

Environmental Impact of Border Security Infrastructure: How Department of Homeland Security’s Waiver of Environmental Regulations Threatens Environmental Interests Along the U.S.-Mexico Border

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I.	INTRODUCTION	328
II.	ECOSYSTEMS AT RISK ON THE SOUTHERN BORDER.....	329
III.	LEGAL FRAMEWORK	334
	A. <i>Legislative History</i>	334
	1. Illegal Immigration Reform and Immigrant Responsibility Act of 1996	334
	2. REAL ID Act of 2005	335
	3. Secure Fence Act of 2006	336
	B. <i>Legal Developments</i>	337
	1. <i>Defenders of Wildlife v. Chertoff</i>	337
	2. Executive Order 13767	338
IV.	CONTEMPORARY CHALLENGE TO DHS WAIVER: <i>IN RE</i> <i>BORDER INFRASTRUCTURE ENVIRONMENTAL LITIGATION</i>	339
	A. <i>Ultra Vires Claim</i>	339
	B. <i>Border Projects Are Not Covered Under IIRIRA</i> <i>Section 102(a)</i>	341
	C. <i>Judge Curiel’s Opinion</i>	342
V.	MEASURING SUCCESS: GOVERNMENT ACCOUNTABILITY OFFICE REPORT ON SOUTHWEST BORDER SECURITY	343
VI.	CONCLUSION	344

There have not been many frontiers like this one, I imagine. An abstraction, a Euclidean line drawn across the desert, has created two distinct human landscapes where there was only one before. Much of the

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frontier is river, and rivers are meant to bring men together, not to keep them apart.¹

I. INTRODUCTION

With the inauguration of President Donald Trump in January 2017, the promise of a border wall along the Mexican-USA border has become a focal point in the administration's immigration priorities. The signing of Executive Order 13767 (EO13767) set forth the federal initiative to "secure the southern border of the United States through the immediate construction of a physical wall on the southern border," covering roughly 2000 miles.² The proposed border wall is projected to cross through a variety of biologically diverse and vulnerable ecosystems, in addition to numerous border communities that reside in its path. The concern for a secure border and the desire to limit the flow of unauthorized immigration has been a part of political discourse for decades, but recent developments have introduced the prospect of an expansive physical border wall as part of the solution to immigration reform. While there are urgent humanitarian questions about the border wall's effects, this Comment will focus on the environmental impact and legal framework applicable to the construction of the border wall.

Political interest in developing a contiguous physical barrier along the entire southern border between the United States and Mexico positions the Department of Homeland Security (DHS) to utilize a broad discretionary waiver of environmental regulations on an unprecedented scale. One of the environmental safeguards to review agency action is the National Environmental Policy Act (NEPA). NEPA sets out an agency review process that ordinarily must be followed, whereby any "major federal actions significantly affecting the quality of the human environment" requires a detailed statement on the environmental impact of the proposed action and opportunity for public review and comment.³ The DHS waiver, supplemented by subsequent amendments and legislation, originates from the Illegal Immigration and Immigrant Responsibility Act's original authorization for the Attorney General to waive two environmental regulations for the expeditious construction of

1. J.B. Jackson, *Chihuahua as We Might Have Been*, in *LANDSCAPE IN SIGHT: LOOKING AT AMERICA* 43 (Helen Lefkowitz Horowitz ed., 1997).

2. Exec. Order No. 13,767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 30, 2017).

3. National Environmental Policy Act, 42 U.S.C. § 4332(C) (2012).

a border fence near San Diego, California.⁴ The exercise of the waiver authority on NEPA would severely limit the public's ability to ensure reasoned decision-making that takes into account environmental interests and considers alternatives to the proposed agency actions. Since DHS was authorized to exercise the waiver, it has done so five times from September 2005 through December 2008, affecting all states along the U.S.-Mexico border.⁵ This Comment will explore the environmental interests at stake in the proposed border wall, the potential ramifications of a DHS waiver's continued application, including limited public review of agency action, abrogation of environmental regulations, and resulting environmental impact, as well as legal challenges to the waiver.

First, this Comment will outline the environmental consequences of border infrastructure in various regions along the southern border. Next, it will review the legislative history of the DHS waiver, tracing the limited authorization provided by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) through subsequent legislative amendments. In the following Part, the Comment will analyze a contemporary challenge to DHS's waiver. Lastly, the Comment will analyze the border wall's role in immigration reform by investigating the costs of border security and its operational capabilities.

II. ECOSYSTEMS AT RISK ON THE SOUTHERN BORDER

The body of land that encompasses the U.S.-Mexico border is roughly 1954 miles long⁶ and is home to the highest rate of species endangerment in the United States.⁷ The borderlands are home to more than 700 migratory species of birds, mammals, and insects.⁸ Along the border are many protected national parks, including Big Bend National Park in Texas and Organ Pipe Cactus National Monument in Arizona.

4. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 102(a)-(c), 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1103 (2000)), amended by REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 302 (codified as amended at 8 U.S.C. § 1103 (2006)); Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638 (codified as amended at 8 U.S.C. § 1103 (2006)); Consolidated Appropriations Act, 2008 Pub. L. No. 110-161, § 564(a), 121 Stat. 1844 (codified as amended at 8 U.S.C. § 1103 (2012)).

5. Press Release, Dep't of Homeland Sec., DHS Issues Waiver to Expedite Border Construction Projects in San Diego Area (Aug. 1, 2017), <https://www.dhs.gov/news/2017/08/01/dhs-issues-waiver-expedite-border-construction-projects-san-diego-area>.

6. *The International Boundary and Water Commission—Its Mission, Organization and Procedures for Solution of Boundary and Water Problems*, RECOVERY.GOV, https://www.ibwc.gov/About_Us/about_us.html (last visited Mar. 22, 2018).

7. Rick Van Schoik, *Conservation Biology in the U.S.-Mexican Border Region*, WORLD WATCH (Nov./Dec. 2004), <http://www.worldwatch.org/system/files/EP176C.pdf>.

8. US-Mexico Border XXI Program Framework Document, at iii.4, Oct. 7, 1996, U.S.-Mex., EPA No. 1 60-R-96-003.

Significant state and local parks also exist along the border, including the World Birding Center in the Lower Rio Grande Valley and the National Butterfly Center in Mission, Texas. The fragile ecosystems of the borderlands form part of transboundary ecosystems whose integrity is essential to the hundreds of vulnerable species that inhabit it.⁹ The migration of species across the international border is vital to their health. In the case of large animal species, a large geographic area is necessary to promote migration and genetic diversity, two important aspects of species survival.¹⁰ The impact of a contiguous border wall will increase the number of species at risk by preventing species migration and genetic dispersal.¹¹

Currently existing border security infrastructure is significantly impacting the environment of the borderlands. To date, 654 miles of pedestrian and vehicular border fence contribute to ecological damage in the region. The existing security infrastructure includes fences, Customs and Border Patrol (CBP) vehicle roads, vehicle road blocks, sensor networks, communication networks, and lighting and video installations.¹² The consequences of border infrastructure contribute to a variety of harmful ecological phenomena that lead to habitat fragmentation, flooding, sedimentation, and damage to cultural and natural resources.¹³ Soil erosion substantially disrupts the local ecology with the construction of border fences that reach up to fifty meters deep in the ground.¹⁴ The construction of border security infrastructure in densely populated areas has pushed the avenues for unauthorized entry into more rural regions.¹⁵ The movement of unauthorized immigration and illegal activity on the border has shifted the environmental impact onto the fragile ecosystems of the rural borderlands.¹⁶ With increased enforcement efforts following new routes of unauthorized immigration, “habitat fragmentation, water pollution, soil damage and compaction,

9. GOOD NEIGHBOR ENVTL. BD., ENVIRONMENTAL QUALITY AND BORDER SECURITY: A 10-YEAR RETROSPECTIVE 20 (2017).

10. *Id.*

11. Jesse R. Lasky et al., *Conservation Biogeography of the US-Mexico Border: A Transcontinental Risk Assessment of Barriers to Animal Dispersal*, 17 DIVERSITY & DISTRIBUTIONS 673 (2011).

12. GOOD NEIGHBOR ENVTL. BD., *supra* note 9, at 15.

13. *Id.* at 15-16.

14. Van Schoik, *supra* note 7, at 38.

15. NOAH GREENWALD ET AL., CTR. FOR BIOLOGICAL DIVERSITY, A WALL IN THE WILD: THE DISASTROUS IMPACTS OF TRUMP’S BORDER WALL ON WILDLIFE 2 (2017).

16. *Id.*

destruction of vegetation, and wildlife disturbance” parallel the movement of border crossing activity.¹⁷

A report by the Good Neighbor Environmental Board (GNEB), an independent federal advisory committee, raised concerns about the “hurried-pace construction of border security infrastructure” and its significant environmental impact.¹⁸ By using the REAL ID Act waiver on NEPA and other regulations, DHS compromises a rigorous environmental review process for expediency in building border infrastructure. GNEB compiled a list of recommendations for the U.S. President and Congress on border fence advice in 2009, which illustrates their concern regarding the REAL ID Act waiver’s application. The first, and most significant, recommendation was to “[r]equire that all border security infrastructure projects fully comply with the National Environmental Policy Act . . . as well as all other laws, including environmental, historic and archeological preservation laws.”¹⁹ While not going as far as amending the REAL ID Act to limit the waiver, implementing the recommendation would require DHS to willingly engage in all the procedural requirements of NEPA—an improbable scenario. In response to the GNEB recommendation, former Council of Environmental Quality (CEQ) Chair Nancy Sutley succinctly summarized the government’s position that it will assess environmental impacts on its own terms, without committing to NEPA compliance for all border security infrastructure.²⁰ GNEB’s third recommendation called for the construction of a border fence to “[f]ully incorporate adequate environmental review, public participation and scientific analysis into the design and implementation of all border security infrastructure projects.”²¹ CEQ’s response to this recommendation could not adequately address public participation. In April 2010, CEQ Chair Sutley outlined measures taken between federal agency stakeholders but did not outline

17. Brian P. Segee & Ana Cordova, *A Fence Runs Through It: Conservation Implications of Recent U.S. Border Security Legislation*, in CONSERVATION OF SHARED ENVIRONMENTS: LEARNING FROM THE UNITED STATES AND MEXICO 248 (Laura Lopez-Hoffman et al. eds., 2009).

