DHS has discretion to construct less fencing than the amount specified under IIRIRA Section 102(b), on account of a proviso that posits that the agency is not required to construct fencing at any "particular location" where it deems fencing to be inappropriate, has been the subject of disagreement (and apparently inconsistent views by DHS itself). While there appears to be stronger support for construing Section 102(b) to establish a firm mandate for the deployment of fencing along 700 miles of the border, with the agency retaining discretion as to the locations along the border where fencing should be installed, it is not clear whether a court would have the ability to compel DHS to install additional fencing (or that a plaintiff would have standing to bring such a claim). If Congress disagrees with DHS's implementation of the fencing mandate under Section 102(b), it would likely need to enact legislation to modify or clarify the fencing requirements found in current statute.

But even assuming that DHS satisfies the fencing requirements under Section 102(b), the general authority conferred to the agency under Section 102(a) permits it to construct additional fencing or other barriers along the U.S. land borders. There is nothing in current statute that would appear to bar DHS from potentially installing hundreds of miles of additional fencing or other physical barriers along the border, at least so long as the action was determined appropriate to deter illegal crossings in areas of high illegal entry. Moreover, IIRIRA Section 102(c) grants DHS authority to waive any legal requirement that would impede the expeditious construction of additional barriers and roads. DHS's decision not to deploy a substantial amount of additional fencing, beyond what is required under IIRIRA Section 102(b), appears primarily premised on policy considerations and funding constraints, rather than significant legal impediments. Accordingly, policymakers may deem it appropriate to review and assess the scope of DHS's authority to construct barriers, and the manner in which such authority is exercised, even after any requirements under IIRIRA Section 102(b) are satisfied.

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[129] Cty. of El Paso v. Chertoff, No. EP-08-CA-196, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008); Save Our Heritage Org. v. Gonzalez, 533 F. Supp. 2d 58 (D.D.C. 2008); Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007); Sierra Club v. Ashcroft, No. 04-CV-272, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 13, 2005).

[130] *County of El Paso*, No. EP-08-CA-196, (W.D. Tex. Aug. 29, 2008), *cert. denied*, 129 S. Ct. 2789 (2009); *Defenders of Wildlife*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 128 S. Ct. 2962 (2008).

Appendix A. IIRIRA Section 102, as Amended (Text)[131]

Sec. 102 - Improvement of Barriers at Border

(a) In General.-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.

(b) Construction of Fencing and Road Improvements Along the Border.-

(1) Additional fencing along southwest border.-

(A) Reinforced fencing.-In carrying out subsection (a), the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.

(B) Priority areas.-In carrying out this section [amending this section], the Secretary of Homeland Security shall-

(i) identify the 370 miles, or other mileage determined by the Secretary, whose authority to determine other mileage shall expire on December 31, 2008, along the southwest border where fencing would be most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States; and

(ii) not later than December 31, 2008, complete construction of reinforced fencing along the miles identified under clause (i).

(C) Consultation.-

(i) In general.-In carrying out this section, the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.

(ii) Savings provision.-Nothing in this subparagraph may be construed to-

(I) create or negate any right of action for a State, local government, or other person or entity affected by this subsection; or

(II) affect the eminent domain laws of the United States or of any State.

(D) Limitation on requirements.-Notwithstanding subparagraph (A), nothing in this paragraph shall require the Secretary of Homeland Security to install fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location along an international border of the United States, if the Secretary determines that the use

[131] Illegal Immigration Reform and Immigrant Responsibility Act, P.L. 104-208, div. C, § 102(a)-(c), as amended by the REAL ID Act of 2005, P.L. 109-13, div. B, § 102; the Secure Fence Act of 2006, P.L. 109-367, § 3, and the Consolidated Appropriations Act, 2008 P.L. 110-161, div. E, § 564(a). These requirements are codified at 8 U.S.C. § 1103 note.

or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.

(2) Prompt acquisition of necessary easements.-The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act [8 U.S.C. 1103(b)] (as inserted by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection and shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).

(3) Safety features.-The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.

(4) Authorization of appropriations.-There are authorized to be appropriated such sums as may be necessary to carry out this subsection. Amounts appropriated under this paragraph are authorized to remain available until expended.

