

# CRS Report for Congress

Received through the CRS Web

## Border Security: Fences Along the U.S. International Border

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### Summary

This report outlines the issues involved with the Department of Homeland Security's (DHS's) completion of a three-tiered, 14-mile fence, along the border near San Diego, California. The state of California delayed completion of the fence due primarily to legal and policy conflicts with its federally-approved, state-run Coastal Management Program. Former authorization for the fence only allowed the waiver of the Endangered Species Act and the National Environmental Policy Act. During the 109<sup>th</sup> Congress, provisions to facilitate the completion of the border fence were included in the REAL ID Act of 2005 (H.R. 418), which was subsequently added to H.R. 1268, the Emergency Supplemental Appropriations Act, and signed into law on May 11, 2005 (P.L. 109-13). The border fence provisions allow the Secretary of DHS to waive *all legal requirements* determined necessary to ensure expeditious construction of authorized barriers and roads. In September of 2005, the Secretary announced that he was using this authority to waive a number of laws. This report will be updated as warranted.

### Background

The United States Border Patrol (USBP) is the lead federal agency charged with securing the U.S. international border. In the early 1990s, the USBP incorporated the construction of physical barriers directly on the border into their National Strategic Plan as part of the "Prevention Through Deterrence" strategy, which called for reducing unauthorized migration by placing agents and resources directly on the border abutting population centers. The USBP first constructed border fencing in the San Diego sector, which extends inland from the Pacific Ocean along the international land border with Mexico, and covers approximately 7,000 square miles of territory. Located north of Tijuana and Tecate, Mexican cities with a combined population of 2 million people, the

sector features no natural barriers to entry by unauthorized migrants and smugglers.<sup>1</sup> Using the broad powers granted to the Attorney General (AG) to control and guard the U.S. border,<sup>2</sup> in 1990 the USBP began erecting a physical barrier to deter illegal entries and drug smuggling in the San Diego sector. The ensuing “primary” fence was completed in 1993 and covered the first 14 miles of the border, starting from the Pacific Ocean, and was constructed of 10-foot-high welded steel.<sup>3</sup> This fence (and the subsequent three-tiered fence, see discussion below) was constructed with the assistance of the Department of Defense’s (DOD’s) Army Corps of Engineers.

According to CBP, the primary fence, in combination with various labor intensive USBP enforcement initiatives along San Diego border region (i.e., Operation Gatekeeper), proved to be quite successful but fiscally and environmentally costly.<sup>4</sup> For example, as undocumented aliens and smugglers breached the primary fence and attempted to evade detection, USBP agents were often forced to pursue the suspects through environmentally sensitive areas. It soon became apparent to immigration officials and lawmakers that the USBP needed, among other things, a “rigid” enforcement system that could integrate infrastructure (i.e., a multi-tiered fence and roads), manpower, and new technologies to further control the border region.

The concept of a three-tiered fence system was first recommended by a 1993 Sandia Laboratories study commissioned by the Immigration and Naturalization Service (INS). The study concluded that aliens attempting to enter the United States from Mexico had shown remarkable resiliency in bypassing or destroying obstacles in their path, including the existing primary fence, and postulated that “[a] three-fence barrier system with vehicle patrol roads between the fences and lights will provide the necessary discouragement.”<sup>5</sup> Congress responded to these enforcement needs, in part, with the passage of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996.<sup>6</sup> This comprehensive law, among other things, expanded the existing fence by authorizing the INS to construct a triple-layered fence along the same 14 miles of the US-Mexico border near San Diego. Since 1990, Congress has included language in DOD appropriations bills allowing the DOD to assist federal agencies in counter-drug activities, including the

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

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

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

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

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

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

construction of fencing and roads to reduce the flow of narcotics into the country.<sup>7</sup> In 2001, this power was re-authorized through FY2006.<sup>8</sup>

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

Section 102 of IIRIRA concerns the improvement and construction of barriers at our international borders. Section 102(a) appears to give the AG<sup>9</sup> broad authority to install additional physical barriers and roads “in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.” The phrase *vicinity of the United States border* is not defined in the Immigration and Nationality Act (8 U.S.C. §1101 *et seq.*) or in immigration regulations. The section also does not stipulate what specific characteristics would designate an area as one of *high illegal entry*.