18. GOOD NEIGHBOR ENVTL. BD., *supra* note 9, at 15.

19. *Id.* at 62.

20. *Id.* (“CEQ and appropriate federal departments and agencies appreciate your recommendations of bringing border security infrastructure activities in full compliance with NEPA and our nation’s environmental laws. As you know, we are reviewing the current environmental impacts of border security infrastructure and looking for opportunities for minimizing these impacts. As part of this process, we look forward to identifying opportunities for ensuring that border security infrastructure and associated maintenance and repair meet national environmental goals.”).

21. *Id.*

any requirement DHS had to invite public participation.²² To date, no actions by Congress or a U.S. President have altered the scope of the REAL ID Act waiver or required DHS to comply with NEPA and other environmental regulations in developing border infrastructure.²³

In addition to the environmental degradation caused by border infrastructure, binational conservation efforts between the United States and Mexico will be jeopardized by the unilateral effort to enforce EO13767. Transborder collaboration is essential in responding to the transboundary environmental problems that arise on the border. One example of harmful consequences of poor collaboration resulted in 2008, when the United States added security fence between Nogales, Arizona, and Nogales, Sonora, without consulting officials from Mexico. As a result of the poor collaboration, the Mexico side of Nogales endured extensive flooding. By preventing storm water from flowing north, the international border wall caused the downtown section of Nogales, Sonora, to flood with six-foot-deep waters.²⁴ The ensuing flooding prompted the government of Sonora to declare the city a disaster zone and contributed to millions of pesos worth of damage.²⁵ The implementation of EO13767's border wall may frustrate binational efforts via its unilateral implementation and exacerbate hazards and ecological challenges that confront the borderlands.

In a region with the highest rate of species endangerment, border infrastructure has impacted and will continue to impact and challenge conservation efforts. Decades worth of conservation work is currently at risk with the proposed border wall plan. The GNEB's *Environmental Quality and Border Security: A 10-Year Retrospective* provided a case study on the National Butterfly Center (NBC) to illustrate the potential impact of bisecting conservation lands with the proposed border wall.²⁶ For over fifteen years, the NBC has worked to preserve endangered plant, butterfly, and reptile species by restoring habitats in the Lower Rio Grande Valley of Texas. The proposed border will threaten this conservation effort by contributing to habitat fragmentation via the

22. *Id.*

23. *Id.*

24. Bernardo J. Márquez Reyes, *Floods, Vulnerability, and the US-Mexico Border: A Case Study of Ambos Nogales 1* (2010) (unpublished Master of Science thesis, Arizona State University), https://www.researchgate.net/profile/Rimjhim_Aggarwal/publication/267370777_Floods_Vulnerability_and_the_US-Mexico_Border_A_Case_Study_of_Ambos_Nogales/links/54579c5a0cf2cf51648218a4/Floods-Vulnerability-and-the-US-Mexico-Border-A-Case-Study-of-Ambos-Nogales.pdf.

25. *Id.*

26. GOOD NEIGHBOR ENVTL. BD., *supra* note 9, at 24.

construction of artificial barriers, preventing terrestrial movement and natural seed distribution.²⁷ If the proposed border wall is built, more than half of the NBC's land would be left on the southern side of the wall, with the potential to cause irreparable ecological damage.²⁸

The Santa Ana Wildlife Refuge, in the Rio Grande Valley in South Texas, is another site likely to be impacted by EO13767 early in its implementation, owing in part to its location in a populous metropolitan area along the border on federal land. The Santa Ana Wildlife Refuge consists of over 2000 acres of land, where subtropical climate, gulf coast, great plains and Chihuahuan desert all collide, resulting in great biological diversity.²⁹ Among the animals that call this place home is the leopardus pardalis, commonly known as the ocelot. Highly endangered and on the cusp of losing one of its last habitats, the ocelot's survival depends on wildlife refuges like Santa Ana.³⁰ In addition to its importance to endangered species, Santa Ana National Wildlife Refuge lies along numerous migratory bird paths, making it one of the top birding destinations in the world.³¹ As federal land, the Santa Ana refuge remains vulnerable to government action because the government already owns it.³² According to maps of planned border security development obtained by the Sierra Club, an environmental organization, the U.S. Army Corps of Engineers (USACE) has drafted plans to build a levee wall that cuts across the Santa Ana refuge with a 150-foot enforcement zone cleared of vegetation.³³ Details of the project have also revealed plans to install 120-foot-tall video surveillance towers and lights to illuminate the enforcement zone.³⁴ The consequences of the drafted plan would substantially impact Santa Ana refuge's future viability. Potentially cutting off most of the refuge from access, the levee wall would also cause habitat fragmentation.

