

ACTION MEMO

DSD HAS SEEN APR 28 2021 APR 27 2021 A/USDP HDI&DSCA Phone Number: [REDACTED]

FOR: DEPUTY SECRETARY OF DEFENSE

FROM: Robert G. Salesses, Performing the Duties of the Assistant Secretary of Defense (Homeland Defense & Global Security)

SUBJECT: Department of Defense Actions Implementing Presidential Proclamation 10142

PURPOSE: Approve the cancellation of all border barrier projects and direct actions by the Acting Secretary of the Army (SecArmy) and the Senior Official Performing the Duties of Under Secretary of Defense (Comptroller)/Chief Financial Officer (PTDO USD(C)/CFO) to effectuate the plan.

COORDINATION: Department of the Army/USACE, USD(A&S), USD(C)/CFO, and OGC.

BLUF: Proclamation 10142 terminated the national emergency on the southern border and directed the Secretary of Defense and the Secretary of Homeland Security to develop a plan for redirecting funding and repurposing contracts for border barrier projects. The memorandum at TAB A directs the cancellation of all border barrier construction projects authorized under Sections 2808(f) and 284 of Title 10, U.S. Code. The memorandum at TAB B informs the Secretary of DHS of the actions you have taken to fulfill the direction in Proclamation 10142.

DISCUSSION (more detailed explanation is provided at TAB E):

Presidential Proclamation 10142

- On January 20, 2021, the President "declare[d] that the national emergency declared by Proclamation 9844...is terminated and that the authorities invoked in that proclamation will no longer be used to construct a wall at the southern border." Proclamation 10142 also directed further actions related to construction of border barriers, including the development of a plan for redirecting funding and repurposing contracts for border barrier construction (TAB C).
On January 23, the Deputy Secretary of Defense directed actions to implement Proclamation 10142, including directing the Under Secretary of Defense for Policy (USD(P)), in coordination with the USD(C)/CFO, to develop DoD's plan required by the Proclamation (TAB D).

Section 2808 of Title 10, U.S. Code, Border Barrier Construction

- Background. The then-Secretary of Defense authorized 11 border barrier military construction (MILCON) projects pursuant to Section 2808, as made available in the declaration of national emergency first declared in Proclamation 9844, and continued on February 13, 2020, (85 Fed. Reg. 8715), and January 15, 2021 (86 Fed. Reg. 6557).
Legal Considerations and Justification for Cancellation. In light the President's termination of the national emergency on January 20, 2021, and as specified in Section 2808(F), the authority provided to the Secretary of Defense in Section 2808 is no longer available, and no further construction may be undertaken pursuant to it. Therefore, the 11 projects must be cancelled.
Unobligated/Deobligated Funds. In addition to approximately \$2.1B associated with unawarded contracts for four Section 2808 projects that may be released back to the relevant DoD Components immediately, the U.S. Army Corps of Engineers (USACE) expects to deobligate approximately \$261M from the termination or de-scoping of awarded contracts. After termination/de-scoping, USACE will expend funds to pay contractor invoices for termination

Table with columns: DSD SA, DSD SMA, DSD MA, DSD CA, ESB Rvw, and a signature column.



costs (approximately \$180M) and suspension costs (estimated to be \$160M), although the precise amounts are subject to negotiation with contractors, which could take 12-18 months to complete.

- Next Steps.
  - Acting SecArmy, through the Commanding General, USACE, will take immediate action to cancel the 11 Section 2808 projects, including congressional notification, and USACE will execute the necessary contract actions.
  - The Department of the Army will coordinate with the Department of the Interior to relinquish all withdrawn lands and coordinate with the Department of Homeland Security (DHS) to transfer administrative jurisdiction over other Federal property.
  - As funds become available, PTDO USD(C)/CFO will release the MILCON funds to the relevant Military Departments and Defense Agencies for use on deferred MILCON projects.

