

Immigration Reform's Unintended Consequence: Providing Greater Justification for Border Patrol to Waive Environmental Compliance at the U.S.- Mexico Border

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IMMIGRATION REFORM'S UNINTENDED CONSEQUENCE: PROVIDING GREATER JUSTIFICATION FOR BORDER PATROL TO WAIVE ENVIRONMENTAL COMPLIANCE AT THE U.S.-MEXICO BORDER

DEENA MUELLER*

INTRODUCTION

At an international border environmental issues become even more complex, clashing with issues of sovereignty, differing laws, and cross-border effects. Along the U.S.-Mexico border, addressing environmental concerns has officially been on the agenda since 1983, when the two nations signed the La Paz Agreement, committing themselves to protecting and improving the environment in the border region.¹ In recent years, the Environmental Protection Agency (“EPA”) has implemented extensive plans to achieve these goals such as the Border 2012 initiative.²

However, not everyone is supportive of an increasingly invasive environmental regulatory regime for the border region. The Department of Homeland Security (“DHS”) and the U.S. Customs & Border Protection (“CBP”)—which manages Border Patrol—contend that the obligations imposed by environmental regulations prevent effective border control, permit increased illegal immigration and risk for entry by terrorists, and subject the borderlands to other types of environmental harms.³ Consequently, many politicians, policy advisors, and security enthusiasts advocate for

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¹ *What Is Border 2012?—Background*, ENVTL. PROT. AGENCY, <http://www.epa.gov/Border2012/framework/background.html> (last updated Nov. 26, 2010).

² *What Is Border 2012?—Goals*, ENVTL. PROT. AGENCY, <http://www.epa.gov/Border2012/framework/goals-general.html> (last updated Nov. 26, 2012) (listing the reduction of land, water, and air pollution as major goals).

³ See Press Release, Natural Res. Comm., Groups Call for Passage of Republican Legislation to Enhance Border Security on Federal Lands (July 8, 2011), available at <http://naturalresources.house.gov/UploadedFiles/07.08.11-BorderHearingRecap.pdf>; *Federal Regs on Environment May Be Hindering Border Security, Lawmakers Say*, FOX NEWS (June 16, 2010), <http://www.foxnews.com/us/2010/06/16/federal-border-comes-months-proposed-legislation/>.

a relaxation on the enforcement of cumbersome environmental regulations along our nation's borders.⁴ This issue was previously addressed during the construction of the border wall several years ago; however, the waivers of environmental regulations approved then were limited specifically to the immediate areas of wall construction along the U.S.-Mexico border.⁵ Today, waivers are more frequently used and are broader, applying throughout the Borderlands and beyond.⁶ The original text of House Resolution 1505 ("H.R. 1505"), introduced early in 2011, permitted waivers over territory encompassing almost 2/3 of the population of the United States.⁷ The proffered justifications for easing, lifting, or essentially ignoring environmental regulations throughout these areas are national security and immigration control.⁸

Environmental regulations have been eased or lifted for the sake of military training exercises or equipment testing.⁹ Therefore, there is a history of weighing the value of environmental regulation against other important interests and guiding precedents that help identify which justifications warrant waiving compliance with environmental regulations.¹⁰ To date, DHS has relied heavily on immigration control to justify its decision to waive environmental laws and regulations at U.S. borders.¹¹ The contentious immigration debate fuels DHS's position that curbing illegal

⁴ Press Release, Natural Res. Comm., Republicans Introduce Bill to Secure Border on Federal Lands, Protect Environment (Apr. 13, 2011), available at <http://naturalresources.house.gov/UploadedFiles/4.13.11-BorderBillIntroduced.pdf>.

⁵ See Jenny Neeley, *Over the Line: Homeland Security's Unconstitutional Authority to Waive All Legal Requirements for the Purpose of Building Border Infrastructure*, 1 ARIZ. J. ENVTL. L. & POL'Y 140, 144 (2011).

⁶ See *Ranchers Split Over Proposal to Waive Environmental Reviews for US Border Security Plan*, FOX NEWS (Dec. 23, 2012), <http://www.foxnews.com/us/2012/12/23/ranchers-split-over-proposal-to-waive-environmental-reviews-for-us-border/>.

⁷ H.R. 1505, 112th Cong. (2011) (as introduced in the House, April 13, 2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1505ih/pdf/BILLS-112hr1505ih.pdf>; see *Fact Sheet on U.S. "Constitution Free Zone"*, ACLU (Oct. 22, 2008), <http://www.aclu.org/technology-and-liberty/fact-sheet-us-constitution-free-zone>.

⁸ Tiffany N. Tisler, *Federal Environmental Law Waivers and Homeland Security: Assessing Waiver Application in Homeland Security Settings at the Southern Border in Comparison to National Security Settings Involving the Military*, 42 U. TOL. L. REV. 777, 796 (2011); Shaun McKinnon, *Federal Legislation Pits Environment vs. Security*, THE ARIZONA REPUBLIC (June 13, 2011, 12:00 AM), <http://www.azcentral.com/arizonarepublic/news/articles/2011/06/13/20110613federal-legislation-pits-environment-security.html>.

⁹ See Tisler, *supra* note 8, at 788.

¹⁰ See, e.g., *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 120–21 (D.D.C. 2007); *County of El Paso v. Chertoff*, 2008 WL 4372693 (W.D. Tex. 2008).

¹¹ See, e.g., *Chertoff*, 527 F. Supp. 2d at 122.

immigration is a paramount government interest worth trumping environmental protection. For a short time in 2012, it appeared that overly broad waivers would no longer be tolerated, as evidenced by the aggressive amendments forced into H.R. 1505 by several House subcommittees.¹² However, with Congress's January 2013 announcement to actively pursue comprehensive immigration reforms that allow illegal immigrants a pathway to citizenship,¹³ the issue of securing the border is going to become a salient concern.

This Note argues that in light of the proposed and expected changes to U.S. immigration policy, the need for strict border control to prevent illegal immigration will be amplified. This amplified need provides a more compelling justification for DHS authority and discretion to invoke environmental waivers along the U.S.-Mexico border. As the interest becomes more compelling, there will likely be even broader grants of waiver authority to DHS as long as the waiver authority is used in the name of preventing illegal immigration.

In the previous year, Congress made great gains toward requiring greater accountability on the part of DHS when waiving environmental regulations. House subcommittees actively altered an overly broad proposal to confer waiver authority to DHS. They required that waived environmental regulations be in fact causally related to impeding DHS actions in the Borderlands. This Note argues that any gains made, and trends started by this subcommittee activism, will be undermined in light of future changes to U.S. immigration policy.

Part I discusses the environmental issues associated with the border regions and the laws and regulations in place there. It examines the alleged burdens such regulations pose for border security operations. In Part II, this Note chronicles the usage of waivers of environmental regulations in prior contexts to illustrate what circumstances justify invoking waivers of environmental regulations. Part III argues that the proposed immigration reforms will strengthen DHS's argument that Border Patrol objectives—like intercepting would-be illegal immigrants—justify the authority to waive any environmental regulation that could get in the way. Thus, the future will see continued broad and unchecked waiver authority granted to DHS. Part III also looks at the amendments to H.R. 1505 inserted by the House Natural Resources Committee and other subcommittees which moderated the far-reaching waiver authority

¹² See *infra* Part III.A.

¹³ See *infra* Part III.B.

otherwise being granted to DHS. This Note contends that these amendments evidence an attempt to institute greater scrutiny over the authority of DHS to waive environmental laws along the U.S. Borders. But this Note argues that such scrutiny will likely not be exercised now that immigration control at the border is going to be a necessary component of immigration reform.

I. ENVIRONMENTAL REGULATION IN THE BORDERLANDS

A. *Border Basics*

The lands surrounding the U.S.'s southern border are often characterized as a barren wasteland, covered in rugged hills and arid deserts,¹⁴ yet they're also home to numerous plant species, animal species, and nearly 12 million people.¹⁵ Some of these species are endangered, like the jaguar and the ocelot, and their habitats are extremely delicate, making environmental stewardship necessary to ensure their continued existence.¹⁶ The Canada-U.S. border is actually longer than the U.S.-Mexico border,¹⁷ but at 1933 miles, the U.S.-Mexico border is still one of longest borders in the world.¹⁸ Besides being one of the longest, it is also one of the busiest borders in the world, with over 300 million legal crossings annually, amounting to as many as 660,000 per day.¹⁹ Left unchecked, this constant wave of people and activity could destroy the ecosystems and rare species that thrive in the dry, hot climate as well as damage the historic and culturally important sites in the area.²⁰

The desire to protect these unique lands has led to the application of as many as thirty-five different federal environmental and land use

¹⁴ See Neeley, *supra* note 5, at 150.