The borderland's environmental challenges are transboundary in nature. They require binational cooperation between the United States and Mexico to create solutions, and neither can succeed without the other. The "Border 2020" is a binational environmental program

27. *Id.* at 24-25.

28. *Id.*

29. *Santa Ana National Wildlife Refuge, About the Refuge*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/refuge/Santa_Ana/wildlife_and_habitat.html (last visited Feb. 24, 2018).

30. *Id.*

31. *Id.*

32. Melissa del Bosque, *Records Show Where Trump Plans to Build Texas Border Wall*, TEX. OBSERVER (Nov. 10, 2017), <https://www.texasobserver.org/map-trump-border-wall-locations-texas/>.

33. *Id.*

34. *Id.*

between the United States and Mexico, marking a continuation of binational cooperation dating back to the Integrated Environmental Plan for the Mexican-U.S. Border Area in 1992. The Environmental Protection Agency (EPA) and Mexico's Secretariat for the Environment and Natural Resources (SEMARNAT) are the main agencies whose cooperation realizes the agreement. With the guiding principle to "[p]rotect the environment and public health in the U.S.-Mexico border region, consistent with the principles of sustainable development," Border 2020 is an example of a binational environmental program that will be frustrated by EO13767.³⁵ If border infrastructure development proceeds under the broad waiver of the REAL ID Act, meaningful interagency cooperation between DHS and the EPA will be limited, and local stakeholders will be alienated from public participation in policymaking. These limitations will likely carry over into international efforts between the EPA and SEMARNAT, as both agencies will be removed from DHS border infrastructure projects that don't require NEPA compliance.

III. LEGAL FRAMEWORK

A. *Legislative History*

1. Illegal Immigration Reform and Immigrant Responsibility Act of 1996

When Congress passed the IIRIRA, it marked one of the most significant reforms to immigration since the Immigration and Nationality Act of 1965 (INA), which eliminated the national origins quotas.³⁶ According to the drafters, the overarching goals of IIRIRA were the following:

[To] improve deterrence of illegal immigration to the United States by increasing border patrol and investigative personnel, by increasing penalties for alien smuggling and for document fraud, by reforming exclusion and deportation law and procedures, by improving the verification system for the eligibility for employment, and through other measures, to reform the legal immigration system and facilitate legal entries into the United States³⁷

35. ENVTL. PROT. AGENCY, BORDER 2020: U.S.-MEXICO ENVIRONMENTAL PROGRAM 4 (July-Aug. 2012), <https://www.epa.gov/sites/production/files/documents/border2020summary.pdf>.

36. See Jennifer Ludden, *1965 Immigration Law Changed Face of America, All Things Considered*, NAT'L PUB. RADIO (May 9, 2006), <https://www.npr.org/templates/story/story.php?storyId=5391395>.

37. H.R. REP. NO. 104-828, at 1 (1996).

In addition to making wide-reaching amendments to the INA relating to interior enforcement of immigration, removal proceedings, and grounds for deportation, IIRIRA made substantial changes to border security.³⁸ Under title 1 of IIRIRA, the Act authorizes the increase in border patrol personnel and the improvement of physical barriers at the border.³⁹

The border barrier provision of IIRIRA stems from the political shift to increase border security during the Clinton administration's Southwest Border Strategy, which made control of unauthorized immigration a top priority.⁴⁰ Under the Southwest Border Strategy, Operation Gatekeeper was the Clinton administration's initiative to control unauthorized immigration along the San Diego/Tijuana border, which had been one of the highest traffic locations for unauthorized border crossings. Since 1992, Operation Gatekeeper increased the deployment of border patrol officers by 60%, marking an unprecedented level of resources devoted to border security.⁴¹

IIRIRA authorizes the Attorney General (AG) to install physical barriers and roads within the "vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." The qualification of "areas of high illegal entry" was not delineated in the Act itself but provides an example in the subsequent provision, "Construction of Fencing and Road Improvements in the Border Area Near San Diego, California."⁴² The section on constructing fencing along the San Diego border identifies fourteen miles of international border that constituted a high priority. IIRIRA, as originally written, also authorized the AG to waive two federal regulations, NEPA and the Endangered Species Act (ESA).

2. REAL ID Act of 2005

Congress subsequently amended IIRIRA when they passed the REAL ID Act of 2005, with the primary goal of enhancing national security against terrorism. The Act authorizes the Secretary of Homeland Security (Secretary) to waive any laws necessary for the construction of border infrastructure. Section 102(c) of the REAL ID Act provides:

38. *See id.*

39. *Id.* at 8-9.

40. News Release, Ag Reno Announces New Agents and Resources to Strengthen Operation Gatekeeper and Cut Illegal Immigration, DOJ 95-003 (Jan. 4, 1995).

41. *Id.*

42. IIRIRA, Pub. L. No. 104-208, § 102, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1103 (2000)), *amended by* REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 302 (codified as amended at 8 U.S.C. § 1103 (2006)).