(c) Waiver.-

(1) In general.-Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section [amending this section]. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

(2) Federal court review.-

(A) In general.-The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

(B) Time for filing of complaint.-Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

(C) Ability to seek appellate review.-An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

Appendix B. Legal Requirements Waived by DHS for the Construction of the San Diego Border Fence

Laws Waived	Pertinent Requirements
Administrative Procedure Act (APA) 5 U.S.C. §§ 551, *et seq.*	The APA establishes the general procedures that an agency must follow when promulgating a legislative rule. An agency must publish a notice of proposed rulemaking in the *Federal Register*, afford interested persons an opportunity to participate in the proceeding through the submission of written comments or, at the discretion of the agency, by oral presentation, and when consideration of the matter is completed, incorporate in the rules adopted "a concise general statement of their basis and purpose." A final rule must be published in the *Federal Register* "not less than 30 days before its effective date."
Clean Air Act (CAA) 42 U.S.C. §§ 7401, *et seq.*	The CAA requires the Environmental Protection Agency to establish minimum national standards for air quality, known as National Ambient Air Quality Standards (NAAQS), and assigns primary responsibility to the states to assure compliance with the standards. Areas not meeting the standards, referred to as "nonattainment areas," are required to implement specified air pollution control measures. Federal agencies must comply with the federal general air conformity rule set forth by the CAA and codified in 40 CFR Part 51. The general conformity rule requires federal agencies to ensure that actions are consistent with the applicable state plan. The states administer the CAA through a comprehensive permitting program.
Coastal Zone Management Act (CZMA) 16 U.S.C. §§ 1451, *et seq.*	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. The federal agency must submit a consistency determination to the applicable state agency.
Endangered Species Act (ESA) 16 U.S.C. §§ 1531, *et seq.*	Section 7 of the ESA mandates that each federal agency consult with the Fish and Wildlife Service (FWS) or National Marine Fishery Services (NMFS), depending on the listed species involved, to ensure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of" designated critical habitat. Once consulted, FWS or NMFS must, if listed species might be affected, prepare a *biological opinion* related to the actual impact of the proposed action. Mitigation measures could be required.
Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §§ 1251, *et seq.*	Section 404 of the Clean Water Act establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt.
Migratory Bird Treaty Act (MBTA) 16 U.S.C. §§ 703, *et seq.*	Section 2 of the MBTA sets out the types of prohibited conduct and states: "Unless and except as permitted by regulations ... it shall be unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill, attempt to do these acts, [or] possess ... any migratory bird, [or] any part, nest, or eggs of any such bird.... " Violations of the MBTA may result in civil or criminal penalties.

Laws Waived	Pertinent Requirements
National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321, *et seq.*	Under NEPA, an environmental impact statement must be prepared for "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." NEPA regulations require that if an agency is uncertain whether an action's impacts on the environment will be significant, it generally must prepare an environmental assessment (EA). An EA is carried out to clarify issues and determine the extent of an action's environmental effects.
National Historic Preservation Act (NHPA) 16 U.S.C. §§ 470, *et seq.* (Act repealed by P.L. 113-287, §7; similar provisions now codified in Title 54 of the U.S. Code)	In accordance with the NHPA and its implementing regulations, sites determined to be eligible for inclusion in the National Register of Historic Places must be protected, either through avoidance or other mitigative action, from direct and indirect impacts. The NHPA also has procedural requirements, including public notice and comment.

Appendix C. Legal Requirements Waived by DHS for the Construction of Physical Barriers and Roads in the Vicinity of the Barry M. Goldwater Range in Southwest Arizona