#### Section 284 of Title 10, U.S. Code, Border Barrier Construction

- Background. Prior Secretaries of Defense authorized 38 projects and segments of border barrier construction pursuant to Section 284(b)(7) based on multiple DHS requests for assistance. USACE has awarded 13 contracts for Section 284 construction projects. USACE has expended approximately \$4.88B on the 13 contracts.
- Justification for Cancellation. Cancelling Section 284 border barrier projects is consistent with the President's determination that "building a massive wall that spans the entire southern border is not a serious policy solution" to the security challenges at the southern border. Although not legally required by the termination of the national emergency, cancelling Section 284 projects is consistent with the policy intent of Proclamation 10142 to end construction on a border wall.
- Status of DoD Funds. Funds transferred for Section 284 construction were available for obligation only during the fiscal year in which they were transferred, and thus have expired. Any unexpended expired funds will remain in the Operation and Maintenance, Army, account, and are available to liquidate obligations properly chargeable to the fiscal year during which the funds were available for obligation (e.g., contract termination costs, including suspension costs), and, after 5 years, the account will be closed and remaining balance in the account will be cancelled.
- Next Steps. Acting SecArmy will take immediate action to cancel Section 284 projects, demobilize contractors, and undertake those activities necessary to make permanent any urgent measures that were needed to avert immediate physical dangers during the pause directed by Section 1(b) of Proclamation 10142.

**RECOMMENDATION 1:** Based on the above and TAB E, sign TAB A, directing Acting SecArmy and PTDO USD(C)/CFO to take actions to cancel all border barrier projects authorized under Sections 284 and 2808, and release unobligated MILCON funds back to relevant DoD Components.

**RECOMMENDATION 2:** Based on the above and TAB E, sign TAB B informing the Secretary of DHS your decision to cancel all projects and segments authorized pursuant to Sections 284 and 2808.

#### Attachments:

TAB A: Memorandum to Acting SecArmy and PTDO USD(C)/CFO

TAB B: Memorandum to Secretary of Homeland Security

TAB C: Presidential Proclamation 10142

TAB D: DepSecDef Memorandum

TAB E: Background Information Paper

TAB F: Coordination

**TAB**

**A**



4  
DEPUTY SECRETARY OF DEFENSE  
1010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1010

APR 30 2021

MEMORANDUM FOR SECRETARY OF THE ARMY  
UNDER SECRETARY OF DEFENSE (COMPTROLLER)/CHIEF  
FINANCIAL OFFICER

SUBJECT: Department of Defense Actions Implementing Presidential Proclamation 10142

In Proclamation 10142, the President “declare[d] that the national emergency declared by Proclamation 9844 ... is terminated and that the authorities invoked in that proclamation will no longer be used to construct a wall at the southern border.” The Proclamation also directed the Secretary of Defense and the Secretary of Homeland Security to develop a plan for redirecting funding and repurposing contracts for all border barrier projects. This memorandum directs actions for the Department of Defense in furtherance of Proclamation 10142 regarding those projects authorized pursuant to title 10, U.S. Code, sections 284 and 2808.

Section 2808 of Title 10, U.S. Code, Border Barrier Construction

As specified in section 2808(c) the termination of the national emergency with respect to the southern border in Proclamation 10142 made the authority provided in section 2808 no longer available. I have also determined, based on the termination of the national emergency, that projects authorized pursuant to section 2808 are no longer necessary to support the use of the armed forces.

The Secretary of the Army will take immediate action to: (1) cancel all section 2808 border barrier construction projects, including providing any requisite congressional notification; (2) relinquish any lands withdrawn by the Department of the Interior for such construction; and (3) transfer administrative jurisdiction of any lands purchased for such construction or transferred from other Federal departments or agencies pursuant to the Federal Property Act, to the Department of Homeland Security. The Department of the Army may expend military construction funds made available for section 2808 border barrier construction only to pay contract termination costs, including suspension costs. Such costs may include expenses of activities necessary for contractor demobilization, but may not include costs associated with any further construction or construction-related activities of any kind.

As funds become available, the Under Secretary of Defense (Comptroller)/Chief Financial Officer will take immediate action to release the unobligated military construction funds to the relevant Military Departments and Defense Agencies and ensure they are used in an appropriately prioritized manner to carry out military construction projects that were deferred to finance section 2808 border barrier construction.