¹⁵ See MPI Staff, *The U.S.-Mexico Border*, MIGRATION INFORMATION SOURCE (June 2006), <http://www.migrationinformation.org/feature/display.cfm?ID=407>.

¹⁶ Dinah Bear, *Environmental Impacts of the U.S.-Mexico Border Wall*, 40 ABA TRENDS, March/April 2009, at 4, 4; Andrea C. Sancho, Note, *Environmental Concerns Created by Current United States Border Policy: Challenging the Extreme Waiver Authority Granted to the Secretary of the Department of Homeland Security under the Real ID Act of 2005*, 16 SOUTHEASTERN ENVTL. L.J. 421, 439 (2008); Tisler, *supra* note 8, at 777.

¹⁷ RUTH ELLEN WATSEM ET AL., CONG. RESEARCH SERV., BORDER SECURITY: INSPECTIONS PRACTICES, POLICIES, AND ISSUES CRS-2 TO CRS-3 (2004), available at <http://www.fas.org/sgp/crs/RL32399.pdf>.

¹⁸ *Id.* at CRS-3.

¹⁹ MPI Staff, *supra* note 15.

²⁰ See Bear, *supra* note 16, at 4.

regulations in the borderlands.²¹ A complete list of these regulations can be found in H.R. 1505,²² but some of the more important laws involved in the dispute between Border Patrol's objectives and environmentalist ideals include: the National Environmental Policy Act ("NEPA"),²³ the Wilderness Act,²⁴ the Safe Drinking Water Act ("SDWA"),²⁵ the Clean Air Act ("CAA"),²⁶ the Clean Water Act ("CWA"),²⁷ the Endangered Species Act ("ESA"),²⁸ the Migratory Bird Treaty Act ("MBTA"),²⁹ the National Parks Service Organic Act,³⁰ the Coastal Zone Management Act of 1972,³¹ the Federal Land Policy and Management Act of 1976,³² the Fish and Wildlife Act of 1956,³³ the Noise Control Act of 1972,³⁴ and the National Historic Preservation Act.³⁵ These acts apply to all federally managed lands countrywide, not just in the border areas. Technically, the 'Borderlands' is defined in the La Paz Agreement as the area subject to the environmental measures and goals laid out in the Agreement, stretching 62.5 miles (100 kilometers) on either side of the actual U.S.-Mexico border.³⁶ Thus, it was initially proposed by H.R. 1505 that these environmental regulatory acts be waived not only in the traditional Borderlands, but anywhere within a 100 mile radius of any international border,³⁷ land or sea—an area which encompasses nearly two-thirds of the U.S population.³⁸

²¹ *See id.*; *see also* Sancho, *supra* note 16, at 432 (discussing the number of environmental regulations that the Secretary of the Department of Homeland Security has waived in the past).

²² *See* H.R. 1505 § 2(c)(2) 112th Cong. (as amended by the Committee on Natural Resources on April 17, 2012).

²³ *See* 42 U.S.C. § 4321 (2006).

²⁴ *See* 16 U.S.C. § 1131 (2006).

²⁵ *See* 42 U.S.C. § 300 (2006).

²⁶ *See id.* § 7401.

²⁷ *See id.* § 1251.

²⁸ *See* 16 U.S.C. § 1531 (2006).

²⁹ *See id.* § 703.

³⁰ *See id.* § 1.

³¹ *See* 43 U.S.C. § 1451 (2006).

³² *See id.* § 1701.

³³ *See* 16 U.S.C. § 742a (2006).

³⁴ *See* 42 U.S.C. § 4901 (2006).

³⁵ *See* 16 U.S.C. § 470 (2006).

³⁶ Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, 35 U.S.T. 2917 [hereinafter La Paz Agreement]. While the La Paz Agreement defines "border area," this Note refers to the same area as "Borderlands."

³⁷ H.R. 1505 § 2(c)(1) 112th Cong. (2011) (as originally introduced on April 13, 2011).

³⁸ *Fact Sheet on U.S. "Constitution Free Zone," supra* note 7.

While some of the regulations to be waived serve purely aesthetic, cultural, or historical functions, such as the Historic Preservation Act, others like the SDWA, CAA, NEPA, ESA, and CWA all play a major role in maintaining a safe and healthy environment.

B. Environmental Regulations Applicable to Border Patrol

This Note next considers the purpose and rules of some of the key environmental regulations for which border area waivers are being sought and explores how their application may impede Border Patrol's mission.

1. National Environmental Policy Act

NEPA was one of the first environmental laws in this country, and was enacted on January 1, 1970.³⁹ It was designed to create a national environmental policy whereby all actions taken by a federal agency would be weighed against their impact on the environment.⁴⁰ In theory, proposed actions that adversely affected the environment could be altered before they were ever carried out. However, NEPA lacks the power to enjoin agency actions that would have a severe impact on the environment; it only ensures that the decision making process includes an adequate consideration of the environmental interests involved.⁴¹ This is achieved through a process of reporting, evaluating, and investigating.⁴²

Prior to taking an action governed by NEPA, the requesting agency must prepare an Environmental Assessment ("EA") which considers what environmental effects the proposed action might have.⁴³ If the expected effects are minimal, the agency must then produce a Finding of No Significant Impact ("FONSI").⁴⁴ If, on the contrary, the likely effects are not minimal, another, more thorough report must be prepared. This report, known as an Environmental Impact Statement ("EIS"), requires notifying the public of the proposed action and its effects, allowing time for public comments and for re-evaluating the proposal in light of those comments.⁴⁵

³⁹ See *National Environmental Policy Act (NEPA)—Basic Information*, EPA, <http://www.epa.gov/compliance/basics/nepa.html> (last visited Apr. 8, 2013) [hereinafter *Basic Information*].

⁴⁰ National Environmental Policy Act, 42 U.S.C. § 4331(a) (2006).

⁴¹ Jennifer Echemendia, *Waiving Environmental Concerns Along the Border: Fence Construction and the Waiver Authority of the Real ID Act*, 3 PITT. J. ENVTL. PUB. HEALTH L. 81, 85–86 (2009).

⁴² *Id.*

⁴³ *Basic Information*, *supra* note 39 (describing the reporting requirements of NEPA).

⁴⁴ *Id.* (comparing the requirements for an EA versus a full EIS).

⁴⁵ Echemendia, *supra* note 41, at 87.

This means the entire process is slow, complex, and expensive. In the border context, if DHS's Customs and Border Protection division—which includes Border Patrol—decides to take an action subject to NEPA, it must wait to act until it has prepared the requisite EA. Preparing the EA requires taking all of the proper steps, even if the agency knows the environmental effects will be negligible or it intends to take the action regardless of what environmental impacts the report reveals.

Despite the establishment of forty three official points of entry along the U.S.-Mexico land border, many illegal crossings are made or attempted over the rugged, desolate border terrain.⁴⁶ Because of this fact, the ability to move Border Patrol personnel and surveillance equipment along the border quickly is indispensable to DHS's ability to secure the border to illegal traffic.

However, according to DHS, NEPA hampers this necessary mobility, justifying their need to waive compliance with NEPA and other environmental regulations.⁴⁷ Measures as routine as constructing temporary roads for terrain patrol vehicles, pitching field quarters, or placing surveillance equipment onto land features all require drafting an EA, and potentially the lengthier EIS as well.⁴⁸ This means that before moving its personnel and equipment into a new zone along the border, Border Patrol must wait on NEPA compliance, which can halt its movement for many weeks, months, or even years.⁴⁹ This delay could cause Border Patrol to miss its opportunity to catch illegal crossers.⁵⁰ According to Border Patrol,

⁴⁶ UNITED STATES-MEXICO BORDER HEALTH COMM'N, THE UNITED STATES-MEXICO BORDER REGION AT A GLANCE (2004), *available at* <http://www.nmsu.edu/~bec/BEC/Readings/10.USMBHC-TheBorderAtAGlance.pdf>; *see also* Neeley, *supra* note 5, at 147–48 (offering a description of the geographic territory of the borderlands).

⁴⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, BORDER PATROL OPERATIONS ON FEDERAL LANDS: STATEMENT OF ANU K. MITTAL, DIRECTOR NATURAL RESOURCES AND ENVIRONMENT (2011) [hereinafter MITTAL STATEMENT], *available at* <http://www.gao.gov/assets/130/126072.pdf>.

⁴⁸ *See id.* at 5; Judson Berger, *House Panel Approves Bill to Lift Environmental Regulations That Impede Border Patrol*, FOX NEWS (Oct. 5, 2011), <http://www.foxnews.com/politics/2011/10/05/house-panel-approves-bill-to-lift-environmental-regulations-that-impede-border>.