Laws Waived	Pertinent Requirements
Administrative Procedure Act (APA) 5 U.S.C. §§ 551, *et seq.*	See **Appendix B** for description of requirements.
Endangered Species Act (ESA) 16 U.S.C. §§ 1531, *et seq.*	See **Appendix B** for description of requirements.
Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §§ 1251, *et seq.*	See **Appendix B** for description of requirements.
Military Lands Withdrawal Act of 1999 P.L. 106-65, Div. B	Section 3031 of the Military Lands Withdrawal Act of 1999 withdrew federal lands administered by the Bureau of Land Management from the public domain for 25 years, transferred these lands to the Secretaries of the Air Force and the Navy for this period, and reserved the lands for U.S. military training, testing, and other related purposes within the Barry M. Goldwater Range. The Secretaries of the Air Force, Navy, and Interior were required to prepare an Integrated Natural Resources Management Plan (INRMP) under the Sikes Act which, among other things, provided that "all gates, fences, and barriers constructed on such lands ... be designed and erected to allow wildlife access, to the extent practicable and consistent with military security, safety, and sound wildlife management use."
National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321, *et seq.*	See **Appendix B** for description of requirements.
National Historic Preservation Act (NHPA) 16 U.S.C. §§ 470, *et seq.* (Act repealed by P.L. 113-287, § 7; similar provisions now codified in Title 54 of the U.S. Code)	See **Appendix B** for description of requirements.
National Wildlife Refuge System Administration Act 16 U.S.C. §§ 668dd-668ee	The National Wildlife Refuge System (NWRS) was primarily established to ensure the conservation of fish, wildlife, and plants. Designated areas may be used for other purposes (e.g., hunting, timber harvest, and grazing) only to the extent that such activities are compatible with the purposes for which the refuge was created. The refuges are managed by the Fish and Wildlife Service.
Sikes Act 16 U.S.C. §§ 670, *et seq.*	The Sikes Act requires the Secretary of Defense to carry out a program providing for the conservation and rehabilitation of natural resources on U.S. military installations under the jurisdiction of the Secretary (including federal lands withdrawn from the public domain, transferred to the Secretary, and reserved for U.S. military use). In cooperation with the Secretary of the Interior, the Secretary of each military department is required to prepare and implement an Integrated Natural Resources Management Plan (INRMP) for each military installation under the jurisdiction of that Secretary if the installation contains "significant" natural resources.

Laws Waived	Pertinent Requirements
Wilderness Act 16 U.S.C. §§ 1131, *et seq.*	The Wilderness Act established a National Wilderness Preservation System on federal lands "where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." Within designated wilderness areas, section 4(c) of the act generally prohibits structures or installations, motor vehicle or other forms of mechanical transport, and roads.

Appendix D. Legal Requirements Waived by DHS for the Construction of Physical Barriers and Roads in the Vicinity of the San Pedro Riparian National Conservation Area in Southeast Arizona

Laws Waived	Pertinent Requirements
Administrative Procedure Act (APA) 5 U.S.C. §§ 551, *et seq.*	See **Appendix B** for description of requirements.
Antiquities Act 16 U.S.C. §§ 431, *et seq.* (Act repealed by P.L. 113-287, § 7; similar provisions now codified in Title 54 of the *U.S. Code*)	The Antiquities Act authorizes the President to declare as national monuments federal lands that contain historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest. Other provisions authorize the Secretaries of the Interior, Agriculture, and Army to issue permits to qualified institutions for the excavation of archaeological sites and gathering of objects of antiquity on lands under their respective jurisdictions. Penalties are provided for removing, excavating, or damaging resources protected under the act.
Archaeological and Historic Preservation Act (AHPA) 16 U.S.C. §§ 469, *et seq.*	The purpose of the AHPA is to provide for the preservation of historical and archeological data which might otherwise be irreparably lost or destroyed as the result of, among other things, any alteration of terrain caused by a federal construction project. If a federal agency becomes aware that its activities in connection with a construction project may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, the agency must notify the Secretary of the Interior. If the Secretary deems such data to be significant and in danger of being irrevocably lost or destroyed, he is authorized to take action to protect and recover it.
Archeological Resources Protection Act (ARPA) 16 U.S.C. §§ 470aa, *et seq.*	ARPA generally prohibits the damage, removal, excavation, or alteration of any archeological resource located on public lands or Indian lands, except pursuant to a permit issued by the appropriate federal land manager.
Arizona-Idaho Conservation Act of 1988 16 U.S.C.§§ 460xx, *et seq.*	The Arizona-Idaho Conservation Act established the San Pedro Riparian National Conservation Area to protect public lands surrounding the San Pedro River in Cochise County, Arizona. The Secretary of the Interior is responsible for managing the area in a manner that conserves, protects, and enhances its wildlife and other resources. The Secretary may only permit uses of the conservation area that are determined to further the primary purposes for which the conservation area was established, and may implement limits to visitation and use. Except in limited circumstances, motorized vehicles are permitted only on designated roads. Persons who violate the act or its implementing regulations are subject to a fine and/or imprisonment.
Clean Air Act (CAA) 42 U.S.C. §§ 7401, *et seq.*	See **Appendix B** for description of requirements.
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. §§ 9601, *et seq.*	CERCLA authorizes federal actions to respond to the release or substantial threat of a release of a hazardous substance into the environment, and of a pollutant or contaminant which may present an imminent and substantial endangerment to the public health or welfare. The act established liability of certain persons associated with a release of hazardous substances for cleanup costs, natural resource damages, and the costs of federal public health studies. Federal departments, agencies, and instrumentalities are subject to the act to the same extent as nongovernmental entities, including for purposes of liability.