Section 284 of Title 10, U.S. Code, Border Barrier Construction

Cancelling section 284 border barrier projects is consistent with the President’s determination that “building a massive wall that spans the entire southern border is not a serious policy solution” to the security challenges at the southern border. Although not legally required

by the termination of the national emergency at the southern border, cancelling section 284 projects is consistent with the policy intent, described in Proclamation 10142, to end construction of a border wall. The Secretary of the Army therefore will take immediate action to cancel all section 284 construction projects. The Department of the Army may use funds transferred for section 284 border barrier construction projects to pay contract termination costs, including suspension costs. Such contract termination and suspension costs may include costs associated with activities necessary for contractor demobilization. The Department of the Army also may use such funds for activities necessary to make permanent any measures that were taken to avert immediate physical dangers during the pause directed by section 1(b) of Proclamation 10142.

I have informed the Secretary of Homeland Security that DoD will no longer undertake the construction of fences and roads and installation of lighting at the southern border pursuant to title 10, U.S. Code, section 284, and that consistent with previous approvals of section 284 construction, DHS will accept custody of border barrier infrastructure constructed pursuant to section 284, account for such infrastructure in its real property records, and operate and maintain the infrastructure (including undertaking any necessary further construction, consistent with applicable law).



cc:

Chairman of the Joint Chiefs of Staff  
Under Secretary of Defense for Acquisition and Sustainment  
Under Secretary of Defense for Policy  
General Counsel of the Department of Defense  
Commander, U.S. Army Corps of Engineers

**TAB**

**B**



7  
DEPUTY SECRETARY OF DEFENSE  
1010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1010

MEMORANDUM FOR THE SECRETARY OF HOMELAND SECURITY

SUBJECT: Department of Defense Actions Implementing Presidential Proclamation 10142

In Proclamation 10142, dated January 20, 2021, the President “declare[d] that the national emergency declared by Proclamation 9844, and continued on February 13, 2020 (85 *Fed. Reg.* 8715), and January 15, 2021, is terminated and that the authorities invoked in that proclamation will no longer be used to construct a wall at the southern border.” The Proclamation also directed further actions related to construction of border barriers, including directing the Secretary of Defense and Secretary of Homeland Security to develop a plan for redirecting funding and repurposing contracts for all border barrier projects. This memorandum communicates the actions for the Department of Defense in furtherance of Proclamation 10142 regarding those projects authorized pursuant to title 10, U.S. Code, sections 284 and 2808.

I have directed the Secretary of the Army to take immediate action to cancel all section 284 border barrier construction projects approved in response to the Secretary of Homeland Security requests for assistance of January 14, 2020 and February 25, 2019. The Department of the Army will demobilize contractors and carry out only limited activities necessary to make permanent any urgent measures that were needed to avert immediate physical dangers during the pause directed by section 1(b) of Proclamation 10142. Consistent with communications in prior memoranda approving support under section 284 provided to the Department of Homeland Security (DHS), DHS will accept custody of border barrier infrastructure constructed pursuant to section 284, account for such infrastructure in its real property records, and operate and maintain the infrastructure (including undertaking any necessary further construction, consistent with applicable law).

With respect to border barrier military construction authorized pursuant to title 10, U.S. Code, section 2808, in light of the termination of the national emergency with respect to the southern border in Proclamation 10142, and the fact that the authority provided in section 2808 is no longer available as a result of this termination, I have directed the Secretary of the Army to take immediate action to cancel all section 2808 border barrier construction projects, relinquish any lands withdrawn by the Department of the Interior for such construction, and transfer administrative jurisdiction of any lands purchased for such construction or transferred from other Federal departments or agencies pursuant to the Federal Property Act, to DHS. DHS must coordinate with the Department of the Interior to secure the rights it requires to operate the border infrastructure constructed pursuant to section 2808.

The Secretary of the Army, acting through the Commander, U.S. Army Corps of Engineers, as necessary, is authorized to coordinate directly with DHS to undertake expeditiously the above actions.