Section 102(b) mandates that the AG construct a barrier in the border area near San Diego. Specifically, §102(b) directs the AG to construct a three-tiered barrier along the 14 miles of the international land border of the United States, starting at the Pacific Ocean and extending eastward. Section 102(b) ensures that the AG will build a barrier, pursuant to his broader authority in §102(a), near the San Diego area, although there is some debate whether IIRIRA requires *continuous* triple fencing and roads for the entire 14-mile corridor.<sup>10</sup> Section 102(b) also provides authority for the acquisition of necessary easements, requires certain safety features be incorporated into the design of the fence, and authorizes an appropriation not to exceed \$12 million.

Section 102(c) — before the passage of P.L. 109-13 — waived the Endangered Species Act (ESA) of 1973 (16 U.S.C. §§1531 *et seq.*) and the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. §§4321 *et seq.*), to the extent the AG determined necessary, in order to ensure expeditious construction of the barriers authorized to be constructed under §102. The waiver authority in this provision appears to apply both to barriers that may be constructed *in the vicinity of the border* and to the barrier that is to be constructed near the San Diego area. Reportedly, the waiver provisions established in this section have not been implemented by the Bureau of Customs and Border Protection (CBP).<sup>11</sup> In fact, CBP reportedly published a Final Environmental Impact Study pursuant to NEPA and received a non-jeopardy Biological Opinion from the U.S. Fish and Wildlife Service under the ESA.<sup>12</sup> The REAL ID Act amended §102(c) to, among other things,

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<sup>7</sup> See P.L. 101-510, Div. A, Title X, §1004; P.L. 102-190, Div A, Title X, Part G, §1088; P.L. 102-484, Div A, Title X, Subtitle E, §1041(a)-(d)(1); P.L. 103-160, Div A, Title XI, Subtitle C, §1121(a), (b); P.L. 103-337, Div A, Title X, Subtitle B, §1011(a).

<sup>8</sup> P.L. 107-107, Title X, Subtit. C, §1021 (amending §1004 of the National Defense Authorization Act of Fiscal Year 1991, P.L. 101-510, codified at 10 U.S.C. §374 nt.).

<sup>9</sup> Although the law still cites to the Attorney General, the authorities granted by this section now appear to rest with the Secretary of DHS. See The Homeland Security Act of 2002, P.L. 104-208, §§102(a), 441, 1512(d) and 1517 (references to the Attorney General or Commissioner in statute and regulations are deemed to refer to the Secretary).

<sup>10</sup> See CCC, *Staff Report*, at 7 nt. 2 and p. 23 nt. 4.

<sup>11</sup> *Id.* at 14.

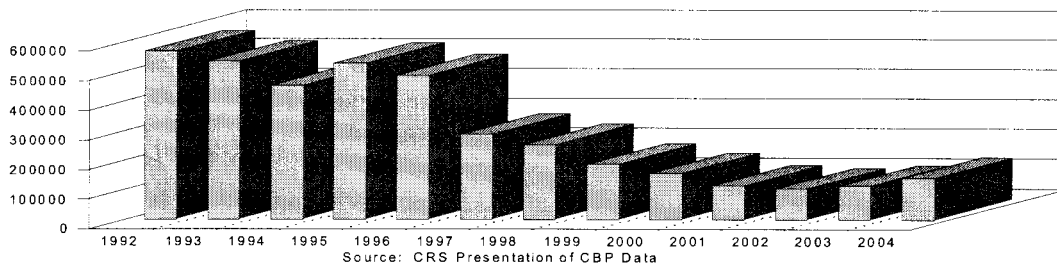
<sup>12</sup> *Id.*

authorize the waiver of *all* legal requirements determined necessary for the construction of the barriers and roads authorized to be constructed in §102 of IIRIRA.