⁴⁹ NEPA TASK FORCE REPORT TO CEQ, MODERNIZING NEPA IMPLEMENTATION, 65–66 (2003), *available at* <http://ceq.hss.doe.gov/ntf/report/finalreport.pdf> (contrasting an EA, whose completion costs anywhere between \$50,000 and \$200,000 and takes between two weeks to two months, with an EIS, which may cost between \$250,000 and \$2,000,000 and takes one to six years to complete).

⁵⁰ MITTAL STATEMENT, *supra* note 47 (testifying that “when Border Patrol requested permission to move surveillance equipment, it took the land manager more than 4 months to conduct the required historic property assessment and grant permission, but by then illegal traffic had shifted to other areas.”).

by the time compliance is complete, foot traffic patterns have changed and the whole purpose of moving into the protected zone has been thwarted.⁵¹

2. The Wilderness Act

Another foundational act in environmental law, the Wilderness Act, dates back to 1964, and is famous for defining the term “wilderness” and statutorily setting aside millions of acres of “wilderness.”⁵² The Act created the National Wilderness Preservation System, administered in part by the National Park Service, the U.S. Forest Service, the U.S. Fish & Wildlife Service, and the Bureau of Land Management,⁵³ which designates spaces within federally held land as wilderness areas governed by heightened land use restrictions.⁵⁴ For example, motorized transportation of any kind is prohibited in wilderness areas.⁵⁵ Most other “unnatural” activity and development is also banned in wilderness areas. The Act explicitly prohibits the construction of temporary roads, any use of motorized or mechanical transport, and placement of any structures, or installations onto wilderness land, except during an emergency.⁵⁶

Routine Border Patrol operations, including surveillance of the border, must strictly abide by the terms of the Act, and limit its modes of transportation to walking or horseback.⁵⁷ Statutorily designated wilderness areas dot the landscape of the southern border states, forcing Border Patrol to constantly switch and adjust its methods whenever it crosses into wilderness zones.⁵⁸ The strict application of land use restrictions in wilderness areas has even caused some border region politicians

⁵¹ McKinnon, *supra* note 8.

⁵² Wilderness Act, 16 U.S.C. § 1131(c) (2006).

⁵³ *Frequently Asked Questions About Wilderness Stewardship*, WILDERNESS.NET, <http://www.wilderness.net/NWPS/manageIssuesOverview> (last visited Apr. 8, 2013).

⁵⁴ Wilderness Act, 16 U.S.C. §§ 1131(a), 1133 (2006); *see also Wilderness Act*, THE WILDERNESS SOCIETY, <http://wilderness.org/article/wilderness-act> (last visited Apr. 8, 2013).

⁵⁵ *See Wilderness Designation FAQs*, THE WILDERNESS SOCIETY, <http://wilderness.org/article/wilderness-designation-faqs> (last visited Apr. 8, 2013).

⁵⁶ Wilderness Act, 16 U.S.C. § 1133(c) (2006) (identifying certain prohibited uses).

⁵⁷ Memorandum of Understanding Among U.S. Department of Homeland Security and U.S. Department of the Interior and U.S. Department of Agriculture Regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands Along the United States' Borders 4 (2006).

⁵⁸ *Wilderness Areas Maps*, BUREAU OF LAND MGMT., <http://www.blm.gov/az/wildarea-map.htm> (last visited Apr. 8, 2013); *Wilderness Areas*, BUREAU OF LAND MGMT., http://www.blm.gov/ca/st/en/prog/wilderness/wa/map_wa.html (last updated July 26, 2011) (highlighting the numerous wilderness areas throughout the borderlands).

to fight against the designation of more wilderness areas for fear that they will become havens for illegal trafficking.⁵⁹ Wilderness areas present a challenge to Border Patrol's daily operations and border security because they limit the means by which Border Patrol may pursue and monitor the movements of people attempting to enter the U.S. illegally.

3. Endangered Species Act

The ESA's objectives are to prevent the extinction of imperiled species living within the U.S. and to restore the populations of these species by reducing threats to their existence.⁶⁰ One of the ways to protect and restore these species is to prevent human presence in the habitat of the endangered species and eliminate human encounters that might be threatening and ultimately dangerous to the species.⁶¹ However, Border Patrol's task requires the use of motorized vehicles and equipment in areas that are also the habitat of endangered species. In 1998, Defenders of Wildlife sued Border Patrol for not reporting actions which Defenders claimed were in violation of ESA because they harmed the Sonoran pronghorn antelope.⁶² The alleged wrongdoing consisted of flying helicopters within 200 feet of the ground over antelope habitats, and using bright spotlights in the antelope's habitat.⁶³ Defenders contended that these activities created unnatural occurrences in the habitat of the antelope and had the potential to frighten the antelope which could lead to stress, injury, and even death.⁶⁴ Border Patrol contends that flying low enough to see what is happening on the ground and using lights in the dark assist with the detection and detainment of illegal immigrants.⁶⁵ Therefore, DHS

⁵⁹ Hugh Holub, *Wilderness Areas on the Border? What a Great Idea if You Are a Cartel Drug Smuggler*, TUCSON CITIZEN (May 21, 2011), <http://tucsoncitizen.com/view-from-baja-arizona/2011/05/21/wilderness-areas-on-the-border-what-a-great-idea-if-you-are-a-cartel-drug-smuggler/> (criticizing the restrictions on use of Wilderness areas as benefitting illegal immigrants and drug traffickers, and impeding Border Patrol in its mission).

⁶⁰ Endangered Species Act, 16 U.S.C. 1531(b) (2006) (stating the purpose for the Act).

⁶¹ Sancho, *supra* note 16, at 436; Press Release, Defenders of Wildlife, Border Patrol Obstruction Continues: Defenders Sues U.S. Border Patrol for Withholding Public Information (Dec. 22, 1998) [hereinafter Defenders Press Release], *available at* http://www.defenders.org/newsroom/press_releases_folder/1998/12_22_1998_defenders_sues_u.s._border_patrol_for_withholding_public_information.php (publicizing an incident where Border Patrol helicopters flew too low over a pack of endangered animals, scaring and disturbing the animals).

⁶² Defenders Press Release, *supra* note 61.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See MITTAL STATEMENT, *supra* note 47, at 13–15.

would like to waive ESA compliance to avoid incurring heavy fines from violating restrictions on flight, light, and other uses.

4. Other Environmental and Land Use Acts

The position of Border Patrol, that environmental regulations are burdensome and impede its ability to achieve border security, is best exemplified through its compliance with the three aforementioned acts. However, many other environmental regulations are in effect along the border. According to DHS, each regulation requires Border Patrol to either wait, evaluate effects, and consider alternatives before taking action, or adopt less effective methods in order to comply with environmental regulations.⁶⁶ Granted some of these regulations exist merely for aesthetic purposes,⁶⁷ others, if contravened, may lead to deleterious effects on the environment.⁶⁸ Yet this risk is balanced against the risk that restrictions on Border Patrol will contribute to the illegal immigration problem that is so costly to the nation,⁶⁹ and leave the region open to environmental degradation from other sources.⁷⁰ History has shown that when other interests outweigh environmental interests, compliance with environmental regulations can be waived,⁷¹ which has made possible DHS's broad authority to waive environmental regulations along the U.S.-Mexico border.

⁶⁶ See Stephen Dinan, *Environmental Laws Put Gaps in Mexico Border Security*, WASHINGTON TIMES (Nov. 16, 2009), <http://www.washingtontimes.com/news/2009/nov/16/national-park-service-putting-holes-in-border-secu/?page=all> (attributing delays in construction of the physical border fence and a virtual fence to compliance with environmental regulations).

⁶⁷ See H.R. 1505 § 2(c)(2) 112th Cong. (2011) (as originally introduced on April 13, 2011) (explaining that, among others, the bill would allow the DHS to waive compliance with the purely aesthetic National Historic Preservation Act, the Archaeological Resources Protection Act of 1979, and the National Parks and Recreation Act).

⁶⁸ See Echemendia, *supra* note 41, at 91–92 (suggesting that Border Patrol action along the border may negatively affect birds and mammals, as well as do physical harm such as erosion and flooding); Neeley, *supra* note 5, at 147–50 (raising concerns about the impact on wilderness areas and rain flow due to Border Patrol activities); Sancho, *supra* note 16, at 443 (arguing that animals' livelihoods may be damaged by infrastructure in the region).

⁶⁹ Ed Barnes, *Illegal Immigration Costs U.S. \$113 Billion a Year, Study Finds*, FOX NEWS (July 6, 2010), <http://www.foxnews.com/us/2010/07/02/immigration-costs-fair-amnesty-educations-costs-reform/>.