A handwritten signature in black ink, appearing to read "Kathleen H. Hester", is located at the bottom of the page.

cc:

Secretary of the Army

Chairman of the Joint Chiefs of Staff

Under Secretary of Defense for Acquisition and Sustainment

Under Secretary of Defense for Policy

Under Secretary of Defense (Comptroller)/Chief Financial Officer

General Counsel of the Department of Defense

Commander, U.S. Army Corps of Engineers



**TAB**

**C**

**Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction**

January 20, 2021

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Like every nation, the United States has a right and a duty to secure its borders and protect its people against threats. But building a massive wall that spans the entire southern border is not a serious policy solution. It is a waste of money that diverts attention from genuine threats to our homeland security. My Administration is committed to ensuring that the United States has a comprehensive and humane immigration system that operates consistently with our Nation's values. In furtherance of that commitment, I have determined that the declaration of a national emergency at our southern border in Proclamation 9844 of February 15, 2019 (Declaring a National Emergency Concerning the Southern Border of the United States), was unwarranted. It shall be the policy of my Administration that no more American taxpayer dollars be diverted to construct a border wall. I am also directing a careful review of all resources appropriated or redirected to construct a southern border wall.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 202 of the National Emergencies Act (50 U.S.C. 1601 *et seq.*), hereby declare that the national emergency declared by Proclamation 9844, and continued on February 13, 2020 (85 *Fed. Reg.* 8715), and January 15, 2021, is terminated and that the authorities invoked in that proclamation will no longer be used to construct a wall at the southern border. I hereby further direct as follows:

Section 1. Pause in Construction and Obligation of Funds. (a) The Secretary of Defense and the Secretary of Homeland Security, in consultation with the Director of the Office of Management and Budget, shall direct the appropriate officials within their respective departments to:

(i) pause work on each construction project on the southern border wall, to the extent permitted by law, as soon as possible but in no case later than seven days from the date of this proclamation, to permit:

(A) assessment of the legality of the funding and contracting methods used to construct the wall;

(B) assessment of the administrative and contractual consequences of ceasing each wall construction project; and

(C) completion and implementation of the plan developed in accordance with section 2 of this proclamation;

(ii) pause immediately the obligation of funds related to construction of the southern border wall, to the extent permitted by law; and

(iii) compile detailed information on all southern border wall construction contracts, the completion status of each wall construction project, and the funds used for wall construction since February 15, 2019, including directly appropriated funds and funds drawn from the Treasury Forfeiture Fund (31 U.S.C. 9705(g)(4)(B)), the Department of Defense Drug Interdiction and Counter-Drug Activities account (10 U.S.C. 284), and the Department of Defense Military Construction account (pursuant to the emergency authorities in 10 U.S.C. 2808(a) and 33 U.S.C. 2293(a)).

(b) The pause directed in subsection (a)(i) of this section shall apply to wall projects funded by redirected funds as well as wall projects funded by direct appropriations. The Secretary of Defense and the Secretary of Homeland Security may make an exception to the pause, however, for urgent measures needed to avert immediate physical dangers or where an exception is required to ensure that funds appropriated by the Congress fulfill their intended purpose.

Sec. 2. Plan for Redirecting Funding and Repurposing Contracts. The Secretary of Defense and the Secretary of Homeland Security, in coordination with the Secretary of the Treasury, the Attorney General, the Director of the Office of Management and Budget, and the heads of any other appropriate executive departments and agencies, and in consultation with the Assistant to the President for National Security Affairs, shall develop a plan for the redirection of funds concerning the southern border wall, as appropriate and consistent with applicable law. The process of developing the plan shall include consideration of terminating or repurposing contracts with private contractors engaged in wall construction, while providing for the expenditure of any funds that the Congress expressly appropriated for wall construction, consistent with their appropriated purpose. The plan shall be developed within 60 days from the date of this proclamation. After the plan is developed, the Secretary of Defense and the Secretary of Homeland Security shall take all appropriate steps to resume, modify, or terminate projects and to otherwise implement the plan.

Sec. 3. Definition. Consistent with Executive Order 13767 of January 25, 2017 (Border Security and Immigration Enforcement Improvements), for the purposes of this proclamation, "wall" means a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.

Sec. 4. General Provisions. (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of January, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-fifth.

JOSEPH R. BIDEN JR.