## San Diego Sector Apprehensions

Apprehension statistics have long been used as a performance measure by the USBP. However, the number of apprehensions may be a misleading statistic for several reasons, including the data's focus on events rather than people<sup>13</sup> and the absence of reliable estimates for how many aliens successfully evade capture. These factors aside, however, apprehensions data remain the best way to gain a glimpse into the reality facing USBP agents and the trends in unauthorized migration along the border. As **Figure 1** shows, apprehensions remained stable during the early 1990s in the San Diego sector despite the construction of the "primary" fence in 1993.

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



After the IIRIRA's mandate for increased enforcement along the Southwest border in 1996, including construction of the triple-fence, apprehensions dropped rapidly in the San Diego sector in the late 1990s — from 480,000 in FY1996 to 100,000 in FY2002. Although some of this reduction may have been due to the construction of the triple-fence, the number of agents assigned to the San Diego sector also increased significantly over this period — from 980 agents in 1993 to 2,274 in 1998.<sup>14</sup> Additionally, the number of underground sensors deployed in the San Diego sector almost tripled from 1993 to 1998, and the fleet of vehicles increased by over 150% over the same period.<sup>15</sup>

The increase in manpower and resources reflected the USBP's policy of re-routing unauthorized migration away from population centers to remote border regions where their agents have a tactical advantage over border-crossers. Other sectors, especially the remote Tucson sector in Arizona, saw apprehensions increase significantly in the late 1990s. Proponents of border fences point to the drastic reduction in apprehensions along the San Diego sector as tangible proof that these fences succeed in their goal of reducing

<sup>13</sup> If the same person is apprehended multiple times attempting to enter the country in one year, each apprehension will be counted separately by the USBP in generating their apprehension statistics. This means that apprehension statistics may overstate the number of aliens apprehended each year.

<sup>14</sup> CBP data provided to CRS on Jan. 12, 2004.

<sup>15</sup> U.S. Citizenship and Immigration Services, "Operation Gatekeeper Fact Sheet," (July 14, 1998) available at [<http://uscis.gov/graphics/publicaffairs/factsheets/opgatefs.htm>].

cross-border smuggling and migration where they are constructed. Opponents attribute part of the decrease in apprehensions to the increase in manpower and resources in the sector and (pointing to the increase in apprehensions in less-populated sectors) contend that the fence only succeeds in re-routing unauthorized migration. Additionally, some believe the reduction in apprehensions can be attributed to the economic recession in the United States which depressed the job market, while others note that the reduction began in the late 1990s when the economy was still undergoing a period of robust growth.

## Recent Developments

**The Controversy.** Of the 14 miles authorized to be constructed, nine miles of the triple-fence have been completed. Two sections, including the final three-mile stretch of fence that leads to the Pacific Ocean, have not been finished. In order to finish the fence, the USBP proposed to fill a deep canyon known as “Smuggler’s Gulch” with over 2 million cubic yards of dirt. The triple-fence would then be extended across the filled gulch. California’s Coastal Commission (CCC), however, objected to and essentially halted the completion of the fence in February 2004, because it determined that the CBP had not demonstrated, among other things, that the project was consistent “to the maximum extent practicable” with the policies of the California Coastal Management Program — a state program approved under the federal Coastal Zone Management Act (CZMA) (16 U.S.C. §§1451-1464).<sup>16</sup> 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.<sup>17</sup>

According to the CCC, the CBP did not believe that it could make further environmental concessions and still comply with IIRIRA. The CCC held that Congress did not specify a particular design in the IIRIRA, and that the CBP failed to present a convincing argument that the less environmentally damaging alternative projects it rejected would have prevented compliance with the IIRIRA. Specifically, the CCC was concerned with the potential for significant adverse effects on (1) the Tijuana River National Estuarine Research and Reserve; (2) state and federally listed threatened and endangered species; (3) lands set aside for protection within California’s Multiple Species Conservation Program; and (4) other aspects of the environment.