⁷⁰ Hugh Holub, *Illegal Alien in Distress Started Murphy Fire?*, TUCSON CITIZEN (June 29, 2011), <http://tucsoncitizen.com/view-from-baja-arizona/2011/06/29/illegal-alien-in-distress-started-muprhy-fire/> (reporting that while making an illegal entrance, an illegal immigrant started a fire in the borderlands that got out of control and turned into a wildfire).

⁷¹ See *infra* Part II.

II. THE USAGE OF WAIVERS FOR ENVIRONMENTAL REGULATIONS

The waiver of environmental regulations is not a novel solution in cases where compliance is deemed too costly or too cumbersome.⁷² Several cases have upheld statutory waivers granting executive agencies the authority to waive environmental laws as constitutional and enforceable.⁷³ This Note next describes the statutory waiver regime, reviews the history of environmental law waivers and identifies the key conditions and circumstances justifying the use of waivers.

A. *Waiver Facts*

The waivers at issue in H.R. 1505 do not explicitly state when an environmental regulation does not apply. Rather, the statute grants a non-legislative entity the authority to decide when the conditions are such that compliance with the law is not necessary.⁷⁴ The recipient of this authority has the discretion to determine when compliance with it becomes optional.⁷⁵ When Congress delegates the decision to waive a regulation, it can take advantage of bodies of expertise within the executive branch that may be better informed to make such a decision.⁷⁶ Furthermore, delegating the decision of when to waive environmental regulations provides for flexibility to prefer some competing interest over environmental regulations.⁷⁷ Thus the delegation of authority to waive environmental regulations is designed to ensure that environmental regulations will not jeopardize other pressing government interests and that any decision to waive the environmental regulation will be made responsibly.

Statutory waivers come in several types, but the basic principle is that the language of the statute permits the non-compliance of a law

⁷² See Tisler, *supra* note 8, at 782 (“Before 9/11, most environmental statutes incorporated a framework of waivers that allowed the environmental laws to be side-stepped for compelling military or emergency purposes.”). See generally, Kate R. Bowers, *Saying What the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 HARV. ENVTL. L. REV. 257, 261–64 (2010).

⁷³ See *County of El Paso v. Chertoff*, 2008 WL 4372693 (W.D. Tex. 2008); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 120–21 (D.D.C. 2007). Both cases involve the Secretary of Homeland Security exercising authority to waive numerous environmental laws.

⁷⁴ Bowers, *supra* note 72, at 258–59.

⁷⁵ See *id.* at 292.

⁷⁶ *Id.* at 301.

⁷⁷ *Id.* at 264.

under the prescribed circumstances.⁷⁸ In a 2010 Harvard Environmental Law Review article, Kate Bowers articulates a dichotomous classification of statutory waivers.⁷⁹ They may be for either a single regulation or multiple regulations, and they may be either “internal” or “external.”⁸⁰ Internal waivers occur when the text of the regulation includes the waiver of its compliance, whereas external waivers permit the waiver of regulations other than the regulation in which the waiver appears.⁸¹ Not surprisingly, multiple regulation waivers and external waivers tend to be more controversial. This is because the broad waiver authority contained in these types of waivers was likely not contemplated by the drafters of the regulation being waived.⁸²

Other defining elements of a statutory waiver are the extent to which the decision to waive is subject to judicial review,⁸³ and to whom the authority to delegate is granted. Bowers identifies four entities to whom waiver authority may be delegated: the President, cabinet-level officers, subcabinet-level officers if the administration of the regulation being waived is within their purview, or an executive commission.⁸⁴ Again, some of these delegations are less troublesome than others. For example, executive branch commissions will be highly competent and expertly informed about the regulations they administer, and are thus better situated than Congress to make a decision regarding the necessity and consequences of waiving regulatory compliance.⁸⁵

In many of the early waivers of environmental regulation the President held the power to determine when a waiver requirement had been fully met,⁸⁶ which at least offered the protection that any waiver decision would be made by a politically accountable, elected official. This political accountability for waiver authority exercised by the President could be viewed as more acceptable and less biased than those made by

⁷⁸ *Id.*

⁷⁹ *See id.*

⁸⁰ Bowers, *supra* note 72, at 264.

⁸¹ An example of an internal waiver would be when regulation X states do X, but the requirement to do X is waived if Y occurs. By contrast, in an external waiver, regulation X might say do X, and to do X under certain situations, the requirement to do Z may be waived. *See id.* at 264–65.

⁸² *See id.* at 287.

⁸³ *See id.* at 270–71 (pointing out the lack of judicial review over waivers and the high level of deference the courts give to waiver delegations).

⁸⁴ *Id.* at 265–66.

⁸⁵ *See id.* at 266.

⁸⁶ *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 18 (2008).

other government officials. More recently, waiver authority has been delegated to other cabinet officers, including the U.S. Attorney General and the DHS Secretary.⁸⁷ Skepticism toward endowing certain Departmental heads with broad waiver authority⁸⁸ might explain the restrictive amendments made by several House subcommittees to H.R. 1505—which proposed to further expand waiver authority and decrease the judicial reviewability of decisions made by the Secretary of Homeland Security.⁸⁹

1. History of the Delegation of Waiver Authority

To understand why Border Patrol and the DHS's demands have elicited such outrage,⁹⁰ it is instructive to follow the recent development and expansions of waiver authority. As this Note will explain, major changes have been seen in the types of challenges that will succeed against these delegations of waiver authority and their use by federal agencies.⁹¹ The accepted justifications for a waiver have also changed over time.⁹² For clarity, these two major changes will be discussed separately.

B. Grounds to Challenge Delegations of Waiver Authority

Early challenges to the waiver regime focused not on the granting of waiver authority but on the waiver's usage. Plaintiffs argued that the use of a waiver in the specific situation was impermissible due to an overriding environmental interest.⁹³ In these cases, the standard of review involved a balancing test, weighing the importance of the governmental agency's interest in non-compliance against the plaintiff's asserted concerns about environmental integrity—a standard that was not impossible

⁸⁷ *E.g.*, *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58, 59–60 (D.D.C. 2008); *Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. 2005).

⁸⁸ Tisler, *supra* note 8, at 789 (expressing concern over the amount of deference shown to the DHS and the level of discretion exercised by the DHS Secretary).

⁸⁹ *See infra* Part III.

⁹⁰ *See Fact Sheet on U.S. "Constitution Free Zone," supra* note 7.

⁹¹ *See* Tisler, *supra* note 8, at 778–89 (summarizing the history and development of waiver justifications).

⁹² *See id.*

⁹³ *See, e.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 12, 26 (2008) (deciding between military preparedness and Save the Whales's objectives). While it is a more recent case, *Winter* is a good example of the type of challenge initially brought against waivers granted by the government.

for plaintiffs to meet, resulting in some waiver uses being overturned.⁹⁴ However, statutory delegations of authority have developed to preclude this possibility by limiting judicial review of the use of the waiver authority.⁹⁵

The legislation which delegates authority to waive environmental regulations around the border regions is the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) and its progeny, including the Real ID Act of 2005.⁹⁶ Section 102(c) of IIRIRA was written to “strip federal appellate courts of jurisdiction.”⁹⁷ Thus the decisions of district courts are final unless the U.S. Supreme Court grants *certiorari*,⁹⁸ severely limiting the number of cases that will be reviewed.

IIRIRA also shortens the statute of limitations to bring a challenge to waiver usage from the six years available under the Administrative Procedures Act⁹⁹ to only sixty days.¹⁰⁰ Finally, Section 102 of the IIRIRA limits judicial review of the waiver authority solely to constitutional challenges.¹⁰¹ Therefore, only arguments that a waiver violates principles of nondelegation or the separation of powers doctrines will warrant review of a district court decision upholding a waiver.¹⁰² As the only route to judicial review, the constitutionality of statutory grants of the waiver authority has been the subject of numerous disputes.¹⁰³ The results of these constitutional challenges have been consistent, and suggest that any constitutional challenge to H.R. 1505—even in its original pre-amendment form—would be unsuccessful.¹⁰⁴

⁹⁴ See, e.g., Tisler, *supra* note 8, at 781 (citing *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1976), where plaintiffs were able to defeat the military’s stated justification for waiver).

⁹⁵ Sancho, *supra* note 16, at 430 (noting the short statute of limitations and restricted grounds for review).

⁹⁶ See Tana Sanchez, *Waiving Good-bye to Environmental Laws Along the Arizona Borderlands*, 16 MO. ENVTL. L. & POL’Y REV. 281, 289–90 (2009).

⁹⁷ Neeley, *supra* note 5, at 142.

⁹⁸ *Id.*

⁹⁹ MARY KENNEY, IMMIGRATION LAWSUITS AND THE APA: THE BASICS OF A DISTRICT COURT ACTION, AMERICAN IMMIGRATION LAW FOUNDATION 4 (2007), available at <http://www.aifl.org/lac/pa/lac-APA-5-9-07.pdf>.