**TAB**

**D**



DEPUTY SECRETARY OF DEFENSE  
1010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1010

JAN 23 2021

MEMORANDUM FOR CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARY OF DEFENSE FOR POLICY  
UNDER SECRETARY OF DEFENSE (COMPTROLLER)/CHIEF  
FINANCIAL OFFICER OF THE DEPARTMENT OF DEFENSE  
UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND  
READINESS  
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
UNDER SECRETARY OF THE ARMY  
COMMANDER, U.S. ARMY CORPS OF ENGINEERS

SUBJECT: Department of Defense Actions Regarding the Proclamation of January 20, 2021,  
Termination of Emergency with Respect to the Southern Border of the United States  
and Redirection of Funds Diverted to Border Wall Construction

In the attached proclamation of January 20, 2021, "Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction," the President terminated the national emergency with respect to the southern border, declared in Proclamation 9844, and continued on February 13, 2020 (85 Fed. Reg. 8715), and January 15, 2021 (86 Fed. Reg. 6557), and the authorities based on that emergency, and directed further actions related to construction of border barriers. The termination of the national emergency eliminates the authority to issue orders for units and members under title 10, U.S. Code, section 12302, but does not otherwise affect the authority to continue supporting the Department of Homeland Security at the southern border outside the framework of the terminated national emergency.

To implement the President's direction, the following actions shall be initiated:

- The Under Secretary of Defense for Policy (USD(P)) shall undertake, in coordination with the Commander, U.S. Army Corps of Engineers, and the Under Secretary of Defense (Comptroller)/Chief Financial Officer (USD(C)/CFO), and in consultation with the Director of the Office of Management and Budget, the following actions:
  - An assessment of the administrative and contractual consequences of ceasing each border barrier construction project authorized pursuant to title 10, U.S. Code, sections 284 and 2808.
  - A compilation of detailed information on all southern border wall construction contracts authorized pursuant to title 10, U.S. Code, sections 284 and 2808, the completion status of each wall construction project, including any land acquisition, and the funds used for wall construction since February 15, 2019.
- The USD(P) shall develop, in coordination with the USD(C)/CFO, and in consultation with the Secretary of the Treasury, the Attorney General, the Director of



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the Office of Management and Budget, and the heads of any other appropriate executive departments and agencies, and in consultation with the Assistant to the President for National Security Affairs, a "Plan for Redirecting Funding and Repurposing Contracts" required in section 2 of the President's proclamation for projects authorized pursuant to title 10, U.S. Code, sections 284 and 2808. The Plan must be completed within the timeframe established in the President's proclamation of January 20, 2021.

- With respect to the 11 border barrier military construction projects authorized under the Secretary of Defense memorandum, "Guidance for Undertaking Military Construction Projects Pursuant to Section 2808 of Title 10, U.S. Code," dated September 3, 2019, the Secretary of the Army shall cease exercising the authority provided by section 2808 to award contracts or options on existing contracts, incur new obligations that advance project performance, or incur new expenses unrelated to existing contractual obligations. This direction applies to land acquisition and to all aspects of construction.
- The Secretary of the Army shall direct the Commander, U.S. Army Corps of Engineers, to take immediate action to pause work on all border barrier military construction projects authorized by title 10, U.S. Code, sections 284 and 2808, to the extent permitted by law, as soon as possible, but in no case later than 1700 EST, Wednesday, January 27, 2021. The Secretary of the Army may authorize the Commander, U.S. Army Corps of Engineers, to approve exceptions to the pause for urgent measures needed to avert immediate physical dangers. Additionally, if the Commander, U.S. Army Corps of Engineers, believes an exception to the pause is required to ensure that funds appropriated by the Congress fulfill their intended purpose, he shall immediately ask the Secretary of the Army to submit a request through the USD(P) for my decision.
- The Commander, U.S. Army Corps of Engineers, shall cease exercising the authority provided by title 10, U.S. Code, section 284(b)(7), to award contracts or options on existing contracts, incur new obligations that advance project performance, or incur new expenses unrelated to existing contractual obligations. This direction applies to all aspects of construction and installation.
- The Commander, U.S. Army Corps of Engineers, shall take immediate action to pause work on all projects authorized by title 10, U.S. Code, section 284(b)(7), to the extent permitted by law, as soon as possible, but in no case later than 1700 EST, Wednesday, January 27, 2021. The Commander, U.S. Army Corps of Engineers, may approve exceptions to the pause for urgent measures needed to avert immediate physical dangers. If the Commander, U.S. Army Corps of Engineers, believes an exception to the pause is required to ensure that funds appropriated by the Congress fulfill their intended purpose, he shall immediately submit a request through the USD(P) for my decision.
- The Commander, U.S. Army Corps of Engineers, shall promptly seek direction from the Department of Homeland Security regarding border barrier projects undertaken by

the Department of Homeland Security for which the U.S. Army Corps of Engineers is the construction agent.