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. Any such decision by the Secretary shall be effective upon being published in the Federal Register.⁴³

This amendment to IIRIRA reallocates the ability to waive laws from the AG to the Secretary and expands the Secretary's discretionary waiver to any laws relating to the construction of barriers and roads at the U.S. border. DHS has interpreted the broad discretionary waiver in IIRIRA to apply to any area within "the vicinity of the United States border," as opposed to the region near San Diego, California, where the previous waiver applied.⁴⁴ Not only did the section 102(c) waiver expand the geographic boundaries of waiver applicability, but DHS also interpreted its authority to waive countless other federal regulations that provide oversight over the agency's actions. Additionally, the REAL ID Act imposes a limited means of review for challenging the discretionary waiver. Under section 102(c)(2), federal courts retain exclusive jurisdiction to hear any claims arising from DHS waiver actions and such claims must be brought on grounds of constitutional violations.⁴⁵ According to a Congressional Research Service report on the laws pertaining to the U.S. border barriers, the amended section 102(c) waiver's scope is substantial, and with the exception of the Constitution, "the waiver potentially could be employed with respect to any other legal requirement."⁴⁶ The scope of the section 102(c) waiver has been challenged repeatedly and the history of its implementation has not helped to clarify concrete parameters for its application.

3. Secure Fence Act of 2006

The Secure Fence Act of 2006 was a significant legislative mandate to continue DHS development of border security, which consequently provided opportunities for DHS to apply the section 102(c) waiver on new border projects. The Act reshaped the geographic scope of border security operations by amending the provision of IIRIRA that targeted

43. REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 302 (codified as amended at 8 U.S.C. § 1103 (2006)).

44. MICHAEL JOHN GARCIA, CONGR. RESEARCH SERV., BARRIERS ALONG THE U.S. BORDERS: KEY AUTHORITIES AND REQUIREMENTS 22-24 (2017), <https://fas.org/sgp/crs/home/sec/R43975.pdf>.

45. *Id.*

46. *Id.* at 22-23.

the region near San Diego, California, to encompass at least 700 miles of fencing along the southern border.⁴⁷ Additionally, the Act set forth new definitions of operational control on the border, promoting the installation of systematic surveillance and physical infrastructure to prevent unlawful entries into the United States.⁴⁸ According to the most recent report by the Government Accountability Office (GAO), DHS has expanded border fencing between 2005 and 2015 from 119 miles to 654 miles.⁴⁹ In the following section, legal challenges on the use of section 102(c) waivers illustrate how the court understood its statutory boundaries.

B. Legal Developments

1. *Defenders of Wildlife v. Chertoff*

On September 2007, the Army Corps of Engineers initiated the construction of border fencing and infrastructure along the U.S.-Mexico border, within the San Pedro Riparian National Conservation Area, on behalf of the DHS. After environmental organizations challenged the conclusion of the Environmental Assessment of the proposed action required by NEPA, DHS Secretary Chertoff published a notice waiving environmental regulations along with eighteen other laws.⁵⁰ The plaintiffs, Defenders of Wildlife and the Sierra Club, challenged the constitutionality of the REAL ID Act on the grounds of the non-delegation doctrine, arguing that the Act “impermissibly delegates legislative powers to the DHS Secretary, a politically-appointed Executive Branch official.”⁵¹

The United States District Court for the District of Columbia analyzed the constitutionality of the REAL ID Act waiver by addressing the plaintiff’s claim that the waiver is functionally equivalent to law making, thus violating separation of powers.⁵² Here, the court was unconvinced that the waiver was equivalent to a legislative function because it was intrinsically not the same as a legislative amendment or

47. *Id.* at 7-9.

48. Secure Fence Act of 2006, Pub. L. No. 109-367, § 23, 120 Stat. 2638 (codified as amended at 8 U.S.C. § 1103 (2006)).

49. GOV’T ACCOUNTABILITY OFFICE, SOUTHWEST BORDER SECURITY: ADDITIONAL ACTIONS NEEDED TO BETTER ASSESS FENCING’S CONTRIBUTIONS TO OPERATIONS AND PROVIDE GUIDANCE FOR IDENTIFYING CAPABILITY GAPS 8 (2017), <https://www.gao.gov/assets/690/682838.pdf>.

50. *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 121 (D.D.C. 2007).

51. *Id.* at 123.

52. *Id.*

partial repeal of law.⁵³ Because the waiver was the exercise of authority explicitly directed by Congress and the delegation of authority was “accompanied by sufficient guidance,” the REAL ID Act waiver satisfied the constitutional challenge of separation of powers and the non-delegation doctrine. The court recognized the boundaries of the delegated authority by Congress’ requirement that the waiver applies to laws that the Secretary determines are “necessary to ensure expeditious construction” to “deter illegal crossings in areas of high illegal entry.”⁵⁴

This first challenge to the REAL ID Act waiver demonstrated that the waiver could survive a constitutional challenge over its expansive scope and broadly defined guidelines. The D.C. district court’s opinion supported two subsequent challenges to the REAL ID Act waiver in *Save Our Heritage Organization v. Gonzalez* and *County of El Paso v. Chertoff*.⁵⁵ In both cases, plaintiffs challenged the waiver of environmental regulations relating to the construction of border wall infrastructure on constitutional grounds stated in *Defenders of Wildlife* and failed to convince the court that the waiver lacked the intelligible principle required by the non-delegation doctrine.