¹⁰⁰ *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58, 60–61 (D.D.C. 2008).

¹⁰¹ Tisler, *supra* note 8, at 789.

¹⁰² See *id.*

¹⁰³ E.g., *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008); *County of El Paso v. Chertoff*, 2008 WL 4372693 (W.D. Tex. 2008); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 120–21 (D.D.C. 2007); *Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. 2005).

¹⁰⁴ See Tisler, *supra* note 8, at 779. The decisions of all cases uphold the constitutionality of the broad waiver provisions of IIRIRA and Real ID, creating a strong prediction that future grants of waiver authority will also be upheld.

A series of cases challenging the waiver of numerous environmental and land use regulations to accommodate the construction of the border wall sets the precedent for the constitutionality of these waiver grants.¹⁰⁵ The first of these cases was *Sierra Club v. Ashcroft*, in which plaintiffs alleged that the Attorney General and Secretary of the DHS's waiver grants were in violation of the nondelegation principles.¹⁰⁶ Instead, the court found that the limited scope and particular geographical constraints served as clear guidance, making the delegation of waiver authority legitimate.¹⁰⁷ Subsequent cases would bring more detailed constitutional arguments, but the courts' conclusions were always the same.

The next major case, *Defenders of Wildlife v. Chertoff*, was decided at the end of 2007.¹⁰⁸ At this time the REAL ID Act had taken effect, transferring the waiver authority under IIRIRA Section 102 from the U.S. Attorney General to the Secretary of the newly created DHS, who at that time was Michael Chertoff.¹⁰⁹ The Bureau of Land Management was to cede right of way to DHS to proceed with construction of a fence along the U.S.-Mexico border, but Defenders of Wildlife contended that the EA done by the Bureau was inadequate and a full EIS was required.¹¹⁰ While this suit was pending, Chertoff decided to invoke the statutory waiver authority and waived not only compliance with NEPA but also nineteen other environmental regulations.¹¹¹ In response, Defenders of Wildlife amended their complaint to allege that the waiving of these regulations was an "impermissible exercise of legislative authority," as it amounted to a partial repeal of the law, and therefore should be governed by the *Clinton v. City of New York* "Line Item Veto" case.¹¹² However, the court rejected the analogy that a waiver was equivalent to a line item veto because a waiver does not change the text of the original law in any way.¹¹³ Nor did the court find any violation of the nondelegation doctrine, because delegation with sufficient guidance is both a permissible and

¹⁰⁵ See *Save Our Heritage Org.*, 533 F. Supp. 2d 58; *County of El Paso*, EP-08-CA-196-FM, 2008 WL 4372693; *Defenders of Wildlife*, 527 F. Supp. 2d 119; *Sierra Club*, 2005 U.S. Dist. LEXIS 44244.

¹⁰⁶ *Sierra Club*, 2005 U.S. Dist. LEXIS 44244 at 5.

¹⁰⁷ *Id.* at 20–21.

¹⁰⁸ See *Defenders of Wildlife*, 527 F. Supp. 2d 119.

¹⁰⁹ See Sancho, *supra* note 16, at 425.

¹¹⁰ *Defenders of Wildlife*, 527 F. Supp. 2d at 121; see also *supra* notes 43–45 and accompanying text (comparing EAs vs. EISs).

¹¹¹ *Defenders of Wildlife*, 527 F. Supp. 2d at 121–22, 124.

¹¹² *Id.* at 124.

¹¹³ *Id.*

well-established practice.¹¹⁴ Finally, the court pointed out that the relevant issues at the border—foreign affairs and immigration—fall within the executive branch's discretion, so a statutory grant of waiver authority regarding these matters is consistent with the Constitution's scheme.¹¹⁵

Just a few months later, that decision was reaffirmed in *Save our Heritage Org. v. Gonzalez*.¹¹⁶ In a short opinion, in which the U.S. District Court for the District of Columbia quoted *Defenders of Wildlife*, the court held that because Congress provided an "intelligible principle" to follow, there was no violation of the nondelegation principle when the Secretary of the DHS utilized the statutory grant of waiver authority.¹¹⁷ Important to the court's finding of an intelligible principle was the limitation that the "Secretary may waive only those laws that he determines 'necessary to ensure expeditious construction.'"¹¹⁸

In order to build roads and other infrastructure needed for the Border Wall construction, Secretary Chertoff invoked the waiver authority a third time in August of 2008.¹¹⁹ Local counties filed suit alleging a nondelegation claim, a presentment clause challenge, and a preemption challenge.¹²⁰ Echoing recent precedents, the court asserted that the existence of an "intelligible principle" meant there was no nondelegation claim and no presentment clause claim because there was no partial repeal.¹²¹ For the first time, plaintiffs raised a preemption challenge. Plaintiffs argued that the text of the statutory grant of waiver authority, Section 102(c) of IIRIRA, is unclear regarding Congress's intentions of the waiver's applicability to local and state laws.¹²² Plaintiffs contended that this lack of clarity should prevent the waiver authority grant from preempting state and local laws.¹²³ Nevertheless, the court disposed of this challenge because the language of Section 102(c) is not ambiguous, and explicitly states that the waiver applies "notwithstanding any other provision of law."¹²⁴ Ultimately, the court found in favor of DHS on all constitutional

¹¹⁴ Bowers, *supra* note 72, at 284–87.

¹¹⁵ *Defenders of Wildlife*, 527 F. Supp. 2d at 129.

¹¹⁶ *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58, 63 (D.D.C. 2008).

¹¹⁷ *Id.* at 64.

¹¹⁸ *Id.* at 63 (quoting *Defenders of Wildlife*, 527 F. Supp. 2d 119, 127 (D.D.C. 2007)).

¹¹⁹ *County of El Paso v. Chertoff*, 2008 WL 4372693, 1 (W.D. Tex. 2008).

¹²⁰ Tisler, *supra* note 8, at 792.

¹²¹ *County of El Paso*, 2008 WL 4372693 at 6–7.

¹²² *Id.* at 9.

¹²³ *Id.*

¹²⁴ *Id.* at 8.

challenges and the waiver usage was upheld again.¹²⁵ In each of the four cases involving waivers of environmental regulations at the border to facilitate actions taken to combat illegal immigration,¹²⁶ the courts have rejected all claims that the waivers were unconstitutional. Such a strong and consistent precedent suggests that courts will uphold a similar action invoking the waiver authority. This holds especially true going forward, as the proposed immigration reform will make sealing the border take on heightened significance.

C. *Justifications for Invoking Waiver Authority*

With the constitutional challenges likely to fail, the only remaining challenge to a waiver is that it is lacking a valid justification for waiving otherwise important and enforceable environmental laws.¹²⁷ As early as the 1970s, the U.S. military tried to assert the interest of national defense as a blanket justification for waiving environmental regulations.¹²⁸ At that time, courts were unwilling to give such sweeping deference to the military or the cause of national security and defense, but would apply a balancing test to the interests of the military versus the interest of upholding the environmental laws.¹²⁹ However, courts would eventually allow for a national defense exception in cases of emergency. In *Valley Citizens for a Safe Environment v. Vest*, the District Court for the District of Massachusetts ruled to exempt the military from NEPA compliance because the ongoing Gulf War tipped the balance in favor of military preparedness and security over environmental concerns.¹³⁰ These cases reflect the pre-9/11 thinking of the courts; however, core values and key players changed after the terrorist attacks. Suddenly, national security interests became paramount.¹³¹ The compelling nature of national security

¹²⁵ *Id.* at 12.

¹²⁶ Namely, the construction of a border wall/fence designed to prevent drugs and persons from illegally crossing into the U.S.

¹²⁷ See Bowers, *supra* note 72, at 270; Tisler, *supra* note 8, at 781–82.

¹²⁸ Tisler, *supra* note 8, at 781.

¹²⁹ *Id.* at 781–82.

¹³⁰ *Id.* at 782–83.

¹³¹ While stopping illegal immigration is not exactly a national security interest, there is overlap between national security and securing our border, which is evidenced by the fact that the Department of Homeland Security is charged with the task of border security.

suggests that courts will not even engage in a balancing of interests when the justification offered by the waiving agency is one of border security.¹³²

A prime example of this is *Winter v. Natural Resources Defense Council*, where, despite the Court's admission that the MFA sonar testing by the Navy was causing "irreparable harm . . . to marine mammals," the public's interest in effective and realistic training of Navy sailors necessitated the action.¹³³ In its opinion, the court was extremely deferential to the Navy's insistence that such training methods were necessary for a strong and prepared Navy.¹³⁴ The stage was set for the deference that the courts would pay toward the DHS in the Border Wall cases.