- The General Counsel of the Department of Defense shall undertake an assessment of the legality of the funding and contracting methods used to construct border barriers pursuant to title 10, U.S. Code, sections 284 and 2808.
- The Under Secretary of Defense for Personnel and Readiness shall issue guidance to ensure there is no further exercise of authority pursuant to title 10, U.S. Code, section 12302, related to the emergency along the southern border.



Attachment:  
As stated



**TAB**

**E**

## INFORMATION PAPER

**Subject:** Background and Next Steps on Border Barrier Project Termination

**Section 2808 of Title 10, U.S. Code, Border Barrier Construction**

- **Background.** The then-Secretary of Defense authorized 11 border barrier military construction (MILCON) projects pursuant to Section 2808, as made available in the declaration of national emergency first declared in Proclamation 9844, and continued on February 13, 2020, (85 Fed. Reg. 8715), and January 15, 2021 (86 Fed. Reg. 6557).
  - The then-Secretary of Defense directed the USD(C)/CFO to make available to the Secretary of the Army \$3.6B in unobligated MILCON funds for these projects.
  - The U.S. Army Corps of Engineers (USACE) has awarded construction contracts for 7 of the Section 2808 construction projects, obligating approximately \$1.5B, and to date expending \$1.0B.
  - Lands required for these MILCON projects have either been withdrawn for military purposes on an emergency basis by the Department of the Interior (DOI) for a three-year period, transferred to the administrative jurisdiction of the SecArmy pursuant to the Federal Property Act (Federal property), or purchased from private parties. The land upon which the projects are being constructed is currently under the administrative jurisdiction of the Department of the Army and reflected in its inventory as part of Fort Bliss, Texas.
- **Legal Considerations and Justification for Cancellation.** On January 20, 2021, President Biden terminated the national emergency at the southern border on January 20, 2021. As a result, pursuant to Section 2808(c), the authority provided to the Secretary of Defense in Section 2808 is no longer available, and no further construction may be undertaken pursuant to it. The Department must, therefore, cancel the 11 Section 2808 border barrier construction projects.
  - Among the activities DoD may no longer undertake are actions to mitigate immediate threats to life, health, and safety; actions to prevent future safety hazards; and environmental restoration of construction sites.
    - The termination of Section 2808 authority does not preclude DoD from expending MILCON funds made available through Section 2808 (and obligated on the construction contracts) to pay the contractors for those 11 Section 2808 border barrier construction projects for contract termination costs, including suspension costs, negotiated pursuant to the terms of those contracts.
  - Cancellation of Section 2808 projects is consistent with the President’s determination that the declaration of national emergency at the southern border was “unwarranted” and that “no more American taxpayer dollars be diverted to construct a border wall.” It is also consistent with the rescission of the Presidential Memorandum of April 4, 2018, directing the Secretary of Defense to support the Department of Homeland Security (DHS) in securing the southern border (*See* Executive Order 14010, February 2, 2021).