2. Executive Order 13767

On January 25, 2017, five days after the presidential inauguration, President Trump signed EO13767, marking his first action to follow through on campaign promises to build a wall along the southern border. Predicated on the national security interests posed by unauthorized immigration, an alleged surge of illegal immigration from Mexico, and transnational criminal organizations that contribute to border violence and the influx of illegal drugs, the border policy outlined by EO13767 provides a policy framework for the executive branch to begin construction of a southern border wall.⁵⁶ This cornerstone policy statement succinctly states the administration’s goal to “secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism.”⁵⁷ In addition to the call for

53. *Id.* at 124.

54. *Id.* at 127.

55. *Our Heritage Org. v. Gonzalez*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Cty. of El Paso v. Chertoff*, No. EP-08 -CA-196-FM, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008).

56. Exec. Order No. 13,767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 30, 2017).

57. *Id.*

construction of a border wall, EO13767 also calls for the additional hiring of 5000 border patrol agents.⁵⁸

Despite the call for immediate action, EO13767 does not account for the funding required to put the policy into action. President Trump repeatedly called for Mexico's funding of the border wall throughout his presidential campaign, but the policy is limited by action from Congress to allocate adequate funds for the border wall and additional personnel.

IV. CONTEMPORARY CHALLENGE TO DHS WAIVER: *IN RE BORDER INFRASTRUCTURE ENVIRONMENTAL LITIGATION*

Following President Trump's EO13767 instructing the DHS Secretary to construct a contiguous border wall between the United States and Mexico, former DHS Secretary Kelly issued the "San Diego Waiver," waiving NEPA, ESA, the Clean Water Act, the Administrative Procedure Act, and numerous other environmental regulations for the construction of a fifteen-mile segment of the United States Border Patrol (USBP) San Diego Sector and the construction of various border wall prototypes.⁵⁹ Concerned with the environmental impact of the proposed border infrastructure projects, the Center for Biological Diversity (CBD), along with Defenders of Wildlife, Sierra Club, Animal Defense Fund, and the State of California, filed suit against DHS in the U.S. District Court for the Southern District of California over the legitimacy of the waiver.

A. *Ultra Vires Claim*

In *In re Border Infrastructure Environmental Litigation*, plaintiffs offered a new legal theory against the broad application of the section 102(c) waiver through an ultra vires claim.⁶⁰ At the heart of the argument is the authority granted to DHS by Congress in IIRIRA and subsequent legislation was exceeded by DHS in the August 2 waiver regarding the San Diego infrastructure projects. CBD argued that because the development of border wall prototypes doesn't fall under the categories of action authorized under the waiver, it was ultra vires. CBD's ultra

58. *Id.*

59. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 35,984 (Aug. 2, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-08-02/pdf/2017-16260.pdf>.

60. Plaintiff Center for Biological Diversity's Memorandum of Points and Authorities in Support of Cross Motion for Summary Judgement and in Opposition to Defendants' Motion for Summary Judgement for Plaintiff Center for Biological Diversity at 10-15, *In re Border Infrastructure Environmental Litigation* (3:17-cv-01215) 2017 WL 5862844 (S.D. Cal.).

vires claim raises the question of how an ultra vires claim may proceed under the statutory preclusion of judicial review under section 102(c)(1):

(2) Federal Court Review. (A) In General. The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims rising from any action undertaken, or any decision made, by the [DHS Secretary] 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.⁶¹

CBD argued that the limitation of judicial review under section 102(c)(1) to constitutional claims should not shield DHS from judicial review in determining whether the agency had acted within its statutory authority delegated by Congress.⁶² Furthermore, CBD contended that because the August 2 waiver was ultra vires, it would not be covered by the limitation of judicial review because an ultra vires action is intrinsically not made “pursuant to” IIRIRA section 102(c)(1).⁶³ Citing *Dart v. United States*, CBD outlines the strong preference for courts to presume judicial review when agencies have allegedly acted beyond their delegated authority.⁶⁴ The ultra vires challenge to agency actions has been available to provide individuals an opportunity to challenge an agency’s action since *American School of Magnetic Healing v. McAnnulty*.⁶⁵ CBD’s argument highlights the importance of a presumption of judicial review by stating:

If a no-review provision shields particular types of [executive] action, a court may not inquire whether a challenged [executive] decision is arbitrary, capricious, or procedurally defective, but it must determine whether the challenged . . . action is of the sort shielded from review. Otherwise, agencies could characterize reviewable or unauthorized action as falling within the scope of no-review provisions whose application to such action Congress did not intend.⁶⁶

CBD must further prove that the border wall replacement and prototype projects were outside the statutory authority of DHS. One of the challenges CBD faced is proving that IIRIRA section 102’s scope is

61. IIRIRA, Pub. L. No. 104-208, § 102(c)(1), 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1103 (2000)), amended by REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 302 (codified as amended at 8 U.S.C. § 1103 (2006)).