Laws Waived	Pertinent Requirements
Endangered Species Act (ESA) 16 U.S.C. §§ 1531, *et seq.*	See **Appendix B** for description of requirements.
Farmland Protection Policy Act (FPPA) 7 U.S.C. §§4201, *et seq.*	The FPPA requires the Department of Agriculture, in cooperation with other federal entities, to develop criteria for identifying the effects of federal programs on the conversion of farmland to nonagricultural uses. Federal agencies are thereafter required to use these criteria to identify farmland that is converted by federal programs and take into account the adverse effects of such programs on the preservation of farmland. Agencies must consider alternative actions, as appropriate, that could lessen such adverse effects.
Federal Land Policy and Management Act (FLPMA) 43 U.S.C. §§ 1701, *et seq.*	The FLPMA primarily establishes guidelines for the management, protection, and use of federal public lands, as administered by the Secretary of the Interior through the Bureau of Land Management. The law provides for BLM lands to be managed on a multiple-use, sustained-yield basis. Provisions pertain to land use planning, acquisition, exchange, disposal, withdrawal, rights of way, range management, wilderness study, and advisory groups, among others. Some provisions also pertain to National Forest System lands.
Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §§ 1251, *et seq.*	See **Appendix B** for description of requirements.
Fish and Wildlife Coordination Act (FWCA) 16 U.S.C. §§ 661, *et seq.*	The FWCA generally provides that whenever the waters of any stream or other body of water are proposed to be modified by a federal agency, the agency must first consult with the United States Fish and Wildlife Service, Department of the Interior, and the head of the agency exercising administration over the wildlife resources of the state where the construction will occur, with a view to the conservation of wildlife resources.
Historic Sites, Buildings, and Antiquities Act (HSBAA) 16 U.S.C. §§ 461, *et seq.* (Act repealed by P.L. 113-287, § 7; similar provisions now codified in Title 54 of the U.S. Code)	The HSBAA declares it the national policy to preserve historic sites, buildings, and objects of national significance. The Secretary of the Interior, through the National Park Service, is charged with implementing the policy of the HSBAA, including through the acquisition, maintenance, administration of historic sites.
Migratory Bird Treaty Act (MBTA) 16 U.S.C. §§ 703, *et seq.*	See **Appendix B** for description of requirements.
National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321, *et seq.*	See **Appendix B** for description of requirements.
National Historic Preservation Act (NHPA) 16 U.S.C. §§ 470, *et seq.* (Act repealed by P.L. 113-287, § 7; similar provisions now codified in Title 54 of the U.S. Code)	See **Appendix B** for description of requirements.
Noise Control Act (NCA) 42 U.S.C. §§ 4901, *et seq.*	Pursuant to the NCA, the federal government has established standards for maximum sound levels generated from a variety of commercial products, railways, and interstate motor carriers.

Laws Waived	Pertinent Requirements
Safe Drinking Water Act (SDWA) 42 U.S.C. §§ 300f, *et seq.*	The Safe Drinking Water Act provides federal authority for the establishment of standards and treatment requirements for public water supplies, control of the underground injection of wastes, and protection of sources of drinking water. Federal agencies involved in certain activities that may contaminate drinking water are subject to all federal, state, and local requirements concerning the protection of water systems to the same extent as any person is subject to such requirements.
Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act (RCRA) 42 U.S.C. §§ 6901, *et seq.*	Through the SWDA, as amended by RCRA, entities that transport or generate hazardous waste are required to comply with regulations concerning the management of waste. Moreover, each federal agency engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste is subject to all federal, state, and local requirements concerning such waste to the same extent as any person is subject to such requirements.
Wild and Scenic Rivers Act 16 U.S.C. §§ 1281, *et seq.*	The Wild and Scenic Rivers Act establishes a National Wild and Scenic Rivers System (System) protecting rivers and adjacent lands with important scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. Components of the System are to be administered in a manner that preserves their free-flowing condition in order to protect water quality and to fulfill other national conservation purposes.