- The 11 border barrier construction projects, therefore, are no longer necessary to support the use of the armed forces in connection with the now-terminated national emergency at the southern border.
- Unobligated/Deobligated Funds. In addition to approximately \$2.1B associated with unawarded contracts for 4 Section 2808 projects that may be released back to the relevant DoD Components immediately, USACE expects to deobligate approximately \$261M from the termination or de-scoping of awarded contracts. After termination/de-scoping, USACE estimates that approximately \$180M will be expended to pay for termination costs and approximately \$160M will be expended to pay for suspension costs, although the precise amounts are subject to negotiation with contractors, which could take 12-18 months to complete.
- Next Steps. The Acting Secretary of the Army (SecArmy), through the Commanding General, USACE, will take immediate action to cancel the 11 Section 2808 projects, and USACE will execute the necessary contract actions. As funds become available as a result of project cancellation, PTDO USD(C)/CFO will take immediate action to release the MILCON funds to the relevant Military Departments and Defense Agencies to be used for deferred MILCON projects.
  - Further, the Department of the Army will:
    - Coordinate with DOI to relinquish all withdrawn lands. DHS must coordinate with DOI to secure the rights it requires to operate the completed areas of border infrastructure constructed pursuant to Section 2808;
    - Coordinate with DHS to transfer administrative jurisdiction to DHS over other Federal property, including that acquired from private land owners.
  - The DHS portion of the plan for border barrier construction required by Proclamation 10142 is not yet finalized. OUSD(P) understands that DHS is seeking to account for any further construction activities necessary to address life, safety, or environmental needs for cancelled Section 2808 projects in this plan, consistent with DHS authorities.

### **Section 284 of Title 10, U.S. Code, Border Barrier Construction**

- Background. Prior Secretaries of Defense authorized 38 projects and segments of border barrier construction pursuant to Section 284(b)(7) based on multiple DHS requests for assistance.
  - USD(C)/CFO transferred a total of \$6.4B pursuant to DoD's General Transfer Authority and Special Transfer Authority for Section 284 construction.
  - USACE has awarded 13 contracts for Section 284 construction projects. USACE has expended approximately \$4.874B on the 13 contracts.
- Justification for Cancellation. Cancelling Section 284 border barrier projects is consistent with the President's determination that "building a massive wall that spans the entire southern border is not a serious policy solution" to the security challenges at the southern border. Cancellation is also in accordance with the President's directive that "no more American taxpayers dollars be diverted to construct a border wall" and Executive Order 14010. All of the funds transferred in furtherance Section 284 border wall construction were

originally appropriated by Congress for other purposes. Although not legally required by the termination of the national emergency, cancelling Section 284 projects is consistent with the President's determination that no more American taxpayers dollars be diverted to construct a border wall at the southern border.

- Additionally, cancelling Section 284 projects, and returning any existing border infrastructure to DHS, allows DHS, the Federal department with statutory responsibility for securing the border, to develop an integrated border security strategy consistent with the President's direction.
- The decisions by the prior Secretaries of Defense to provide border wall construction support to DHS were made at a time when a then-existing memorandum from the President directed DoD to support DHS in securing the southern border. *See* Presidential Memorandum (April 4, 2018). The President recently revoked that memorandum in Executive Order 14010 (Feb. 2, 2021). In light of the revocation of that support directive, cancellation of the Section 284 contracts is appropriate.
- Status of DoD Funds. Funds transferred for Section 284 construction were available for obligation only during the fiscal year in which they were transferred, and thus have expired and are no longer available for current requirements. Any unexpended expired funds will remain in the Operation and Maintenance, Army, account, and remain available to liquidate obligations properly chargeable to the fiscal year during which the funds were available for obligation (e.g., contract termination costs, including suspension costs), and, after five years, the account will be closed and any remaining balance in the account will be cancelled.
  - After contract termination, USACE estimates that approximately \$624M will be expended to pay for outstanding contract claims and termination costs and that approximately \$415M will be expended to pay for suspension costs, although the precise amounts are subject to negotiation with contractors, which could take 12-18 months to complete.
- Next Steps. Acting SecArmy will take immediate action to cancel Section 284 projects, demobilize contractors, undertake those activities necessary to make permanent any urgent measures that were needed to avert immediate physical dangers during the pause directed by Section 1(b) of Proclamation 10142, and transfer all existing border infrastructure to DHS.

**TAB**

**F**

**Policy Coordination Sheet**

**Subject:** Department of Defense Actions Implementing Presidential Proclamation 10142  
**Control Number:** USP001023-21

<b>Title/Organization</b>	<b>Name</b>	<b>Coordination Requested</b>	<b>Coordination Received</b>
SecArmy	Dr. Whitley	23Apr21	27APR21
USD(A&S)	Ms. Cummings	23APR21	26APR21
USD(C)/CFO	Ms. McAndrew	23APR21	26APR21
OGC	Mrs. George	23APR21	27APR21
USACE	LTG Spellmon	23APR21	26APR21