In the Border Wall cases, the courts never questioned the necessity of the waivers used, and inquired only into their constitutionality.¹³⁵ Where a conflict exists between Border Patrol methods to reduce illegal immigration traffic and environmental compliance, it is no surprise that the resolution is authorizing Border Patrol to invoke environmental law waivers.¹³⁶ In addition, the courts recognize that congressional delegations of authority may be even broader than traditionally permissible when made in regard to immigration because the executive branch already has significant control over this matter.¹³⁷ Therefore, courts will be willing to approve the use of environmental waivers when the waiver can be predicated on a need to prevent illegal immigration. This justification, which forms the basis for H.R. 1505,¹³⁸ will carry more weight in the future as the proposed immigration reforms necessitate sealing our borders from illegal entrants. One effect of this will be to halt any trend that the House Natural Resources Committee began when it made amendments scrutinizing the overly broad H.R. 1505, as it was initially introduced. Rather, the result may mean that even greater discretion and authority will be conferred upon DHS in order to enable it to beef up border security in the manner it deems best.

¹³² See *id.* at 783–84; see also *About CBP*, U.S. CUSTOMS & BORDER PROTECTION, <http://www.cbp.gov/xp/cgov/about/> (last visited Apr. 8, 2013). When the Department of Homeland Security was created, it took charge of Border Patrol, adding more weight to the contention that Border Patrol is directly related to national security.

¹³³ See Tisler, *supra* note 8, at 785–86.

¹³⁴ *Id.* at 786.

¹³⁵ See Bowers, *supra* note 72, at 281.

¹³⁶ H.R. 1505 § 2(c) 112th Cong. (2011) (as amended on April 17, 2012).

¹³⁷ Sancho, *supra* note 16, at 431.

¹³⁸ H.R. 1505 § 2(a) 112th Cong. (2011) (as amended on April 17, 2012).

III. IMMIGRATION REFORM'S UNINTENDED CONSEQUENCE WILL BE TO LEGITIMIZE DHS'S AUTHORITY TO WAIVE ENVIRONMENTAL LAWS AT THE U.S.-MEXICO BORDER

A. *One Step Forward, Two Steps Back—A Fleeting Moment of Scrutiny Over Waiver Authority: Amending H.R. 1505*

The original conception of H.R. 1505 was far too broad. Not only were the triggering conditions for justifying a waiver written too vaguely, but there were at least four clauses in the original text of the bill that extended the waiver authority of the DHS/Border Patrol beyond what preventing illegal border crossings requires, allowing DHS to grant needless waivers.¹³⁹ Preceding waivers have made it clear that environmental concerns are to be given consideration in determining whether such regulations should be waived.¹⁴⁰ This means that the guiding principle in drafting waivers should be to only waive regulations when the waiver is necessary to achieve another governmental interest, and to limit the extent of the waiver as much as possible while still allowing for the achievement of the superseding government interest. The original language of the proposed House Resolution waived regulations even when there was little or no Border Patrol purpose for doing so.¹⁴¹

Today, the amended version has eliminated some extraneous authority and restricted the applicability of waiver authority to a smaller geographic region, as well as limited the number of actions which trigger waiver authority.¹⁴² These amendments take a reasonable approach to balancing border security and environmental protection. Additionally, these amendments may have signaled a switch toward questioning the purpose and needs of DHS-authorized waivers, rather than simply deferring unbounded authority to DHS to waive whatever environmental regulations it deems as interfering with its goals. However, this Note argues that while these amendments go a long way toward keeping DHS more accountable, there are still more amendments that should be made. Unfortunately amendments are unlikely to ever be made because the

¹³⁹ See Paul Gottlieb, *Bill Before U.S. House Would Give Border Patrol Unprecedented Powers in Olympic National Park*, PENINSULA DAILY NEWS, <http://www.peninsuladailynews.com/article/20111016/NEWS/310169986/bill-before-us-house-would-give-border-patrol-unprecedented-powers> (last updated Oct. 16, 2011).

¹⁴⁰ Tisler, *supra* note 8, at 800–01.

¹⁴¹ Gottlieb, *supra* note 139.

¹⁴² See generally H.R. 1505, 112th Cong. (2011) (as amended on April 17, 2012).

justification of preventing illegal immigration is going to become more powerful as Congress moves closer to passing the immigration reforms.

The original text of the Bill was reviewed by the House Natural Resources Subcommittee, the House Agricultural Subcommittee, and the House Homeland Security Subcommittee.¹⁴³ On April 17, 2012, the committees voted to report the Resolution, with several significant amendments, to the entire House for a vote.¹⁴⁴ The amendments curtail the extent of DHS's waiver authority by making the bill more tailored and narrower in scope.

This Note next discusses these amendments and how they radically shrunk the authority being granted to DHS by the original text. The amendments are groundbreaking because they force DHS to causally link the waiver of an environmental regulation to a concrete impediment to DHS/Border Patrol actions. One of these is a sunset provision.¹⁴⁵ Under the original version, the waiver authority exists perpetually. There was no mechanism to revise or recall the authority to waive if the waiver of a specific environmental regulation proves either useless in efforts to improve border security, or if the waiver is more harmful to the environment than was anticipated. The amended version includes a sunset provision, making the authority to waive invalid after five years, unless Congress votes to renew it.¹⁴⁶ This is an important safeguard because it provides a way to terminate this extremely broad grant of waiver authority.

Another amendment restricts authorization of waivers to only certain textually designated actions.¹⁴⁷ Rather than the broad discretion from the original text, which permitted the waiver to be invoked for any action that would "assist in securing the border,"¹⁴⁸ the revision specifically limits the authority to invoke a waiver in order to (1) construct and maintain roads and fences; (2) use vehicles or aircraft for patrolling; (3) installation, maintenance and use of surveillance equipment and sensors; and (4) deployment of temporary tactical infrastructure.¹⁴⁹ This is significant

¹⁴³ *H.R. 1505 (112th): National Security and Federal Lands Protection Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h112-1505> (last visited Apr. 8, 2013).

¹⁴⁴ *Id.*

¹⁴⁵ ROBERT BISHOP, SUBCOMM. ON NATURAL RESOURCES, AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 1505 (2011) [hereinafter AMENDMENT TO H.R. 1505], *available at* http://naturalresources.house.gov/UploadedFiles/MU_HR1505_Bishop.ANS.pdf.

¹⁴⁶ *Id.*

¹⁴⁷ Emilie Boyles, *Tester Speaks to National Security Bills*, EXAMINER (Oct. 11, 2011), <http://www.examiner.com/economy-in-billings/tester-speaks-to-national-security-bills>.

¹⁴⁸ H.R. 1505 § 2(b), 112th Cong. (2011) (as originally introduced on April 13, 2011).

¹⁴⁹ AMENDMENT TO H.R. 1505, *supra* note 145.

because it shrinks the authority of DHS to waive regulations in these four contexts rather than at will. It also implicitly requires that the environmental regulation actually be impeding a Border Patrol action in order to be waived. This would mean that DHS could not preemptively waive an environmental regulation on mere speculation that it could encumber border security operations.

Another example of the House subcommittees withdrawing waiver authority was their removal of waiver authority in regards to maritime borders. The original H.R. 1505 applied to all borders, both land and sea.¹⁵⁰ Upon review, the committees decided that it would be more appropriate to restrict the reach of the bill to only land borders. The text was amended to state specifically that, and to exclude maritime borders from the authority otherwise being given to DHS.¹⁵¹ This is more evidence that the committees did not want to give DHS excessive waiver authority. Removing maritime borders is logical because if DHS's concern is catching illegal immigrants crossing the border, this is far more likely to happen at land borders. Stopping illegal immigrants does not justify DHS's non-compliance with NEPA miles off the Oregon coast, although the pre-amendment text of H.R. 1505 would have allowed that.¹⁵²

The grant of authority was also narrowed by amending to whom the grant was made. The original text stated that the Secretary of Homeland Security would have the authority to waive the listed environmental regulations.¹⁵³ However, the waivers are being justified by securing the border. Border Patrol is a task managed by U.S. Customs and Border Protection, one of many offices governed by the DHS.¹⁵⁴ The amendment grants the waiver authority directly to U.S. Customs and Border Protection.¹⁵⁵ This has several important effects. First, it is consistent with the principles of delegating waiver authority, because it allows for an administrative body with the most expertise in the area to make the decision whether or not a waiver should be used.¹⁵⁶ CBP will be better able to assess whether it must have a waiver of an environmental regulation, than

¹⁵⁰ H.R. 1505 § 2(a), 112th Cong. (2011) (as originally introduced on April 13, 2011).

¹⁵¹ AMENDMENT TO H.R. 1505, *supra* note 145 (specifying that the bill applies to land borders only).

¹⁵² H.R. 1505 § 2(a), 112th Cong. (2011) (as originally introduced on April 13, 2011).