Appendix E. Legal Requirements Waived by DHS for the Construction of Physical Barriers and Roads in Hidalgo County, Texas

Laws Waived	Pertinent Requirements
Administrative Procedure Act (APA) 5 U.S.C. §§ 551, *et seq.*	See **Appendix B** for description of requirements.
American Indian Religious Freedom Act (AIRFA) 42 U.S.C. § 1996	AIRFA ensures American Indian groups access to religious sites by directing federal agencies to consult with American Indian spiritual leaders to determine appropriate procedures to protect access and other religious rights.
Antiquities Act 16 U.S.C. §§ 431, *et seq.* (Act repealed by P.L. 113-287, § 7; similar provisions now codified in Title 54 of the U.S. Code)	See **Appendix D** for description of requirements.
Archaeological and Historic Preservation Act (AHPA) 16 U.S.C. §§ 469, *et seq.*	See **Appendix D** for description of requirements.
Archeological Resources Protection Act (ARPA) 16 U.S.C. §§ 470aa, *et seq.*	See **Appendix D** for description of requirements.
Clean Air Act (CAA) 42 U.S.C. §§ 7401, *et seq.*	See **Appendix B** for description of requirements.
Coastal Zone Management Act (CZMA) 16 U.S.C. §§ 1451, *et seq.*	See **Appendix B** for description of requirements.
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. §§ 9601, *et seq.*	See **Appendix D** for description of requirements.
Eagle Protection Act 16 U.S.C. §§ 668, *et seq.*	The Eagle Protection Act provides for the protection of the bald eagle and the golden eagle by prohibiting the taking, possession, and commerce of such birds.
Endangered Species Act (ESA) 16 U.S.C. §§ 1531, *et seq.*	See **Appendix B** for description of requirements.
Farmland Protection Policy Act (FPPA) 7 U.S.C. §§ 4201, *et seq.*	See **Appendix D** for description of requirements.
Federal Grant and Cooperative Agreement Act of 1977 31 U.S.C. §§ 6303-6305	The Federal Grant and Cooperative Agreement Act governs the use of various types of agreements. This act imposes standards mandating the use of procurement contracts, grants, and cooperative agreements in specific situations, while allowing the use of non-standard agreements in other situations.
Federal Land Policy and Management Act (FLPMA) 43 U.S.C. §§ 1701, *et seq.*	See **Appendix D** for description of requirements.

Laws Waived	Pertinent Requirements
Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §§ 1251, *et seq.*	See **Appendix B** for description of requirements.
Fish and Wildlife Act of 1956 16 U.S.C. §§ 742a, *et seq.*	The Fish and Wildlife Act establishes a comprehensive national fish, shellfish, and wildlife resources policy. The law requires the Secretary of Interior to develop measures for "maximum sustainable production of fish," make economic studies of the industry and recommend measures to insure the stability of fisheries, take steps "required for the development, management, advancement, conservation and protection of the fisheries resources," and take steps "required for the development, management, advancement, conservation, and protection of fish and wildlife resources" through research, acquisition of land or water, development of existing facilities, and other means.
Fish and Wildlife Coordination Act (FWCA) 16 U.S.C. §§ 661, *et seq.*	See **Appendix D** for description of requirements.
Historic Sites, Buildings, and Antiquities Act (HSBAA) 16 U.S.C. §§ 461, *et seq.* (Act repealed by P.L. 113-287, § 7; similar provisions now codified in Title 54 of the U.S. Code)	See **Appendix D** for description of requirements.
Migratory Bird Treaty Act (MBTA) 16 U.S.C. §§ 703, *et seq.*	See **Appendix B** for description of requirements.
National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321, *et seq.*	See **Appendix B** for description of requirements.
National Historic Preservation Act (NHPA) 16 U.S.C. §§ 470, *et seq.* (Act repealed by P.L. 113-287, §7; similar provisions now codified in Title 54 of the U.S. Code)	See **Appendix B** for description of requirements.
National Wildlife Refuge System Administration Act 16 U.S.C. §§ 668dd-668ee	See **Appendix C** for description of requirements.
Native American Graves Protection and Repatriation Act (NAGPRA) 25 U.S.C. §§ 3001, *et seq.*	NAGPRA requires federal agencies and other institutions receiving federal funding to return Native American cultural items and human remains to their respective people. If federal officials anticipate that activities on federal and tribal land might have an effect on American Indian burial, or their activities inadvertently discover such burials, they must consult with American Indian tribal officials as part of their compliance duties.
Noise Control Act (NCA) 42 U.S.C. §§ 4901, *et seq.*	See **Appendix D** for description of requirements.
Religious Freedom Restoration Act (RFRA) 42 U.S.C. § 2000bb	RFRA generally provides that the government may not substantially burden a person's exercise of religion, except when the government demonstratives that the action is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest.