**Congressional Action.** Although the IIRIRA allowed DHS to waive two major environmental laws, it did not include the CZMA in its purview. Congress, accordingly, attempted to pass legislation to facilitate the completion of the fence. The final version of the House passed intelligence bill in the 108<sup>th</sup> Congress, S. 2845 EAH, for example, contained language that would have added the CZMA, among a wide array of other environmental, conservation, and cultural restrictions, to the list of laws and regulations that DHS could waive in its construction of border barriers.<sup>18</sup> This section was ultimately

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<sup>16</sup> See CCC, *Staff Report*, at 5-7.

<sup>17</sup> 16 U.S.C. §1456(c).

<sup>18</sup> S. 2845 EAH, §3131. See also P.L. 107-296, §446 (making the completion of the 14-mile border fence a priority for the newly created Secretary of DHS).

removed during the conference process, and no border fence type provision was included in the intelligence bill that was signed into law (P.L. 108-458).

In the 109<sup>th</sup> Congress, H.R. 418, the REAL ID Act of 2005, contained language requiring 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 also 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 to “authorize,” instead of “require,” the Secretary of DHS to waive all “legal requirements,” instead of “all laws.” The conferees also added a new provision that would make such waiver decisions effective upon publication in the Federal Register. Language was also added granting federal district courts exclusive jurisdiction to review claims alleging that the actions or decisions of the Secretary violate the U.S. Constitution, and allowing district court rulings to be reviewed only by the U.S. Supreme Court. H.R. 1268 was signed into law on May 11, 2005 (P.L. 109-13).

The waiver authority provided in §102 appears to be a broad grant of authority because, in part, it authorizes the waiver of *all* legal requirements determined necessary by the Secretary for the expeditious construction of authorized barriers and only allows judicial review for constitutional claims.<sup>19</sup> Furthermore, these claims can only be appealed to the Supreme Court (i.e., there is no intermediate appellate review), whose review is discretionary. Moreover, because §102 of the REAL ID Act amends only the waiver provision of §102 of IIRIRA, the new waiver authority appears to apply to all the barriers that may be constructed under IIRIRA — that is, both to barriers constructed in the vicinity of the border in areas of high illegal entry and to the barrier that is to be constructed near the San Diego area.

**Construction.** The military has now begun upgrading and rebuilding the San Diego border fence. On September 14, 2005, the Secretary of DHS announced that he was going to apply the new waiver authority to complete the San Diego fence. DHS published a *Federal Register* notice on September 22, 2005, declaring the waiver of, in their entirety: (1) the National Environmental Policy Act; (2) the Endangered Species Act; (3) the Coastal Zone Management Act; (4) the Federal Water Pollution Control Act (33 U.S.C. §§1251 *et seq.*); (5) the National Historic Preservation Act (16 U.S.C. §§470 *et seq.*); (6) the Migratory Bird Treaty Act (16 U.S.C. §§703 *et seq.*); (7) the Clean Air Act (42 U.S.C. §§7401 *et seq.*); and (8) the Administrative Procedure Act (5 U.S.C. §§551 *et seq.*).<sup>20</sup> Relatedly, plans to construct a 123 mile vehicle barrier, consisting of steel beams planted five feet deep into concrete bases, along the Arizona border are also moving forward.<sup>21</sup> The FY2006 DHS Appropriations Act provides, within the CBP construction account, \$35 million for the construction of the border fence in San Diego and \$35 million for tactical infrastructure in the USBP’s Tucson sector (P.L. 109-90).

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<sup>19</sup> One of the most analogous provisions CRS located appears to be, at least on its face, 43 U.S.C. §1652(c), which authorizes the waiver of all procedural requirements in law related to the construction of the Trans-Alaska pipeline and limits judicial review to constitutional claims.

<sup>20</sup> The waiver also includes all federal, state, or other laws and regulations deriving from the listed laws.

<sup>21</sup> Jonathan Athens, *Officials say OK to Border Fence*, YumaSun.com (July 20, 2005) available at [<http://sun.yumasun.com/google/ysarchive14980.html>].