¹⁵³ *Id.*

¹⁵⁴ *Organizational Chart, About*, DEPARTMENT OF HOMELAND SECURITY, http://www.dhs.gov/xabout/structure/editorial_0644.shtm (last visited Apr. 8, 2013).

¹⁵⁵ AMENDMENT TO H.R. 1505, *supra* note 145.

¹⁵⁶ *Id.*

could the more removed, less specialized Secretary of Homeland Security. Secondly, other offices in DHS will not benefit from the broad waiver grant. Within the entire DHS, only CBP will be invoking and using the waiver.¹⁵⁷ Giving the Secretary the authority to waive environmental regulations along the U.S.-Mexico border might lead to the waiving of regulations in order to benefit other DHS offices, even though it will have no impact on CBP and its mission. This amendment takes away any temptation to waive environmental regulation for any purpose other than enhancing Border Patrol's ability to apprehend illegal immigrants. This limits the application of the waiver to a smaller number of users, therefore, any harmful effect of waivers on the environment will also be more limited.

The aforementioned amendments did narrow the scope of the waiver authority; however, even more tailoring is possible. This Note suggests three more amendments that would improve H.R. 1505 by eliminating unnecessary waiver authority without allowing environmental regulations to hamper the task of border security.

First, the grant of waiver authority is applicable on any and all federal lands within 100 miles of the border that are managed by the Secretary of the Interior or the Secretary of Agriculture.¹⁵⁸ The environmental impact of applying waivers to such a large area could be significant, especially considering how many people and how many environmentally sensitive areas fall within that range.¹⁵⁹ Therefore, the potential harm of extending waivers throughout this entire area is significant, but the presence of Border Patrol 100 miles away from the border is not substantial. One hundred air miles from the border is regarded as the upper limit on Border Patrol's jurisdiction.¹⁶⁰ Although Border Patrol's jurisdiction technically reaches out that far, they are not given absolute discretion to make searches and operate in these zones. Border Patrol may act at ports of entry or the first reasonable location after a port of entry, known as the functional equivalent of the border.¹⁶¹ Border Patrol may also exercise authority to act further inland under the extended border search theory.¹⁶²

¹⁵⁷ Boyles, *supra* note 147.

¹⁵⁸ AMENDMENT TO H.R. 1505, *supra* note 145.

¹⁵⁹ *House Votes to Put Public Lands at Risk, Maps*, PEW CHARITABLE TRUSTS (June 20, 2012), <http://www.pewenvironment.org/news-room/other-resources/maps-us-public-lands-at-risk-from-hr-1505-85899361611>. Note that the continental U.S. map shows all public lands at risk from the original bill, which included territory within 100 miles of maritime borders.

¹⁶⁰ WATSEM ET AL., *supra* note 17, at CRS-6 n.14 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)).

¹⁶¹ *Id.* at CRS-3.

¹⁶² *Id.* at CRS-4.

Yet this extended border search ability is subject to a three-part test requiring a high degree of probability that a cross occurred, reasonable certainty that no change has occurred to the object of the search since the crossing, and reasonable suspicion of criminal activity.¹⁶³

Therefore Border Patrol's ability to act far away from the actual border is limited. Likewise, any provision allowing Border Patrol to invoke waivers should consider Border Patrol's limited activity and limited needs 100 miles away from a border. A stronger showing of need should be required to justify Border Patrol's decision to waive environmental regulations so many miles away from the actual border. Further restricting the geographic zone of the waiver authority can cut down on any environmental harms from waiving compliance and it will better protect certain inland areas that might otherwise be needlessly and automatically included in waivers.

A second geographic change that should be made to H.R. 1505 would be to exclude the U.S.-Canada border from the scope of the CBP's waiver authority. Otherwise, Border Patrol is free to decide that it need not comply with environmental regulations operating within 100 miles of the U.S.-Canada border. Such a waiver serves little purpose with regards to the Canadian border and their use poses a potentially greater threat to the environment.

Waivers are less practical along the Canadian border because there are few instances of illegal crossings that need to be prevented.¹⁶⁴ The purpose of these waivers is to prevent environmental regulations from encumbering Border Patrol's efforts to halt illegal immigration.¹⁶⁵ That same justification cannot be argued along the U.S.-Canada border; in fact, CBP employs only a small fraction of the number of workers in the Northern region as it employs in the Southwest region.¹⁶⁶

¹⁶³ *Id.*

¹⁶⁴ See *Environmental Law Waiver Faces Skeptics on U.S.-Canada Border*, MISSOULIAN (Nov. 14, 2011 5:30 AM), http://missoulian.com/news/local/environmental-law-waiver-faces-skeptics-on-u-s-canada/article_679baa18-0e85-11e1-a909-001cc4c03286.html.

¹⁶⁵ See *supra* Part II.

¹⁶⁶ *U.S. Border Patrol Agent Staffing by Fiscal Year*, U.S. CUSTOMS AND BORDER PATROL, http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/staffing_1993_2012.ctt/staffing_1993_2012.pdf (last visited Apr. 8, 2013) (explaining that in the first three quarters of 2011, there were almost eight times as many Border Patrol employees in the Southwest region as in the Northern Region. Some Southwest sectors like San Diego employ more patrol workers than all sectors of the Northern Region combined).

Furthermore, the risk of harm to the environment due to waiving environmental regulations is serious along the massive and environmentally sensitive 5525-mile-long U.S.-Canada border.¹⁶⁷ Geographically, it encompasses the Great Lakes which account for 21% of the world's supply of surface fresh water.¹⁶⁸ Clearly, waiving the Federal Water Pollution Control Act, the Safe Drinking Water Act, and numerous other environmental regulations, all of which H.R. 1505 makes waivable, could have harmful effects on the fresh water supply. Other delicate waterways form part of the U.S.-Canada border as do prairies, forests, and mountain ranges that provide homes to endangered and threatened species of plants, animals and fish.¹⁶⁹

Therefore there is a strong environmental interest in compliance but a weak interest in border security along the U.S.-Canada border. H.R. 1505 would allow waivers of the various federal environmental regulations that protect all of these.¹⁷⁰ Due to the sheer length of the border, the 100 mile radius subjected to waiver usage would amount to a huge land mass affecting many animals and people who live there.

Finally, a third way to limit the grant of waiver authority is to delete some of the thirty-five different environmental acts that are made expressly waivable by H.R. 1505.¹⁷¹ H.R. 1505 ups the ante again by authorizing the waiver of more federal environmental regulations than any previous grant of the waiver authority in this context.¹⁷² Only some of these regulations intrude upon Border Patrol; the waiver of those that do not should not be authorized.¹⁷³ Unfortunately, there is unlikely to be any push toward making these or future amendments. The new immigration reform bill will reinvigorate the demand for border security, perhaps justifying an even broader discretion of the Border Patrol in waiving environmental laws.

¹⁶⁷ WATSEM ET AL., *supra* note 17, at CRS-2.

¹⁶⁸ *Great Lakes—Basic Information*, ENVTL. PROT. AGENCY, <http://epa.gov/glnpo/basicinfo.html> (last visited Apr. 8, 2013).

¹⁶⁹ See Alan Morantz, *What is the Canada-U.S. Border, Really?*, CANADIAN GEOGRAPHIC (July/Aug. 2010), <http://www.canadiangeographic.ca/magazine/ja10/what-is-canada-us-border.asp>.

¹⁷⁰ H.R. 1505, 112th Cong. § 2(c)(2) (2011) (as amended April 17, 2012); see *supra* Part II.A.

¹⁷¹ *Supra* Part II.A.

¹⁷² Sancho, *supra* note 16, at 433 (tracing the growing number of laws waived in the first four challenges to the delegation of waiver authority to the Secretary of Homeland Security, being respectively eight, nine, twenty, and then over thirty).

¹⁷³ An example of a waiver that should not be authorized is the Coastal Zone Management Act which is no longer applicable since the amended text excludes maritime borders. 16 U.S.C. § 1451 (2006).

B. Immigration Reforms will Add Support to Border Patrol's Immigration Control Justification for Waiving Environmental Regulations at the U.S.-Mexico Border

A chief item on the Obama Administration's second term agenda is immigration reform, offering a pathway to citizenship for many of the illegal immigrants currently residing in the United States.¹⁷⁴ Although providing a means of citizenship to deserving illegal immigrants was always part of Obama's platform, it appears that it might actually be achieved this term.¹⁷⁵ Similar in many ways to the proposal the Obama Administration has outlined, the U.S. Senate has independently developed a plan for immigration reform.¹⁷⁶ Like Obama's, the Senate's proposal, announced in January 2013, offers illegal immigrants currently living in the United States a chance to become citizens upon meeting certain provisions—including paying back taxes and submitting to a background check.¹⁷⁷ One major difference between the President's plan and the Senate's is that the Senate wants to delay opening the citizenship process until after the U.S.-Mexico border has been secured.¹⁷⁸ Until that occurs, the Senate's plan merely grants illegal immigrants a provisional status allowing them to live and work in the United States.¹⁷⁹ While Obama opposes this approach, emphasizing the need to have a clear path to citizenship from the start,¹⁸⁰ he will need Congress's bipartisan support to enact any reform and he may have to compromise on that issue.¹⁸¹

¹⁷⁴ *Obama Says Immigration Reform 'Within Our Grasp,' Key Senator Raises Concern with Plan*, FOXNEWS (Jan. 29, 2013), <http://www.foxnews.com/politics/2013/01/29/obama-presses-immigration-agenda-as-senators-draft-new-overhaul/>.