Laws Waived	Pertinent Requirements
Rivers and Harbors Act of 1899 33 U.S.C. § 403	The Rivers and Harbors Act prohibits the obstruction of navigable waters of the United States, or to excavate, fill, or alter the course, condition, or capacity of any port, harbor, channel, or other area within the reach of the act, unless a permit from the Army Corps of Engineers is obtained.
Safe Drinking Water Act 42 U.S.C. §§ 300f, *et seq.*	See **Appendix D** for description of requirements.
Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act (RCRA) 42 U.S.C. §§ 6901, *et seq.*	See **Appendix D** for description of requirements.

Appendix F. Legal Requirements Waived by DHS for the Construction of Physical Barriers and Roads at Various Project Areas Located in California, Arizona, New Mexico, and Texas

Laws Waived	Pertinent Requirements
Administrative Procedure Act (APA) 5 U.S.C. §§ 551, *et seq.*	See **Appendix B** for description of requirements.
American Indian Religious Freedom Act (AIRFA) 42 U.S.C. § 1996	See **Appendix E** for description of requirements.
Antiquities Act 16 U.S.C. §§ 431, *et seq.* (Act repealed by P.L. 113-287, §7; similar provisions now codified in Title 54 of the *U.S. Code*)	See **Appendix D** for description of requirements.
Archaeological and Historic Preservation Act (AHPA) 16 U.S.C. §§ 469, *et seq.*	See **Appendix D** for description of requirements.
Archeological Resources Protection Act (ARPA) 16 U.S.C. §§ 470aa, *et seq.*	See **Appendix D** for description of requirements.
Arizona Desert Wilderness Act §§ 301(a)-(f) P.L. 101-628	The waived sections of the Arizona Desert Wilderness Act designate certain lands in the Havasu National Wildlife Refuge, Imperial National Wildlife Refuge, Kofa National Wildlife Refuge, and Cabeza Prieta National Wildlife Refuge (all in Arizona) as components of the National Wilderness Preservation System to be administered under the Wilderness Act.
California Desert Protection Act §§ 102(29) and 103 P.L. 103-433	The waived provisions of the California Desert Protection Act designate certain lands managed by BLM as the Jacumba Wilderness, to be managed in accordance with the Wilderness Act.
Clean Air Act (CAA) 42 U.S.C. §§ 7401, *et seq.*	See **Appendix B** for description of requirements.
Coastal Zone Management Act (CZMA) 16 U.S.C. §§ 1451, *et seq.*	See **Appendix B** for description of requirements.
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. §§ 9601, *et seq.*	See **Appendix D** for description of requirements.
Eagle Protection Act 16 U.S.C. §§ 668, *et seq.*	See **Appendix E** for description of requirements.
Endangered Species Act (ESA) 16 U.S.C. §§ 1531, *et seq.*	See **Appendix B** for description of requirements.
Farmland Protection Policy Act (FPPA) 7 U.S.C. §§ 4201, *et seq.*	See **Appendix D** for description of requirements.