62. Plaintiff Center for Biological Diversity’s Memorandum of Points and Authorities, *supra* note 60, at 13.

63. *Id.* at 11.

64. *Id.* at 12 (citing *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988)).

65. *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

66. Plaintiff Center for Biological Diversity’s Memorandum of Points and Authorities, *supra* note 60, at 12 (citing *Amgen v. Smith*, 357 F.3d 103, 113 (D.C. Cir. 2004)).

more limited than the DHS interpretation. CBD's main argument for a limited interpretation of the waiver is a statutory interpretation that reads section 102(c) as operating solely over the preceding provision's enumerated projects in section 102(b).⁶⁷ This interpretation is supported by CBD's claim that the legislative history and case law precedent, in addition to the statute formatting, indicate the necessity of a limited interpretation of the section 102(c) waiver.

In its motion for summary judgment, CBD points the court to its previous interpretation of the section 102(c) waiver in *Sierra Club v. Ashcroft*.⁶⁸ There, the United States District Court for the Southern District of California stated that the "barriers and roads" referenced in section 102(c) in the original and amended IIRIRA operate with a narrow scope over the Triple Fence project located near San Diego.⁶⁹

In addition to highlighting the court's previous interpretation of the section 102(c) waiver, CBD argues that, at the least, the construction of section 102 remains ambiguous and the legislative history of the REAL ID Act sheds light on the waiver's limited application.

B. Border Projects Are Not Covered Under IIRIRA Section 102(a)

CBD makes a compelling case by arguing that regardless of whether the section 102(c) waiver applies to section 102(a), the August 2 waiver should not be authorized by IIRIRA because the project does not fall under the broad category of activities under section 102(a). Under section 102(a), "The Attorney General . . . shall take such actions as may be necessary . . . in areas of high illegal entry into the United States."⁷⁰ Information provided by the State of California in their brief provides evidence that the region of the border projects are not in "areas of high illegal entry," and to determine such would be unreasonable. Using CBP's data, the State of California pointed out that the number of deportable migrants apprehended in the San Diego sector fell from

67. *Id.* at 17.

68. *Id.* (citing *Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 2005)).

69. *Id.* (citing *Ashcroft*, 2005 U.S. Dist. LEXIS 44244, at *19-20) ("[T]he 'barriers and roads' alluded to are in the same in both articulations of Section 102(c): the Triple Fence project located along the U.S.-Mexico border in the vicinity of San Diego Congress simply broadened the scope of the waiver authority of the pre-existing delegation to 'all laws,' but again only for the narrow purpose of expeditious completion of the Triple Fence authorized by the IIRIRA.")

70. IIRIRA, Pub. L. No. 104-208, § 102(c)(1), 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1103 (2000)), amended by REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 302 (codified as amended at 8 U.S.C. § 1103 (2006)).

483,815 in 1996 to 31,891 in 2016.⁷¹ Despite overwhelming evidence that shows that the rate of illegal entries has declined dramatically over the past decade in the San Diego sector, the agency's determination of "high illegal entry" is a threshold that is difficult to challenge because of the discretion of the agency. Congress has declared "operational control" of the borders as "the prevention of all unlawful entries into the United States, including entry by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband."⁷² Considering the definition of operational control's high standard, challenging San Diego Sector's designation as "high illegal entry" may likely be unavailing.

C. Judge Curiel's Opinion

On February 28, 2018, the United States District Court for the Southern District of California issued an opinion on *In re Border Infrastructure Environmental Litigation*. In an order granting DHS's motion for summary judgment, Judge Curiel reviewed the agency's actions under CBD's ultra vires claim, finding that the agency had not acted ultra vires.⁷³ The court found that it had jurisdiction to hear the ultra vires claims under the narrow exception when there is a claim that an agency acted beyond its statutory authority.⁷⁴ The analysis of whether the actions were ultra vires relied upon the standard that the agency acted in contravention of "clear and mandatory" statutory language.⁷⁵ Because of the statutory language of section 102 and the plausibility of both the CBD and DHS's interpretations, the court could not conclude that DHS acted in excess of their delegated powers, contrary to the "clear and mandatory" standard.⁷⁶

The court order supported the validity of an ultra vires challenge to challenges against the construction of border infrastructure under IIRIRA and the limited judicial review available; however, the order reinforced the broad authority delegated to DHS. Judge Curiel emphasized his belief in the court's role, where he echoes Chief Justice

71. Memorandum in Support of Motion for Summary Judgment for People of the State of California and the California Coastal Commission at 18, *In re Border Infrastructure Environmental Litigation* (3:17-cv-01215) 2017 WL 5760186 (S.D. Cal.).

72. Secure Fence Act of 2006, Pub. L. No. 109-367, § 2(b), 120 Stat. 2638 (codified as amended at 8 U.S.C. § 1103 (2006)).

73. Order Denying Plaintiffs' Motions for Summary Judgment and Granting Defendants' Motions for Summary Judgment, at 19-20, *In re Border Infrastructure Environmental Litigation* (S.D. Cal. June 15, 2017) (No. 3:17-cv-01215).