¹⁷⁵ *Id.*

¹⁷⁶ Rosalind S. Helderman & William Branigin, *Bipartisan Group of Senators Unveils Immigration Reform Plan*, WASH. POST (Jan. 28, 2013), http://www.washingtonpost.com/politics/white-house-embraces-principles-of-senate-immigration-reform-plan/2013/01/28/a539c44a-6974-11e2-ada3-d86a4806d5ee_story.html.

¹⁷⁷ *Id.*

¹⁷⁸ Rosalind S. Helderman & William Branigin, *Obama to Announce His Immigration Reform Plan, Said to be More Liberal than Senate Effort*, WASH. POST. (Jan. 28, 2013), http://www.washingtonpost.com/politics/obama-to-announce-his-immigration-reform-plan-said-to-lean-left-of-senate-effort/2013/01/28/8bda04ce-6974-11e2-ada3-d86a4806d5ee_story.html.

¹⁷⁹ Dana Bash & Tom Cohen, *Possible Compromise on Immigration Reform Takes Shape*, CNN (Jan. 28, 2013, 9:11 PM), <http://www.cnn.com/2013/01/28/politics/immigration-reform/>.

¹⁸⁰ *Obama Says Immigration Reform 'Within Our Grasp,' supra* note 174.

¹⁸¹ *See, e.g.,* Kathie Obradovich, *Immigration Reform Hinges on Securing the Border*, DES MOINES REGISTER (Jan. 31, 2013, 4:30 AM), <http://abetteriowa.desmoinesregister.com/2013/01/31/Obradovich-immigration-reform-hinges-on-securing-the-border/> (quoting Senator

It is largely Republicans who demand the sealing of the U.S.-Mexico border prior to implementing any path to citizenship for illegal residents.¹⁸² Republicans criticize—and history illustrates—that without enforcement the United States will again find itself in the same position with millions of people living in the shadows.¹⁸³ When the U.S. tried amnesty in 1986, three million illegal immigrants changed their status to become lawful, yet that did not stop illegal immigration.¹⁸⁴ Today, there are an estimated eleven million illegal immigrants living in the U.S.¹⁸⁵ Opponents of the immigration reform proposals worry that after setting the current eleven million illegal immigrants on a path to citizenship, this country will soon find itself host to millions of new illegal immigrants in need of another amnesty or earned citizenship option,¹⁸⁶ all of which costs money.¹⁸⁷

Whether or not a secured border is made a precondition to allowing illegal immigrants to apply for citizenship, the ability to halt illegal entries will be inherent in any immigrant reform proposal.¹⁸⁸ As one article explained, “[t]he debate over a national immigration overhaul has quickly begun to focus on a key question: Are the U.S. borders secure enough?”¹⁸⁹ How secure must they be to allow immigration reform to go forward?¹⁹⁰ Does Border Patrol have to stop every single attempted crossing? Need

Grassley on the need for better border security to induce other Republicans to sign on to an immigration reform with a pathway to citizenship); David Nakamura, *Key Question in Immigration Debate: Is U.S. Border Secure?*, WASH. POST (Jan. 30, 2013), http://www.washingtonpost.com/politics/key-question-in-immigration-debate-is-us-border-secure/2013/01/30/0c20b168-6afc-11e2-95b3-272d604a10a3_story_1.html (reporting that Senator Rubio will not support immigration reform legislation that does not include language tightening border control).

¹⁸² Obradovich, *supra* note 181.

¹⁸³ See Charles Krauthammer, *How to Make Immigration Reform Work This Time*, FOX NEWS (Jan. 31, 2013), <http://www.foxnews.com/opinion/2013/01/31/how-to-make-immigration-reform-work-this-time/>.

¹⁸⁴ *Id.*

¹⁸⁵ *Let Them Stay, Let Them In*, ECONOMIST (Feb. 2, 2013), <http://www.economist.com/news/leaders/21571145-area-where-barack-obama-has-got-it-right-let-them-stay-let-them>.

¹⁸⁶ See Krauthammer, *supra* note 183.

¹⁸⁷ See Sarah Kliff, *Immigration Reform Could Add 7 Million People to Obamacare*, WASH. POST WONKBLOG (Jan. 29, 2013, 11:41 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/29/immigration-reform-could-add-7-million-people-to-obamacare/>.

¹⁸⁸ See *Fixing the Immigration System for America's 21st Century Economy*, THE WHITE HOUSE (2013), <http://www.whitehouse.gov/issues/fixing-immigration-system-america-s-21st-century-economy>.

¹⁸⁹ Nakamura, *supra* note 181.

¹⁹⁰ See Obradovich, *supra* note 181.

it only slow the flow of illegal immigration? Interestingly, the President supports his position that the reforms should take effect without waiting to enhance border security with statistics suggesting that border security has been at an all time high under his Administration.¹⁹¹

During his first term, Border Patrol received more funding, had a larger staff, and better equipment.¹⁹² Not surprisingly, the President attributes lower numbers of illegal entries over the last several years to Border Patrol's efforts.¹⁹³ Coincidentally, this time period is also when DHS had its greatest authority to waive environmental regulations along the border. Whether there is true causation between the two is beyond the scope of this Note. However, if the President believes, and statistics support, the fact that the Border Patrol is doing a better job now than before, it is unlikely that any of DHS/CBP authority to waive regulations in favor of securing the border and apprehending illegal entrants will be questioned or limited in the near future. As the immigration reform bill progresses through the legislative process, it will become increasingly politically prudent to maintain a Border Patrol adept at intercepting illegal immigrants. This will help appease some of the more conservative members of Congress, and mitigate the cost increase as more and more illegal immigrants arrive hoping to take advantage of the reform's citizenship pathway. Because the need for effective border security will be salient and politically sensitive, no one is going to remove or narrow any of DHS/CBP authority to waive environmental regulations that CBP claims are encumbering their objectives. Just when it seemed that the government was going to be more scrutinizing of an agency's use of environmental waivers, the immigration reform provided a substantial boost to the illegal immigration justification used by DHS/CBP.

CONCLUSION

Although environmental protection is an important governmental interest, it may at times be superseded by more compelling interests.¹⁹⁴ Intercepting illegal border crossers has been held to be a compelling interest.¹⁹⁵ In particular, now that immigration reform is materializing via real congressional action, and it is likely that there will soon be a pathway

¹⁹¹ See Nakamura, *supra* note 181.

¹⁹² *Id.*

¹⁹³ See *id.*

¹⁹⁴ See *supra* Part II.

¹⁹⁵ See *supra* note 10.

to citizenship for illegal immigrants already living in the U.S., preventing future illegal immigration is going to be an even more compelling justification for waiving compliance with environmental regulations along the U.S.-Mexico border.

At times there may be good cause to waive certain environmental regulations, and the situation along the U.S.-Mexico border offers examples of how cumbersome regulations can impede agency objectives. This Note argues that the growing imperative to curb illegal immigration into this country will continue to justify what has been an overly broad, and at times imprudently invoked, delegation of waiver authority to branches of the DHS charged with securing our nation's borders. This Note applauds the scrutiny exercised by the House Natural Resources Subcommittee in amending a House Resolution that proposed giving unbounded and unwarranted waiver authority to DHS. This Note laments that the amendments did not go further. The future looks bleak for restricting DHS use of waiver authority as immigration reform has boosted the strength of DHS's justification that it needs waiver authority to adequately combat illegal immigration attempts.

This Note does not seek to make a value judgment on whether the DHS needs waiver authority to accomplish its tasks but this Note does argue that any authority granted should be narrowly tailored to minimize the scope and extent of, and maximize review of, such grants of waiver authority. Waiving environmental compliance along the U.S.-Mexico border may be necessary in order to address illegal immigration. However, if it is not truly necessary, the waiver should not be made; a logical explanation for why compliance causes hardship to Border Patrol missions should exist. Unfortunately, proposed immigration reform threatens to turn "preventing illegal immigration" into DHS's magic phrase to justify its waiver of any environmental regulations along the border.