Laws Waived	Pertinent Requirements
Federal Land Policy and Management Act (FLPMA) 43 U.S.C. §§ 1701, *et seq.*	See **Appendix D** for description of requirements.
Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §§ 1251, *et seq.*	See **Appendix B** for description of requirements.
Fish and Wildlife Act of 1956 16 U.S.C. §§ 742a, *et seq.*	See **Appendix E** for description of requirements.
Fish and Wildlife Coordination Act (FWCA) 16 U.S.C. §§ 661, *et seq.*	See **Appendix D** for description of requirements.
Historic Sites, Buildings, and Antiquities Act (HSBAA) 16 U.S.C. §§ 461, *et seq.* (Act repealed by P.L. 113-287, § 7; similar provisions now codified in Title 54 of the U.S. Code)	See **Appendix D** for description of requirements.
Migratory Bird Treaty Act (MBTA) 16 U.S.C. §§ 703, *et seq.*	See **Appendix B** for description of requirements.
Multiple Use and Sustained Yield Act of 1960 16 U.S.C. §§ 528-531	The Multiple Use and Sustained Yield Act declares that national forests are to be managed for outdoor recreation, range, timber, watershed, and fish and wildlife purposes, and in a way that provides a high level of resource outputs for perpetuity, but does not impair the productivity of the land.
National Environmental Policy Act (NEPA) 16 U.S.C. §§ 4321, *et seq.*	See **Appendix B** for description of requirements.
National Forest Management Act of 1976 16 U.S.C. §§ 1600, *et seq.*	The National Forest Management Act provides standards for the planning and management of the national forests by the Forest Service within the Department of Agriculture.
National Historic Preservation Act (NHPA) 16 U.S.C. §§ 470, *et seq.* (Act repealed by P.L. 113-287, § 7; similar provisions now codified in Title 54 of the U.S. Code)	See **Appendix B** for description of requirements.
National Park Service General Authorities Act 16 U.S.C. §§ 1a-1, *et seq.* (Act repealed by P.L. 113-287, § 7; similar provisions now codified in Title 54 of the U.S. Code)	The National Park Service General Authorities Act is the organic statute for the National Park Service. The act calls for the preservation of certain lands and empowers the National Park Service to issue regulations and manage these lands.
National Park Service Organic Act 16 U.S.C. §§ 1, 2-4 (Act repealed by P.L. 113-287, § 7; similar provisions now codified in Title 54 of the U.S. Code)	The National Park Service Organic Act calls for the preservation of certain lands and empowers the Secretary of the Interior to issue regulations and manage these lands. The Secretary of the Interior may make such regulations as necessary or proper for the use and management of parks, monuments, and reservations under the National Park Service's jurisdiction.
National Parks and Recreation Act of 1978 §§ 401(7), 403, and 404	These sections of National Parks and Recreation Act designate a number of areas, including the Organ Pipe Cactus National Monument in Arizona as "wilderness" to be administered under the Wilderness Act.

Laws Waived	Pertinent Requirements
P.L. 95-625	
National Wildlife Refuge System Administration Act 16 U.S.C. §§ 668dd-668ee	See **Appendix C** for description of requirements.
Native American Graves Protection and Repatriation Act (NAGPRA) 25 U.S.C. §§ 3001, *et seq.*	See **Appendix E** for description of requirements.
Noise Control Act (NCA) 42 U.S.C. §§ 4901, *et seq.*	See **Appendix D** for description of requirements.
Otay Mountain Wilderness Act of 1999 P.L. 106-145	The Otay Mountain Wilderness Act designates certain public lands in California as "wilderness" to be managed in accordance with the Wilderness Act. Any lands acquired by the United States within the designated area shall become part of the designated "wilderness area," and shall also be managed in accordance with the Wilderness Act.
Religious Freedom Restoration Act (RFRA) 42 U.S.C. § 2000bb	See **Appendix E** for description of requirements.
Rivers and Harbors Act of 1899 33 U.S.C. § 403	See **Appendix E** for description of requirements.
Safe Drinking Water Act 42 U.S.C. §§ 300f, *et seq.*	See **Appendix B** for description of requirements.
Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act (RCRA) 42 U.S.C. §§ 6901, *et seq.*	See **Appendix D** for description of requirements.
Wild and Scenic Rivers Act 16 U.S.C. § 1281, *et seq.*	See **Appendix D** for description of requirements.
Wilderness Act 16 U.S.C. §§ 1131, *et seq.*	See **Appendix C** for description of requirements.

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