74. *Id.* at 21.

75. *Id.* at 29.

76. *Id.* at 39.

Roberts: “Court[s] are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments It is not our job to protect the people from the consequences of their political choices.”⁷⁷

V. MEASURING SUCCESS: GOVERNMENT ACCOUNTABILITY OFFICE REPORT ON SOUTHWEST BORDER SECURITY

The fencing infrastructure in place since the congressional mandate of the Secure Fencing Act of 2006 should inform policymakers on the development of border infrastructure, including EO13767. Available information on the efficacy of various fencing structures on DHS’s operational objectives should be considered before more taxpayer money is devoted to the project. In February 2017, the GAO published a report on the state of Southwest border security and the efficacy of fencing infrastructure.⁷⁸ As an independent, nonpartisan agency working for Congress, GAO’s mission is to investigate how taxpayer dollars are spent and the success of government programs in meeting their objectives.⁷⁹ The congressionally requested report examines border fencing’s intended contributions to security and CBP’s ability to assess the contributions of fencing.⁸⁰ The report concludes that CBP has still not assessed pedestrian or vehicle fencing’s contributions to border security, despite spending approximately \$2.3 billion to deploy border fencing along the border from 2007 through 2015.⁸¹ Beyond the costs of deployment, maintenance and repair work on the border will cost more than \$1 billion over twenty years.⁸² Because CBP has not developed a system of metrics to assess the operational capabilities of border fencing, the agency has not provided any measurements of fencing contributions to border security.⁸³

In addition to highlighting CBP’s lack of contribution metrics, the GAO report details Border Patrol Agents’ acknowledgement of the limitations of border fencing.⁸⁴ Between 2010 and 2015, CBP recorded 9287 breaches in pedestrian fencing.⁸⁵ Methods for breaching pedestrian

77. *Id.* at 3 (quoting Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012)).

78. GOV’T ACCOUNTABILITY OFFICE, SOUTHWEST BORDER SECURITY: ADDITIONAL ACTIONS NEEDED TO BETTER ASSESS FENCING’S CONTRIBUTIONS TO OPERATIONS AND PROVIDE GUIDANCE FOR IDENTIFYING CAPABILITY GAPS (2017).

79. *About GAO*, GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/about/index.html> (last visited Feb. 25, 2018).

80. GOV’T ACCOUNTABILITY OFFICE, *supra* note 78, at 2.

81. *Id.* at 25.

82. *Id.*

83. *Id.*

84. *Id.* at 22.

85. *Id.*

fencing are varied and depend on the type of fencing, which ranges from legacy landing mat fences to modern bollard fences. Simple portable power tools, burrowing, and wire cutters are common methods for breaching border fencing.⁸⁶ Border Patrol Agents have also witnessed small aircrafts transporting contraband over the pedestrian and vehicle fencing.⁸⁷ In early August 2017, Border Patrol in San Diego County, California, apprehended an individual for transporting over thirteen pounds of methamphetamines over the border with a remote control drone.⁸⁸ While not the first instance of drones transporting contraband over the border, new technologies and methods for breaching border fencing are emerging and present a clear limitation in border fencing.

While billions of dollars have been spent on the development of border fencing along the U.S.-Mexico border, questions remain on its efficacy and call for further studies and assessments. EO13767 proposes a contiguous wall for the purposes of securing the border from “illegal immigration, drug and human trafficking, and acts of terrorism,” which a conservative estimate by DHS reports would cost \$21.6 billion to construct, not including annual maintenance and repair costs.⁸⁹

VI. CONCLUSION

The development of border security infrastructure along the U.S.-Mexico border has significant impacts on the local environment and will continue to transform the landscape with high environmental costs. The question of how many environmental interests we are willing to give up to advance some form of border security is one that is being removed from the public and a multitude of stakeholders. The DHS authorization to waive laws pursuant to the REAL ID Act has alienated and will continue to alienate public oversight of the agency’s actions, circumventing a vital mechanism for public participation and assessment of mitigation and alternative measures via NEPA. Unless Congress reforms, limits, or eliminates the scope of the waiver, the strongest instrument preventing EO13767 from realizing a contiguous border without adhering to environmental regulations is funding.

86. *Id.*

87. *Id.* at 23.

88. Pauline Repard, *In New Tactic, Smugglers Use Drone to Fly Meth Over Mexican Border into San Diego*, *Official Say*, L.A. TIMES (Aug. 19, 2017), <http://www.latimes.com/local/lanow/la-me-drug-smuggle-drone-20170819-story.html>.

89. Julia Edwards Ainsley, *Exclusive-Trump Border ‘Wall’ to Cost \$21.6 Billion, Take 3.5 Years to Build: Internal Report*, REUTERS (Feb. 9, 2017), <https://www.reuters.com/article/us-usa-trump-immigration-wall-exclusive/exclusive-trump-border-wall-to-cost-21-6-billion-take-3-5-years-to-build-internal-report-idUSKBN15O2ZN>.